BAR BULLETIN

Official Publication of the State Bar of New Mexico

August 3, 2016 • Volume 55, No. 31

Above It All, by Jennifer Butler (see page 3)

Turquoise Butterfly, Santa Fe

Inside This Issue

10.0 G **2.0 EP** Standard Fee: $325

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11
Business Law Section BOD,
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11
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Noon, Montgomery & Andrews, Santa Fe

Workshops and Legal Clinics

August

3
Divorce Options Workshop:
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

3
Civil Legal Clinic:
10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque, 1-877-266-9861

3
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10 a.m.–2 p.m., 13th Judicial District Court, Bernalillo, 505-867-2376

5
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10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

11
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10 a.m.–2 p.m., 13th Judicial District Court, Los Lunas, 505-865-4639

16
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10 a.m.–2 p.m., 13th Judicial District Court, Grants, 505-287-8831

About the Cover Image: *Above It All*
Jennifer Butler has been painting for more than six years. She uses acrylic paint on canvas or watercolor on watercolor paper. Nature is a major theme in most of her paintings, fantasy being the second. Much of her work features trees, owls, the moon and stars. A lot of inspiration is taken from the New Mexico sky, especially the sunsets. From her East Mountains studio she works steadily, primarily doing stained glass, which she has been doing for more than 20 years. Her work includes stained, fused, steel and glass panels and commissioned work from sidelights to pet portraits. Her work has been in various galleries, she is currently showing at the Turquoise Butterfly in Santa Fe. For more of Butler's work, visit her online store, Etsy.com/shop/vistaglassonline or her Vista Glass Facebook page.

Notices

Court News

New Mexico Supreme Court

Publication for Comment of Recently Approved Amendments

The Supreme Court recently approved new and amended rules on a provisional basis, with a retroactive effective date of May 18, 2016, to coincide with the effective date of related, recently enacted statutory changes. See Rules 1-079, 1-131 (new), 5-123, 5-615 (new), 10-166, and 10-171 (new) NMRA and new Forms 4-940, 9-515, and 10-604 NMRA; see also 2016 N.M. Laws, ch. 10, § 2 (H.B. 336, 52nd Leg., 2nd Sess.). The Court seeks public comment before deciding whether to revise or approve the provisional rule changes on a non-provisional basis. To view the amendments in their entirety and instructions for submitting comments, refer to the July 6 *Bar Bulletin* (Vol. 55, No. 27) or visit the Supreme Court's website. The comment deadline is Aug. 5.

New Mexico Court of Appeals

Notice of Retirements

Court of Appeals Chief Judge Michael E. Vigil announces two retirements: Hon. Michael D. Bustamante on Oct. 31 and the Hon. Roderick T. Kennedy on Nov. 30. A Judicial Nominating Commission will be convened in Santa Fe on Dec. 1 to interview applicants for the vacancy of Judge Bustamante. A second Judicial Nominating Commission will be convened later in December to interview applicants for the Judge Kennedy vacancy. Further information on the application process can be found at http://lawschool.unm.edu/judsel/index.php. Look for updates regarding these vacancies in the fall.

State Bar News

Attorney Support Groups

- Aug. 8, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (group meets on the second Monday of the month). Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- Aug. 15, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)
- Oct. 3, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group meets the first Monday of the month but will skip September due to Labor Day.)

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

Professionalism Tip

With respect to the courts and other tribunals:
I will be respectful toward and candid with the court.

Appellate Practice Section

Appellate Pro Bono Program

The Appellate Practice Section has launched an appellate pro bono program that will match volunteer attorneys with qualifying pro se litigants in appeals assigned to the Court of Appeals general calendar. The Volunteer Attorney Program of New Mexico Legal Aid will manage the process of assembling a panel of volunteer lawyers and matching lawyers with specific cases. Those interested in learning about and possibly accepting appellate pro bono opportunities should join the volunteer lawyer panel by contacting VAP Director, Dina Afek at dinaa@nmlegalaid.org or 505-814-6719. For additional information, contact Section Chair Edward Ricco at ericco@rodey.com or 505-768-7314.

Board of Bar Commissioners

Commissioner Vacancy on the Sixth Bar Commissioner District

A vacancy was created in the Sixth Bar Commissioner District (representing Chaves, Eddy, Lea, Lincoln and Otero counties) due to Dustin K. Hunter's appointment to the bench. The Board will make the appointment at the Aug. 18 meeting to fill the vacancy until the next regular election of Commissioners. The term will run through Dec. 31, 2016. Active status members with a principal place of practice located in the Sixth Bar Commissioner District are eligible to apply. Applicants should plan to attend the 2016 Board meetings scheduled for Sept. 30 (Albuquerque) and Dec. 14 (Santa Fe). Members interested in serving on the Board should submit a letter of interest and resume to Executive Director Joe Conte at jconte@nmbar.org by Aug. 8.

Young Lawyers Division

Pro Bono Filmmakers' Clinic

New Mexico Lawyers for the Arts and City of Albuquerque Film Office seek volunteer attorneys for the NM Lawyers for the Arts Pro Bono Filmmakers' Clinic from 10 a.m.–2 p.m. (or any portion thereof), Aug. 13. at Hotel Andaluz in Albuquerque. Continental breakfast will be provided. Volunteer attorneys are needed for assistance in the following areas: entertainment, contracts, business law, employment matters, tax law, estate planning, IP law. For more information and to participate, contact Jose J. Garcia at josejgarcia_esq@lawyer.com. The Young Lawyers Division and Intellectual Property Law Section are co-sponsors of this clinic.

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	10a.m.–6p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed

Other Bars

ABA Women Rainmakers

Essential Tips for Success in ADR

Join the ABA Women Rainmakers on Aug. 10 for an event as part of the Wednesday Rainmaking Webinar Series: Ten Essential Tips for Success in ADR to Build Your Practice. Attracting and keeping clients today requires that litigators and business lawyers have the expertise for effectively resolving their clients' disputes through litigation alternatives. Learn essential tips from three experienced arbitrators and mediators for drafting effective ADR clauses and positioning clients to be successful in arbitration, mediation, and hybrid forms of ADR. These tips are designed to give you an added advantage in building your book of business. To register, visit https://attendee.gotowebinar.com/register/8848355383759099906.

New Mexico Criminal Defense Lawyers Association

Digital Evidence CLE

Join the New Mexico Criminal Defense Lawyers Association for a CLE "I Always

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Legal Education

August

5 **I'm With Her! Women in the Courtroom VI: Uniting for Success**
4.5 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Defense Lawyers Association
www.nmdla.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

11–12 **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**
Possible 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

26 **I Always Feel Like Somebody's Watching Me, And I Have No Privacy: Digital Evidence and the 4th Amendment**
6.7 G
Live Seminar, Las Cruces
New Mexico Criminal Defense Lawyers Association
www.nmcdla.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

9 **Wildlife and Endangered Species on Public and Private Lands**
6.0 G
Webcast/Live Seminar, Albuquerque
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

15 **Workers' Compensation Law and Practice Seminar**
5.6 G, 1.0 EP
Live Seminar, Santa Fe
Sterling Education Services
www.sterlingeducation.com

16 **27th Annual Appellate Practice Institute**
6.4 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
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

22 **EEOC Update, Whistleblowers and Wages (2015 Employment and Labor Law Institute)**
3.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **The New Lawyer – Rethinking Legal Services in the 21st Century (2015)**
4.5 G 1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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.*

September

22 **Law Practice Succession – A Little Thought Now, a Lot Less Panic Later (2015)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

23 **2016 Tax Symposium**
6.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
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

29 **Legal Technology Academy for New Mexico Lawyers (2016)**
4.0 G 2.0 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 **The US District Court: The Next Step in Appealing Disability Denials (2015)**
3.0 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

October

3 **Mastering Microsoft Word in the Law Office**
6.2 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

10–14 **Basic Practical Regulatory Training for the Electric Industry**
26.2 G
Live Seminar, Albuquerque
Center for Public Utilities New Mexico State University
business.nmsu.edu

13 **Joint Ventures Between For-Profits and Non-Profits**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13–14 **34th Annual Advanced Oil, Gas & Energy Resources Law**
10.3 G, 1.7 EP
Video Replay, Santa Fe
State Bar of Texas
www.texasbarcle.com

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

21 **Ethics and Cloud Computing**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Fiduciary Standards in Business Transactions: Good faith and Fair Dealing**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

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

New Mexico Lawyers and Judges Assistance Program

Tip of the Month

Strategies to Improve Health and Increase Satisfaction

It is well-documented that emotions such as anger, anxiety and sadness can negatively impact health by activating the stress response and contributing to chronic stress, resulting in depression, cardiovascular disease, gastrointestinal disorders, diabetes and other health conditions. Fortunately, positive psychology research has identified some positive emotional states that can counteract the physical reactivity that leads to these health conditions.

To decrease the negative effects of stress and improve life satisfaction, strive to incorporate these emotional states into your daily life:

Gratitude

Cultivating a sense of gratitude for what you have in life enhances happiness and a sense of contentment. Activities that promote gratitude—like keeping a gratitude journal and expressing gratitude to another individual each week—will strengthen social connections, result in a greater feeling of abundance and lift your mood. (Resource recommendation: *Gratitude Works* by Robert A. Emmons)

Optimism

As a legal professional whose work experience emphasizes prudence (i.e., pessimism), this state can be especially challenging. However, integrating "flexible optimism" into your life can reduce depression and produce multiple health benefits. An optimistic interpretation style views negative events as specific, temporary and changeable. The optimist who experiences a disappointment or failure asks, "What can I learn from this and how can I do better next time?" The optimist isn't immune to sadness and anger, but regards his or her thoughts and feelings as specific to the event, knowing they will soon dissipate. (Resource recommendation: Learned Optimism: *How to Change Your Mind and Your Life* by Martin Seligman)

Mindfulness

Being in the "here and now" avoids the anticipatory anxiety and catastrophic thinking of living in the future and the rumination and regrets associated with dwelling in the past. One technique to increase mindfulness is to infuse a normal daily activity with a mindful purpose and positive perspective—Each time you wash your hands, pay attention to how the water flows over your hands. Think of this as a metaphor for life—life flows by and all things pass, good and bad. As life flows on, we can seize the opportunity to savor the good parts and allow the bad parts to flow by. Practice this consistently for two weeks and you will experience a positive shift.

Featured

Member Benefit

New Mexico Lawyers and Judges Assistance Program

Confidential help is available to lawyers, judges, and law students troubled by substance abuse, depression, stress, and other issues. Contact Jill Ann Yeagley, 505-797-6003 or visit http://www.nmbar.org/JLAP/JLAP.html. Free helpline services are available during non-business hours at 505-228-1948 or 1-800-860-4914 and through the Judges Helpline at 1-888-502-1289.

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Feel Like Somebody's Watching Me, and I Have No Privacy: Digital Evidence and the Fourth Amendment" (6.7 G) on Aug. 26 in Las Cruces. Topics include: cell phone forensics, caselaw update on the fourth amendment and technology, child porn discovery and forensics and more. After the CLE, NMCDLA members and their friends and families are invited to the annual membership party and auction. Visit www.nmcdla.org to join NMCDLA and register for the seminar.

New Mexico Defense Lawyers Association

Annual Awards Nominations

The New Mexico Defense Lawyers Association is now accepting nominations for the 2016 NMDLA Outstanding Civil Defense Lawyer and the 2016 NMDLA Young Lawyer of the Year awards. Nomination forms are available online at www.nmdla.org or by contacting NMDLA at nmdefense@nmdla.org or 505-797-6021. Deadline for nominations is Aug. 12. The awards will be presented at the NMDLA Annual Meeting Luncheon on Oct. 14 at the Hotel Andaluz in Albuquerque.

Women in the Courtroom CLE

Last chance to register for "I'm With Her! Women in the Courtroom VI: Uniting for Success" (4.5 G, 1.0 EP) on Aug. 5 at the Greater Albuquerque Community Center. Don't miss this popular and dynamic full-day seminar followed by a wine tasting reception. Register at www.nmdla.org or call 505.797.6021.

Other News

Workers' Compensation Administration

Notice of Public Hearing

The New Mexico Workers' Compensation Administration will conduct a public hearing on the adoption of new WCA Rules at 1:30 p.m., Aug. 11, at the WCA, 2410 Centre Avenue SE, Albuquerque. Proposed changes can be found at www.workerscomp.state.nm.us/. Comments should be sent to Rachel.bayless@state.nm.us. Those with disabilities should call 505-841-6083 for assistance attending or participating in the meeting.

STATE BAR of NEW MEXICO

2016 Annual Meeting– Bench & Bar Conference

2016 State Bar of New Mexico Annual Awards

The 2016 Annual Awards recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2015 or 2016. They will be presented at 5:30 p.m., on Friday, Aug. 19, at the Buffalo Thunder Resort during the 2016 Annual Meeting—Bench & Bar Conference. To attend the awards ceremony and register for the Annual Meeting, visit www.nmbar.org/AnnualMeeting.

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

Hannah B. Best was a social worker prior to enrolling at the University of New Mexico Law School at age 40. After graduating, she worked for the American Indian Law Center, preparing materials for tribal leaders prior to White House meetings. In 1981, Ms. Best opened her own law practice where she focused on the issues of employment law, civil rights and work-related discrimination cases. She was also a consultant to several businesses in human resources. Her work to give a voice to New Mexicans continued through her active community life. Ms. Best is a co-founding member of the New Mexico Black Lawyers Association, and a member of the New Mexico Chapter of the National Employment Law Association. She has been an active member of the Albuquerque Bar Association, American Indian Chamber of Commerce, National Association of Social Workers, National Organization of Women New Mexico Chapter and she served as President of the National Association for the Advancement of Colored People (NAACP). Ms. Best has received numerous awards: the Governor's Lifetime Achievement Award, National Endowment for the Humanities of the NAACP Footprints Award and from various organizations, and from the United Nations.

TINA KELBE
Distinguished Bar Service Nonlawyer Award
Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

Tina Kelbe has been involved with the Paralegal Division since its inception in August of 1995, serving on the board and various committees that benefit and serve the legal profession on many levels. She served as chair of the division in 2009 and has been its treasurer since 2011. Her devotion and dedication to working with members of the Paralegal Division and the members of the State Bar has been constant. She has spent countless hours working with the Young Lawyers Division Wills for Heroes events and annual seminars attended not only by paralegals but by attorneys as well. The State Bar could not have selected a more deserving individual for the Distinguished Bar Service—Nonlawyer Award than Tina Kelbe.

ARTURO L. JARAMILLO

Justice Pamela B. Minzner Professionalism Award

Recognizes attorneys or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism. Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994–2007.

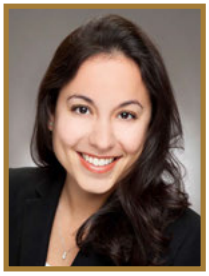
Arturo L. Jaramillo received his undergraduate degree from the University of New Mexico in 1971, and his J.D. in 1975 from the University of Santa Clara School of Law, *magna cum laude*. He was admitted to the State Bar of New Mexico in 1975. Currently a Partner with the firm of Cuddy & McCarthy, L.L.P., he practices in the fields of real property law, title insurance litigation and commercial real estate transactions for the firm's institutional clients. For 26 years, Mr. Jaramillo was a partner at the Jones Law Firm in Santa Fe, practicing in the field of complex commercial litigation. From 2003 to 2010, Mr. Jaramillo served as Cabinet Secretary for the New Mexico General Services Department and Superintendent of the New Mexico Regulation and Licensing Department. He is an experienced presenter of continuing education programs on professionalism, enhanced communication and leadership skills applying the competencies of emotional intelligence. Mr. Jaramillo was the first Hispanic to be elected President of the State Bar of New Mexico in 1993, a recipient of Distinguished Career Achievement Awards from the University of Santa Clara School of Law (2002), and the University of New Mexico School of Law (2003), and the "Spirit of Excellence Award" from the American Bar Association (2007).

SELF HELP CENTER AT THE THIRD JUDICIAL DISTRICT

Outstanding Legal Program Award

Recognizes outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

The **Self Help Center (SHC)** provides Pro Se litigants with general information on the procedures they need to follow to file a court case, respond to a suit, and how to obtain assistance from other agencies. A typical interaction will involve a person who has never been involved in a court case, who is in crisis, and needs information that may help solve their issues. The SHC serves a primarily Spanish speaking, under educated, poverty-stricken community. The SHC staff deals with litigants in cases ranging from domestic relations matters, civil matters, and appeals from administrative agencies. In 2015, the SHC saw on average, 60 people a day. In a legal system where the poor, elderly, and the most vulnerable of our neighbors are vastly underrepresented by counsel and must fend for themselves; the SHC provides these litigants with a resource to assist them in finding access to justice.



DENISE M. CHANEZ

Outstanding Young Lawyer of the Year Award

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

Ms. Denise M. Chanez is a partner at Rodey, Dickason, Sloan, Akin & Robb, P.A. where her practice is focused on medical malpractice defense. Her work in this area earned her the designation of "Rising Star" in the 2014, 2015 and 2016 editions of Southwest Super Lawyers. She also has experience in the areas of First Amendment/media law and personal injury. She co-chairs her law firm's diversity committee and the State Bar of New Mexico's Committee on Diversity in the Legal Profession. Ms. Chanez is a board member of the New Mexico Hispanic Bar Association and previously served as its president from 2013 to 2015. She chairs the NMHBA's education, mentorship and scholarship committees. She is a 2015 Albuquerque Business First 40 Under Forty honoree and a 2016 Albuquerque Business First Women of Influence honoree.

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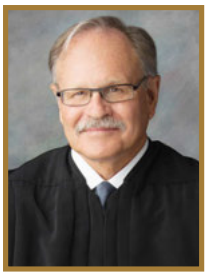
BILLY K. BURGETT

Robert H. LaFollette Pro Bono Award

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance over his or her career to people who could not afford the assistance of an attorney. Robert LaFollette (1900–1977), director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.

Billy K. Burgett has been a practicing attorney based in Albuquerque, New Mexico for over 34 years, specializing in a broad range of real estate and business law, while also dedicating his time to serving with various charitable organizations. He has maintained a successful legal practice representing many individuals and businesses throughout the state of New Mexico since graduating from UNM Law School in 1982. In addition, he has been a licensed real estate broker for 29 years. Raised in Las Cruces, Billy enjoys searching for the best green chili enchiladas in the state of New Mexico with his wife, Paula, and three children, Taylor, Chase and Zoe. When not in the office, Billy can be found arguing his case on the racquetball court, trying his luck at fishing or biking with friends through the mountains.



JUSTICE RICHARD C. BOSSON

Seth D. Montgomery Distinguished Judicial Service Award

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and bar; generally given to judges who have or soon will be retiring. Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989–1994.

Justice Richard C. Bosson served for over 21 years on the New Mexico Judiciary, first on the Court of Appeals including two years as Chief Judge, and then almost 13 years on the Supreme Court including two years as Chief Justice 2005-2006. During that time he authored hundreds of well-respected legal opinions, provided much-needed leadership to the Judiciary and the State Bar during a period of public crisis and loss of confidence in the courts, served on many court and Bar committees, and was a steadfast advocate for the State Bar and the cause of improved administration of fair and equal justice to all. Before becoming a judge, he practiced law in the private sector for many years and was a Division Director with the Attorney General's Office as well as working with the Legal Aid Society of Albuquerque and being a founding member of the Mexican American Legal Defense and Education Fund. He also served on the New Mexico Constitutional Revision Commission 1994-95 and received a Master's degree in Judicial Process from the University of Virginia law school in 1998.

2016 Disciplinary Board Distinguished Service Award

REBECCA KITSON has worked in the field of Immigration Law for a decade. At her firm she practices the spectrum of Immigration Law, including humanitarian relief, employment-based and family-based immigration and removal defense. For the past seven years, Rebecca has also taught immigration-related courses as an adjunct professor at the University of New Mexico School of Law. She is a member of the American Immigration Lawyers Association (AILA) and has served as the Albuquerque DHS-USCIS liaison and spoken at AILA conferences nationally and regionally. Rebecca advises on the immigration-related consequences of crime, and co-authored a manual for the Law Office of the Public Defender on the consequences of New Mexico criminal statutes. She serves on the Supreme Court's MCLE board, the Immigration Law Section board, and the board of One Woman, One Case, Once a Year (a project of the SW Women's Law Center and NM Legal Aid). She also speaks Spanish fluently.

Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

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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
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Effective July 22, 2016

Published Opinions

No. 34182	12th Jud Dist Otero CR-12-230, STATE v M LOZA (affirm)	7/18/2016
No. 33370	13th Jud Dist Sandoval CV-11-201, H MARQUEZ v G & D (reverse and remand)	7/21/2016

Unpublished Opinions

No. 35289	13th Jud Dist Cibola JQ-13-11, CYFD v LEONARD M (affirm)	7/18/2016
No. 33764	11th Jud Dist San Juan CR-13-914, STATE v K YELLOWHAIR (affirm)	7/19/2016
No. 34339	11th Jud Dist San Juan CR-14-496, STATE v K PETERS (affirm)	7/20/2016
No. 34111	2nd Jud Dist Bernalillo DM-09-4220, M COBB v C SCHREMPP (affirm)	7/20/2016
No. 34199	2nd Jud Dist Bernalillo LR-13-42, STATE v P GIANNINI (affirm)	7/20/2016
No. 35385	8th Jud Dist Colfax JQ-14-8, CYFD v PATRICIA M (affirm)	7/21/2016
No. 35293	13th Jud Dist Sandoval CV-12-1209, L CEPELAK v GREEN TREE (affirm)	7/21/2016

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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In Memoriam

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Dated July 22, 2016

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective August 3, 2016

Pending Proposed Rule Changes Open for Comment:

		Comment Deadline
Rule 1-079	Public inspection and sealing of court records	08/05/16
Rule 1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	08/05/16
Form 4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	08/05/16
Rule 5-123	Public inspection and sealing of court records	08/05/16
Rule 5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	08/05/16
Form 9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	08/05/16
Rule 10-166	Public inspection and sealing of court records	08/05/16
Rule 10-171	Notice of federal restriction on right to receive or possess a firearm or ammunition	08/05/16
Form 10-604	Notice of federal restriction on right to possess or receive a firearm or ammunition	08/05/16

Recently Approved Rule Changes Since Release of 2016 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
Rule 1-079	Public inspection and sealing of court records	05/18/16
Rule 1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Civil Forms		
Form 4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Rules of Criminal Procedure for the District Courts		
Rule 5-123	Public inspection and sealing of court records	05/18/16
Rule 5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/16
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
Criminal Forms		
Form 9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Children's Court Rules and Forms		
Rule 10-166	Public inspection and sealing of court records	05/18/16
Rule 10-171	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/16
Form 10-604	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
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.

Certiorari Granted, May 3, 2016, No. S-1-SC-35771

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-044

No. 33,425 (filed January 25, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
LUIS ALFREDO GARCIA,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
FERNANDO R. MACIAS, District Judge

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Opinion

Michael E. Vigil, Chief Judge

{1} The question presented in this case is whether an emergency medical technician (EMT) is authorized to draw blood for the purpose of determining its alcohol or drug content under the Implied Consent Act, NMSA 1978, Sections 66-8-105 to -112, (1978, as amended through 2015). We conclude no such authority exists and affirm the order of the district court suppressing the results of Defendant's blood test.

I. BACKGROUND

{2} State Police Officers Bernal and Robles were dispatched to a head-on collision on NM 404 near the Texas border. Officer Bernal encountered the two cars involved in the accident, and his on-scene investigation indicated that Defendant crossed over the centerline and struck the other vehicle, causing its occupants serious injuries. Bernal interviewed Defendant at the scene and observed that Defendant had blood-shot, watery eyes, smelled of marijuana, and demonstrated indicators of being under the influence of marijuana. Officer Bernal asked Defendant if he had smoked marijuana, which he denied. Officer Bernal placed Defendant under arrest for driving while intoxicated, and read the Implied Consent Act advisory to Defendant. Defendant consented to a blood draw.

{3} Defendant, who was also injured in the accident, was placed inside an ambulance for transport to a trauma center in El Paso, Texas. Defendant was being treated by EMT Denise Andavazo inside the ambulance and while she was getting ready to administer Defendant an intravenous (IV) solution, Officer Robles asked her to draw a blood sample from Defendant, and she agreed.

{4} Officer Robles gave Ms. Andavazo an unexpired Scientific Laboratory Division (SLD) approved blood draw kit to do the blood draw. SLD-approved blood draw kits include everything that is needed for a blood draw to ensure continuity and standardization, and to avoid compromising the accuracy and integrity of blood samples. The kits contain instructions, paperwork, an iodine cleaning pad, a needle with attached tube, and two gray-topped, sterile vacuum tubes containing sodium fluoride—a white powder preservative.

{5} To avoid compromising Defendant's care, which was her first priority, Ms. Andavazo did not read the instructions, and she did not use the needle with attached tube provided in the SLD-approved kit. Instead, she used a sterile IV catheter from the ambulance's supply to puncture Defendant's vein and a sterile syringe from the ambulance's supply to draw Defendant's blood through the IV catheter and then transferred Defendant's blood sample to the two vacuum tubes in the SLD-approved kit. Ms. Andavazo then connected the IV to Defendant and the ambulance transferred him to the hospital. Ms. Andavazo did not use the needle from the SLD-approved kit to puncture Defendant, because this would have required her to puncture Defendant twice, which she wanted to avoid. SLD received the sample, and after analyzing it, concluded that THC metabolites, related to the "high" marijuana produces, were present in Defendant's blood, but not alcohol.

{6} Defendant was charged by indictment with causing great bodily harm by vehicle while driving under the influence of alcohol and drugs and failure to maintain a traffic lane.

{7} Defendant filed a motion to suppress the results of the blood test on grounds that Ms. Andavazo was not qualified to perform blood draws under NMSA 1978, Section 66-8-103 (1978) and that the blood draw was improperly performed. Following a second evidentiary hearing, the district court granted the motion to suppress on both grounds. The State appeals.

II. ANALYSIS

A. Standard of Review

{8} "We review rulings upon the admission or exclusion of evidence under an abuse of discretion standard, but when there is no evidence that necessary foundational requirements are met, an abuse of discretion occurs." *State v. Gardner*, 1998-NMCA-160, ¶ 5, 126 N.M. 125, 967 P.2d 465 (citation omitted). This case requires us to engage in statutory interpretation to determine what the appropriate foundation is for admitting the results of blood tests to determine the content of alcohol or drugs under the Implied Consent Act. We do so under a de novo standard of review. *State v. Bowden*, 2010-NMCA-070, ¶ 9, 148 N.M. 850, 242 P.3d 417.

B. Qualifications Under Section 66-8-103

{9} The Implied Consent Act states that "[o]nly the persons authorized by Section

66-8-103. . . shall withdraw blood from any person for the purpose of determining its alcohol or drug content." Section 66-8-109(A). Section 66-8-103 in relevant part then directs:

> Only a physician, licensed professional or practical nurse or laboratory technician or technologist employed by a hospital or physician shall withdraw blood from any person in the performance of a blood-alcohol test.

In interpreting Section 66-8-103, we follow standard statutory interpretation principles. The primary goal of statutory interpretation is "to ascertain legislative intent, indicated by the plain language of the statute." *State v. Vaughn*, 2005-NMCA-076, ¶ 33, 137 N.M. 674, 114 P.3d 354. "When the statute's language is clear and unambiguous, we give the statute its plain and ordinary meaning and refrain from further interpretation." *Id.* (internal quotation marks and citation omitted). "All portions of statutes are read in connection with every other part to produce a harmonious whole." *Id.*

{10} The State first argues that because Section 66-8-103 only refers to a "blood-alcohol test," it does not apply here as this case involves a blood test which was used to determine the presence of drugs. However, this argument overlooks the plain language of Section 66-8-109(A), which makes it clear that only the persons authorized by Section 66-8-103 "shall withdraw blood from any person for the purpose of determining its alcohol or drug content." In reading these sections together, we conclude that the Legislature intended blood draws under the Implied Consent Act—whether for alcohol or drug content—be performed only by persons listed in Section 66-8-103.We therefore reject the State's argument, and turn to the question presented—whether an EMT falls within the parameters of Section 66-8-103.

{11} Section 66-8-103 explicitly states that "only" the categories of persons listed may perform blood draws under the Implied Consent Act. The categories are: (1) a physician; (2) a licensed professional or practical nurse; (3) a laboratory technician; and (4) a technologist. The State argues that there is a fifth category: a "licensed professional", and as a licensed EMT, Ms. Andavazo is a "licensed professional" authorized to perform a blood draw under Section 66-8-103. To answer this contention, we first look to our own cases construing the statute.

{12} In *State v. Trujillo*, 1973-NMCA-076, ¶¶ 2-3, 15-16, 85 N.M. 208, 510 P.2d 1079, the defendant was arrested for driving while intoxicated and taken to a hospital where a laboratory technologist who was employed by a physician, but not licensed, withdrew his blood in a medically approved manner. The defendant argued that the statute[1] identifies five authorized categories: (1) a physician; (2) a licensed professional nurse; (3) a licensed practical nurse; (4) a laboratory technician; and (5) a laboratory technologist. *Trujillo*, 1973-NMCA-076, ¶ 16. The defendant further asserted that the licensing requirement set forth in the statute applies to a laboratory technician and a laboratory technologist. *Id.* We first noted that the statute is ambiguous, requiring us to ascertain the legislative intent by applying rules of statutory construction. *Id.* ¶ 17. We then rejected the argument that the licensing requirement stated in the statute applies to a laboratory technologist on the basis that there was no provision in effect for licensing technologists when the statute (Section 66-8-103) was enacted. *Trujillo*, 1973-NMCA-076, ¶¶ 18-20, 22. Reading a licensing requirement into the statute when there were no other provisions to allow for licensing would lead to an otherwise absurd or unreasonable result. *Id.* ¶ 19.

{13} In *State v. Wiberg*, 1988-NMCA-022, ¶ 10, 107 N.M. 152, 754 P.2d 529, we stated that "[s]tatutes are to be read and understood primarily according to their grammatical sense, unless it is apparent that the [Legislature] intended something different." We utilized the "last antecedent doctrine" to conclude that the phrase "employed by a hospital or physician" applied to the preceding phrase "laboratory technician or technologist" and not to "nurse," the more remote term, as the defendant contended. *Id.* ¶¶ 7, 11 (internal quotation marks and citation omitted). We therefore held, "Section 66-8-103 does not require a licensed professional nurse or registered nurse to be employed by a hospital or physician in order to withdraw blood for blood-alcohol tests." *Wiberg*, 1988-NMCA-022, ¶ 18.

{14} Finally, in *State v. Nez*, 2010-NMCA-092, ¶¶ 11, 13-14, 148 N.M. 914, 242 P.3d 481, we concluded that the evidence was sufficient to establish the blood drawer's identity in a hospital emergency room as a registered nurse, and therefore, that she was qualified to withdraw the defendant's blood under Section 66-8-103. While these cases are of some assistance to us, they are not definitive, and for additional assistance, we now turn to how other states have treated the question before us here.

{15} In *Andrews v. State ex rel. Department of Public Safety*, 2014 OK CIV APP 19, 320 P.3d 27 (cert. denied Jan 27, 2014), the arresting officer observed several indicators of intoxication while investigating a single car accident, and at his request, an EMT took the defendant's blood inside the ambulance. *Id.* ¶¶ 4-8. Like the New Mexico statute, Oklahoma's specifies that "[*o*]*nly*" certain categories of individuals are qualified to withdraw blood to determine alcohol or other intoxicants. *Id.* ¶ 15. Because an EMT was not among those persons specifically listed in the statute to withdraw blood, the Oklahoma Court of Appeals concluded that the blood test results could not be used as evidence to revoke the defendant's driver's license. *Id.* ¶ 22.

{16} Similarly, in *People v. Reynolds*, 749 N.Y.S.2d 687, 690-91, (2002) (non-precedential), since the EMT was not acting "under the supervision and at the direction of a physician" when he withdrew the defendant's blood in the emergency room, as required by the applicable statute, the results were held not admissible in the defendant's trial for driving while intoxicated, vehicular manslaughter, and other charges.

{17} In *Bortnem v. Commissioner of Public Safety*, 610 N.W.2d 703, 704 (Minn. Ct. App. 2000), a police officer who received several hundred hours of training, including 100-200 blood draws, to obtain his state certification as an "emergency medical technician paramedic," withdrew the driver's blood at the police station following his arrest for DWI. Like our statute, the Minnesota statute states that "only" certain individuals may withdraw blood to determine the presence of alcohol or drugs, including a "physician's trained mobile intensive care paramedic." The court determined that the blood draw was not authorized because notwithstanding his training

[1]NMSA 1953, Section 64-22-2.1 (1978) (recompiled as Section 66-8-103)

and experience, the officer was not a paramedic as defined in the statute. *Id.* at 705-706.To conclude otherwise would require reading the words "physician's," "trained," "mobile", "intensive", and "care" out of the statute. *Id.*

{18} We construe Section 66-8-103[2] in the same manner as the foregoing cases: according to the language used, according to their grammatical sense, and consistent with other existing statutes. A physician is clearly qualified under the statute. The phrase which follows refers to two types of nurses: a "licensed professional nurse" or a "licensed practical nurse." We arrive at this conclusion because the Nursing Practice Act, NMSA 1978, §§ 61-3-1 to -31(1968, as amended through 2014), has these two classes of nurses. A registered nurse is a "licensed professional nurse." Such an individual is a nurse who "practices professional registered nursing" and is entered in the "register of licensed nurses." Section 61-3-3(N), (O) (defining "professional registered nursing" and "registered nurse"). In turn, a "licensed practical nurse" is "a nurse who practices licensed practical nursing" and is entered in the "register of licensed practical nurses." Section 61-3-3(I), (J) (defining "licensed practical nurse" and "licensed practical nursing").These two classes are followed by "or" to refer to two additional categories: a "laboratory technician, or technologist employed by a hospital or physician." Section 66-8-103. Because we have found no applicable separate statutory definition for a "laboratory technician" and given the structure of the phrase, it appears that a laboratory technician must be employed by a hospital or physician to qualify. However, that question is not before us in this case.

{19} We therefore conclude that Section 66-8-103 sets forth the only five categories of individuals authorized to withdraw blood pursuant to the Implied Consent Act: (1) a physician; (2) a licensed professional nurse; (3) a licensed practical nurse; (4) a laboratory technician (who must be employed by a hospital or physician); and (5) a technologist (who must be employed by a hospital or physician). There is no separate category of a "licensed professional," as urged by the State. Our conclusion is buttressed by the second sentence of Section 66-8-103, which refers to "such physician, nurse, technician or technologist" as being exempt from certain criminal and civil liabilities. This sentence tells us that the Legislature was referring only to these categories and that it did not intend to include a "licensed professional." We therefore hold that a "licensed professional" is not a separate category of individual authorized to draw a blood sample for alcohol or drug content under the Implied Consent Act, and since Ms. Andavazo does not satisfy any of the categories that are listed as the "only" ones qualified to draw blood samples she is not qualified under the Implied Consent Act.

{20} Even if we were able to accept the State's argument for a separate category of a "licensed professional," Ms. Andavazo's license as an EMT does not qualify her to draw blood to determine its alcohol or drug content under the Implied Consent Act. Ms. Andavazo is employed by American Medical Response (AMR), an ambulance company licensed by the State of New Mexico. AMR is approved by the Department of Health as a "certified emergency medical service" under the Emergency Medical Services Act, NMSA 1978, Sections 24-10B-1 to -7 (1983, as amended through 2014). *See* §§ 24-10B-3(E), (F), and (H) (defining "certified emergency medical service" in pertinent part as an organization approved by the Department of Health to provide "emergency services"). The Emergency Medical Services Act in turn defines "emergency medical services" as "the services rendered by providers in response to an individual's need for immediate medical care to prevent loss of life or aggravation of physical or psychological illness or injury." Section 24-10B-3(K).

{21} Within this statutory framework, Ms. Andavazo is licensed by the Department of Health to provide "emergency medical services" as an "emergency medical technician," that is, "a provider who has been licensed by the department to provide patient care." Section 24-10B-3(N), -5(A) (providing that the Department of Health shall adopt licensure requirements "for all persons who provide emergency medical services within the state"). Specifically, Ms. Andavazo is certified as an EMT-Intermediate (EMT-I) by the Department of Health. As such, she is allowed to perform various skills, techniques, and procedures, and to administer medications, with "medical director approval," all of which "are considered advanced life support." 7.27.11.8(C) NMAC (8/14/2014).[3] One of the procedures Ms. Andavazo is allowed to perform with "medical director approval" is blood drawing. 7.27.11.8(M)(2)(a)(vii) NMAC.

{22} The statutory and regulatory provisions therefore allow Ms. Andavazo to perform blood drawing, but only in the context of providing "emergency medical services" under the Emergency Medical Services Act; that is, services rendered "in response to an individual's need for immediate medical care to prevent loss of life or aggravation of physical or psychological illness or injury." Section 24-10B-3(K). Blood draws to determine the content of alcohol or drugs in blood under the Implied Consent Act do not fall under the scope of Ms. Andavazo's license as an EMT-I. Moreover, her training as an EMT-I does not include the protocols for performing blood draws that comply with the Scientific Laboratory Division regulations of the Department of Health under the Implied Consent Act. Accordingly, Ms. Andavazo's EMT-I certification did not authorize her to draw blood for the purpose of determining its alcohol or drug content. *See Greaves v. N. Dakota State Highway Comm'r*, 432 N.W.2d 879, 882-83 (N.D. 1988) (concluding that an EMT-I who had authority to provide pre-hospital emergency care consistent with the skills possessed by an EMT-I,

[2]Section 66-8-103 in its entirety states:

Only a physician, licensed professional or practical nurse or laboratory technician or technologist employed by a hospital or physician shall withdraw blood from any person in the performance of a blood-alcohol test. No such physician, nurse, technician or technologist who withdraws blood from any person in the performance of a blood-alcohol test that has been directed by any police officer, or by any judicial or probation officer, shall be held liable in any civil or criminal action for assault, battery, false imprisonment or any conduct of any police officer, except for negligence, nor shall any person assisting in the performance of such a test, or any hospital wherein blood is withdrawn in the performance of such a test, be subject to civil or criminal liability for assault, battery, false imprisonment or any conduct of any police officer, except for negligence.

[3]In addition, it must be documented that the EMT "has been appropriately trained," and the EMS provider must have a signed authorization from the service's medical director on file at its headquarters or administrative offices.7.27.11.8(C) NMAC.

which included taking blood draws, did not include authority to withdraw blood for the purpose of determining its alcohol content).

{23} A predicate for the admission of a blood test result in a DWI case is that the test be performed "pursuant to the Implied Consent Act." Section 66-8-110(A). The State failed to meet its burden of proving that Defendant's blood was drawn by a person authorized to do so under Section 66-8-103, and the results of the test are therefore inadmissible. *See Price v. State*, 498 S.E.2d 262, 263 (Ga. 1998) (stating that "[i]n order to admit results of a blood test showing a defendant's blood alcohol level, the state must prove that the blood was withdrawn by a "qualified" person under the applicable statute.)*; City of Salina v. Martin*, 849 P.2d 1010, 1011 (Kan. Ct. App. 1993) (affirming an order suppressing results of a blood test in a DWI prosecution because the state failed to satisfy its burden of proving that the person who withdrew the defendant's blood was qualified to do so under the applicable statute); *Cavazos v. State*, 969 S.W.2d 454, 457 (Tex. App. 1998) (holding that results of a blood test in an intoxication manslaughter case were inadmissible because the state failed to meet its burden of proving that the blood was withdrawn by a person qualified to do so under the applicable statute).

{24} In this case, Defendant's blood was drawn by a person who was not qualified to do so, and in accordance with our analysis, the district court properly suppressed the test results on this basis. Section 66-8-103 has a two-fold purpose: to insure the safety and protection of the person whose blood is drawn; and to insure the reliability of the sample. *See Steere Tank Lines, Inc. v. Rogers*, 1978-NMSC-049, ¶ 6, 91 N.M. 768, 581 P.2d 456. Compliance with Section 66-8-103 advances both of these purposes. In light of our holding, it is not necessary for us to address whether the test results were properly suppressed, because the protocols and contents of the SLD blood draw kit were not followed and used.

III. CONCLUSION

{25} The order of the district court is affirmed.

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

MICHAEL E. VIGIL, Chief Judge

WE CONCUR:

RODERICK T. KENNEDY Judge

M. MONICA ZAMORA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-045

No. 33,837 (filed February 3, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CAESAR ORTIZ-CASTILLO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
JAMES M. HUDSON, District Judge

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Opinion

James J. Wechsler, Judge

{1} This appeal arises from a jury trial in which Defendant Caesar Ortiz-Castillo was convicted of trafficking controlled substances, contrary to NMSA 1978, Section 30-31-20(A)(3) (2006), and possession of drug paraphernalia, contrary to NMSA 1978, Section 30-31-25.1(A) (2001). Defendant originally appealed three issues, two of which we addressed in a memorandum opinion that affirmed Defendant's convictions. *State v. Ortiz-Castillo*, No. 33,837, mem. op. (N.M. Ct. App. Feb. 3, 2016) (non-precedential).

{2} The final issue on appeal relates to Defendant's claim that the district court's failure to provide Spanish translations of written jury instructions to a Spanish-speaking juror violated that juror's constitutional right to fully participate in the trial. Because we conclude that the accommodations made by the district court were sufficient to avoid any impairment to the ability of a Spanish-speaking juror to fully participate, we affirm.

BACKGROUND

{3} The jury panel convened for Defendant's criminal trial included individuals for whom Spanish was their primary language. One of these individuals was ultimately selected to serve on the jury and required interpretative services throughout the trial. Defendant's request that the Spanish-speaking juror be provided written jury instructions in Spanish was denied, but the district court noted that an interpreter would be present during deliberations and could translate the jury instructions as needed. Defendant appealed the district court's refusal to provide written translations of the jury instructions into Spanish.

PRESERVATION

{4} Defendant argued both at trial and in his appellate briefing that the district court's failure to provide Spanish-language translations of written jury instructions could compromise the Spanish-speaking juror's ability to fully participate in the deliberative process. Our appellate courts have held that criminal defendants have standing to assert the rights of jurors to be free from discriminatory exclusion, a premise that extends to the deliberative process. *See State v. Rico*, 2002-NMSC-022, ¶ 6, 132 N.M. 570, 52 P.3d 942 ("In [*State v. Singleton*, 2001-NMCA-054, 130 N.M. 583, 28 P.3d 1124], the Court of Appeals held that a defendant has standing to protect the Article VII, Section 3 rights of an excluded juror. This result is correct." (citation omitted)).

STANDARD OF REVIEW

{5} Defendant's argument that Spanish-speaking jurors are entitled to written translations of jury instructions is premised upon language found in the New Mexico Constitution. *See* N.M. Const. art. VII, § 3. We review questions of constitutional law de novo. *State v. DeGraff*, 2006-NMSC-011, ¶ 6, 139 N.M. 211, 131 P.3d 61.

WRITTEN JURY INSTRUCTIONS FOR SPANISH-SPEAKING JURORS

{6} Defendant argues on appeal that the New Mexico Constitution requires that written translations of jury instructions be provided to Spanish-speaking jurors. The New Mexico Constitution provides, in pertinent part, that "[t]he right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages[.]" N.M. Const. art. VII, § 3.[1] As additional support for his argument, Defendant notes that our Supreme Court, discussing Article VII, Section 3 in *Rico*, stated that "[i]t is an unusual constitutional provision and . . . will not always be convenient to implement. The judicial branch of government will need the resources to make full implementation a reality." 2002-NMSC-022, ¶ 7.

{7} Our Supreme Court recently spoke to whether jury instructions must be provided in languages other than English in Order No. 00-8500, which adopted the Non-English Speaking Juror Guidelines (NES Guidelines) drafted by the Committee for the Improvement of Jury Service in New Mexico. *See* Supreme Court Order No. 00-8500 (Sept. 11, 2000). The NES Guidelines exist "to assist in the efforts of the New Mexico Judiciary to incorporate non-English speaking (NES) citizens into New Mexico's jury system." *State v. Pacheco*, 2007-NMSC-009, app. C § I, 141 N.M. 340, 155 P.3d 745. In contemplation of whether trial courts should provide written translations of jury instructions to NES jurors, the NES Guidelines state that "courts are encouraged to draft

[1]While only the English and Spanish languages are afforded inherent status under Article VII, Section 3, our Supreme Court has indicated that the constitutional principles and protections apply to persons who speak other languages. *See Rico*, 2002-NMSC-022, ¶ 3 ("Since the basis of our order was Article VII, Section 3, we see no reason why its principles . . . should not protect speakers of the Navajo language.").

written, Spanish translations of the jury instructions with the assistance of a court interpreter. Alternatively, the court interpreter assigned to assist NES jurors during deliberations may provide an oral translation of the jury instructions." *Id.* § II(H). Given this language, it appears that our Supreme Court has considered the issue raised by Defendant and determined that the alternate accommodations outlined in the NES Guidelines are sufficient.

{8} Our analysis of Article VII, Section 3 leads to the same conclusion. The language of Article VII, Section 3 limits a government's ability to "restrict[], abridge[], or impair[]" a citizen's right to serve on a jury. N.M. Const. art. VII, § 3. The facts of this case implicate the potential for impairment of jury service as opposed to the potential for restriction or abridgment. *Cf. Rico*, 2002-NMSC-022, ¶ 1 (holding that a trial court may not excuse a potential juror simply because the juror would need an interpreter to participate in the proceedings).

{9} Our central purpose in interpreting the constitution is to "reflect[] the drafters' intent." *State v. Lynch*, 2003-NMSC-020, ¶ 24, 134 N.M. 139, 74 P.3d 73. Principles of statutory construction "apply equally to constitutional construction." *State v. Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d 830 (internal quotation marks and citation omitted). As with legislative intent, to determine the intent of the drafters of our Constitution, "we first turn to the plain meaning of the words at issue, often using the dictionary for guidance." *Id.* ¶ 9. Under the plain meaning rule, we apply the ordinary meaning of the chosen language "unless the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction[.]" *State v. Maestas*, 2007-NMSC-001, ¶ 9, 140 N.M. 836, 149 P.3d 933 (internal quotation marks and citation omitted).

{10} Webster's International Dictionary variously defines the word "impair" as to "do harm to[,]" to "damage[,]" and to "lessen[.]" *Webster's Third New Int'l Dictionary*, 1131 (unabridged ed. 1993). Application of any of these definitions to the language of Article VII, Section 3 indicates that, to violate the New Mexico Constitution, a governmental entity must implement a system whereby the "inability to speak, read or write the English or Spanish languages" somehow harms the ability of an individual to serve on a jury. N.M. Const. art. VII, § 3.

{11} Defendant argues that the absence of a written translation of jury instructions impairs, or harms, the ability of a NES juror to fully participate in the deliberative process. In order to determine whether this is true, we must first establish the purpose of written jury instructions. The seminal case on this topic, *Kunz v. Nelson*, holds that the general purpose of written jury instructions is to assist the jury during deliberations. 76 P.2d 577, 584 (Utah 1938) ("The requirement to instruct in writing does not mean for the purposes of the record only, but for the purposes of use by the jury in the jury room[.]"). Our Supreme Court has advanced similar rationales for the use of written jury instructions in New Mexico. *See Territory v. Lopez*, 1884-NMSC-012, ¶ 10, 3 N.M. 156, 2 P. 364 ("[I]nstructions, under our statute, must be in writing, and should properly enunciate the law on the subject."); *State v. Greenlee*, 1928-NMSC-020, ¶ 27, 33 N.M. 449, 269 P. 331 ("Since 1880 it has evidently been the legislative policy that there should be an authoritative record to which the jurors might refer to avoid misapprehension or differences of opinion[.]"); *Hayes v. Hockenhull*, 1964-NMSC-087, ¶ 14, 74 N.M. 329, 393 P.2d 444 ("The purpose of instructing the jury is to make the issues that they are to determine plain and clear.").

{12} Legal scholarship further clarifies that the purpose of written jury instructions relates directly to the ability of jurors to remember oral instructions once they have retired to the jury room. *See, e.g.*, Jeannine Turgeon and Elizabeth Francis, *Improving Pennsylvania's Justice System Through Jury System Innovations*, 18 Widener L.J. 419, 439 (2009) ("Empirical research confirms our intuitive notion that written instructions aid in the comprehension, retention, and application of the judge's instructions. . . . Research in cognitive psychology has amply demonstrated the benefits for comprehension and recall of both multiple exposure and written materials. Providing jurors with copies of written instructions increases juror understanding of the instructions, results in less confusion about applicable law, reduces questions about the instructions during the deliberations, reduces deliberation time, reduces disputes among jurors about the meaning and correct application of instructions, and increases jurors' confidence in the verdicts they reach." (footnotes omitted)); Elizabeth A. Tashash, Note, *Mandatory Provision of Written Copies of Jury Instructions to Retiring Juries in Criminal Trials in Massachusetts*, 19 Suffolk J. of Trial & App. Advoc. 414, 427-28 (2014) ("[T]he advantages of submitting written copies of [jury instructions] are clearly demonstrated by the empirical studies on juror comprehension of jury instructions. The simple visual aid of a written copy of the jury instructions for use in the deliberation room allows for a solution to the study results that show that jurors cannot remember—let alone comprehend—instructions after hearing them only once. In addition, there is evidence that juries provided with a written copy of the jury instructions deliberate in more efficient and informed ways, and feel more confident about their decisions." (footnotes omitted)). There is no reason to believe that these findings would be less applicable to NES jurors.

{13} However, the question before this Court is not whether written jury instructions are beneficial, but it is instead whether the absence of written jury instructions would impair a NES juror's ability to fully participate given the facts of this case.

{14} New Mexico law provides that jurors are entitled to the same interpretative services during jury deliberations as they are during the trial itself. *See Pacheco*, 2007-NMSC-009, ¶ 2 ("[O]nce an interpreter has been given the mandatory interpreters' oath to interpret testimony correctly, an interpreter is authorized to be in the room during deliberations to assist non-English speaking jurors."). New Mexico law also defines "court interpreter" as "a person who provides interpretation or translation services for a case participant[,]" including jurors. Rule 1-103(A)(5) NMRA. "Translation" is defined as "the transmission of a written message from one language to another[.]" Rule 1-103(A)(4).

{15} In the present case, three certified court interpreters were sworn prior to the beginning of the proceedings. Two of these interpreters accompanied the NES juror into the jury room to assist with the deliberative process.

{16} If the purpose of written jury instructions is to limit the need for absolute recall memory of oral instructions given in the court room, we are unable to say that the presence of the interpreters in the jury room does not mitigate any potential impairment. Our rules of trial practice anticipate the need to translate written documents, including jury instructions, for NES jurors. Rule 1-103(E)(8). There is no reason to believe that one or both of the

court interpreters present, who were qualified under Rule 1-103(E)(1)-(3), would be unable to do so in this, or any, case.

{17} Defendant's reliance on *Rico* to argue that a trial court must provide written jury instructions, regardless of the procedural costs, is misplaced in this case. In addition to the language cited by Defendant, our Supreme Court in *Rico* also noted, "[t]he rights protected by Article VII, Section 3, like most constitutionally protected rights, are not absolute. There are circumstances in which a prospective juror's right to serve on a jury must be balanced against practical considerations[.]" *Rico*, 2002-NMSC-022, ¶ 10. The practical considerations in this case, obviously, are the resources necessary to translate jury instructions when a readily available accommodation exists within our current system of trial administration. Were data available showing that jury instructions serve a purpose that cannot be resolved through translation by a court interpreter in the jury room, our analysis could differ. Because any potential prejudice to the juror is equally well resolved by written translations prior to deliberations, or oral or written translations as needed within the confines of the jury room, the juror's right to fully participate has not been impaired as that word is used in Article VII, Section 3 of the New Mexico Constitution.

{18} In the absence of an impairment to a juror's constitutional right to fully participate in the deliberative process, we decline to mandate that trial courts provide written translations of jury instructions. This conclusion accords with the accommodations contemplated in the NES Guidelines that were implemented by order of our Supreme Court. *Pacheco*, 2007-NMSC-009, app. C § II(H). If the "unusual" wording set forth in Article VII, Section 3 of the New Mexico Constitution necessitates that written translations be provided to Spanish-speaking jurors in the absence of an impairment, that determination is properly left to our highest court. *Rico*, 2002-NMSC-022, ¶ 7.

CONCLUSION

{19} Therefore, we affirm.

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

JAMES J. WECHSLER, Judge

WE CONCUR:
RODERICK T. KENNEDY, Judge
TIMOTHY L. GARCIA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-046

No. 33,983 (filed February 9, 2016)

WELLS FARGO BANK, N.A.,
Plaintiff-Appellee,
v.
JAMES J. PYLE,
Defendant-Appellant,
and
LAREE J. PYLE, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (solely as nominee for lender and lender's successors and assigns), and CAPITAL ONE BANK (USA), N.A.,
Defendants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BEATRICE J. BRICKHOUSE, District Judge

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for Appellee

MICHAEL PRINZ
MARK A. PUSTAY
UNITED SOUTH BROADWAY CORP.
Albuquerque, New Mexico
for Appellant

Opinion

Michael D. Bustamante, Judge

{1} James and Laree Pyle were unable to redeem their property after a foreclosure sale because the district court denied their motion to extend the thirty-day redemption period set by their mortgage on the ground that the motion was not filed before the foreclosure judgment was entered. James Pyle appeals arguing that the plain language of NMSA 1978, Section 39-5-19 (1965), which requires that motions for extensions of redemption periods be made "before judgment," is contrary to the purpose of the redemption statutes. We disagree and affirm.

BACKGROUND

{2} In 2003 James (Appellant) and Laree Pyle, who is not a party in this appeal, executed a note and mortgage for the purchase of property in Albuquerque, New Mexico. Approximately six years later, Wells Fargo Bank, N.A. (Wells Fargo) filed a complaint for foreclosure. An amended complaint was filed approximately three months later. Appellant did not answer either complaint. Consequently, a default judgment was entered against him in June 2010. Appellant did not move to set aside the default judgment and does not argue on appeal that the default judgment was improperly entered against him. *See* Rule 1-060(B) NMRA (providing for relief from a judgment for, among other things, "mistake, inadvertence, surprise, or excusable neglect"). The judgment provided that Appellant was "barred and foreclosed of any right, title, interest, or claim in or to the property, subject only to a one month period of redemption set forth in the [m]ortgage[.]" *See* § 39-5-19 (stating that "[t]he parties to any such instrument may, by its terms, shorten the redemption period to not less than one month").

{3} After a series of delays, some of which were caused by bankruptcy filings by Appellant, the property was sold at a public auction on December 17, 2013, to Wells Fargo for approximately $46,000 less than the amount owed by Appellant. The sale was approved by the district court. Twenty-five days later, Appellant moved for a thirty-day extension of the one month redemption period so that he could assign his right to redeem to a third party. Because the district court hearing on the motion to extend was scheduled for more than thirty days after the original redemption period ended, Appellant filed an amended motion requesting a ninety-day extension. A hearing was held on June 26, 2014. The district court denied the motion to extend and Appellant filed a timely notice of appeal.

DISCUSSION

{4} Appellant argues that a "strict interpretation" of Section 39-5-19 leads to absurd results that are "contrary to the purpose of the redemption statute and overly restrictive of the district court's exercise of equitable [powers]." We begin with Wells Fargo's contention that this argument was not preserved for appeal. *See Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717 ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court."). At the hearing on Appellant's motion to extend the redemption period, Appellant argued that requiring a showing that he intended to redeem the property before the judgment "does lead to an absurdity," and that "[t]he plain language [reading of the statute] would limit the statute so greatly I don't know if the [L]egislature intended that." During Appellant's argument, the district court stated that it was "trying to think what the purpose of [the 'before judgment'] language is" and that under that language, it "seems as though it would be extremely difficult to redeem." Finally, the district court observed that "[it couldn't] even imagine very many scenarios where a homeowner . . . on the verge of judgment at that point thinks, okay, I'm going to have enough [money], and I'm asking right now for there to be an extension of the redemption." It is clear from the district court's comments that it understood Appellant's arguments. This issue was adequately preserved for appeal.

{5} The operative statutes here are NMSA 1978, Section 39-5-18 (2007) and Section 39-5-19. Section 39-5-18(A) permits a former defendant owner of property to redeem the property after a foreclosure sale within nine months of the sale. Section 39-5-19 permits the parties to a mortgage to reduce the redemption period to not less than one month and provides that the district court may, "upon a sufficient showing before judgment that redemption will be effected, increase the period of redemption to not to exceed nine months notwithstanding the terms of such instrument." *See Sun Country Sav. Bank of N.M., F.S.B. v. McDowell*, 1989-NMSC-043, ¶ 21, 108 N.M. 528, 775 P.2d 730 (noting that it had "implicitly interpreted the phrase 'parties to an instrument' to mean that parties to a mortgage may reduce the redemption period to one month"). The grant or denial of an extension of the redemption period, an equitable remedy, is generally

reviewed for an abuse of discretion. *Chapel v. Nevitt*, 2009-NMCA-017, ¶ 39, 145 N.M. 674, 203 P.3d 889 (stating that "in equity, the district court has some discretion to extend the time to redeem").

{6} The grounds for the district court's denial of Appellant's motion are unclear. But since the mortgage here specified a redemption period of one month and the parties' arguments below focused on the interpretation of Section 39-5-19, we infer that the district court's decision rested on its construction of the statute. Our review is therefore de novo. *Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 48, 131 N.M. 100, 33 P.3d 651.

{7} Appellant argues that "[o]ne of the purposes of the redemption statute is to give the property owner . . . a reasonable opportunity to redeem the property." *Chase Manhattan Bank v. Candelaria*, 2004-NMSC-017, ¶ 9, 135 N.M. 527, 90 P.3d 985. He maintains that requiring property owners to demonstrate that they intend to redeem the property *before judgment* restricts the opportunity to redeem such that it is no longer a reasonable one and hence is contrary to the Legislature's intent. Appellant also argues that such a requirement "seriously erode[s] the rights of all non-responsive defendants to redeem as they will be precluded from ever getting an extension, no matter the circumstances surrounding the request." Finally, appellant argues that the requirement "runs contrary to the notion that enlargement of the redemption period is an equitable remedy" because it restricts the district court's ability to grant such relief.

{8} "In construing a statute, [the appellate courts'] charge is to determine and give effect to the Legislature's intent." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135. In doing so, we are "aided by classic canons of statutory construction, and . . . look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* (internal quotation marks and citation omitted); *see* NMSA 1978, § 12-2A-19 (1997) ("The text of a statute or rule is the primary, essential source of its meaning."). If the plain language is "clear and unambiguous, [the appellate courts] must give effect to that language and refrain from further statutory interpretation." *Marbob*, 2009-NMSC-013, ¶ 9 (internal quotation marks and citation omitted). Our courts have repeatedly recognized that "[t]he right to redeem from a foreclosure at law is a legal right, is created by the statute, and can neither be enlarged nor abridged by courts." *Ulivarri v. Lovelace*, 1934-NMSC-087, ¶ 7, 39 N.M. 36, 38 P.2d 1114 (internal quotation marks and citation omitted); *Richardson v. Pacheco*, 1930-NMSC-111, ¶ 7, 35 N.M. 243, 294 P. 328 (stating that redemption "is a statutory right that is not to be enlarged by judicial interpretation" (internal quotation marks and citation omitted)), *abrogated on other grounds by Plaza Nat'l Bank v. Valdez*, 1982-NMSC-105, ¶ 17, 106 N.M. 464, 745 P.2d 372. Consistent with these principles, we conclude that the phrase "before judgment" in Section 39-5-19 is clear and unambiguous and does not require further construction.

{9} We disagree with Appellant that our conclusion is contrary to the purpose of the statute. The fact that the Legislature set a deadline for a *request* for an extension of the redemption period does not contravene its intent to provide a reasonable opportunity to redeem. Even though the request must be made before judgment, property owners may still request up to nine months to effectuate the redemption. Section 39-5-19. In addition, Appellant's argument rests on a false premise that it is unreasonable to expect defendant property owners to consider whether they might redeem the property during foreclosure proceedings and before judgment. We recognize, as did the district court, that the statutory deadline for extension requests makes redemption more difficult for defendant property owners. Nevertheless, we conclude that the deadline does not render the opportunity to redeem, or at least to request an extension of the redemption period, unreasonable. Indeed, here, Appellant was aware of the complaint for foreclosure for six months before the default judgment was entered. Thus, he was not taken unawares by the judgment and was not deprived of a reasonable opportunity to request an extension of the redemption period.

{10} As to Appellant's argument that, under a "strict" reading of the statute, defaulting property owners would never be granted an extension of the redemption period because they would not be able to request an extension of the redemption period before judgment, we disagree that this presents a problem that requires judicial action. Appellant's argument ignores his own role as a nonresponsive party; by failing to respond to the complaint, Appellant removed himself from the legal process and deprived himself of the opportunities it offers. We agree with Wells Fargo that Appellant's appeal arises from his "failure to move for an extension in the litigation he chose to ignore." *Cf. Xorbox v. Naturita Supply Co.*, 1984-NMSC-062, ¶ 12, 101 N.M. 337, 681 P.2d 1114 ("[Appellate courts] cannot reward those who sleep on their rights and ignore a summons to appear in court to defend their position.").

{11} Finally, we disagree that the statute improperly impinges on the district court's equitable powers. "It is a basic maxim that equity is ancillary, not antagonistic, to the law. Equitable relief is not available when the grant thereof would violate the express provision of a statute." *Coppler & Mannick, P.C. v. Wakeland*, 2005-NMSC-022, ¶ 8, 138 N.M. 108, 117 P.3d 914 (internal quotation marks and citation omitted). The principle of equity "cannot overcome the public policy established by the Legislature." *Id.; cf. Dalton v. Franken Constr. Cos.*, 1996-NMCA-041, ¶ 9, 121 N.M. 539, 914 P.2d 1036 (stating that "[a] statute establishes public policy, and the courts advance that policy by enforcing the statute"). Thus, the district court's equitable powers must be exercised within the framework established by the Legislature. Furthermore, although the statutory deadline for requests for extensions provides this framework, it does not unduly hinder the district court's ability to grant an extension upon a timely request and "sufficient showing." Section 39-5-19.

{12} To the extent Appellant argues that the district court erred by not granting his motion as an equitable matter, "we note that equity aids the vigilant, not those who slumber on their rights." *Magnolia Mountain Ltd. P'ship v. Ski Rio Partners, Ltd.*, 2006-NMCA-027, ¶ 37, 139 N.M. 288, 131 P.3d 675 (internal quotation marks and citation omitted). Moreover, Appellant does not argue that there was a clerical error or misconduct such that equitable relief was appropriate. *See Chapel*, 2009-NMCA-017, ¶ 39 (stating that "[t]here are two general situations in which a court may use its equitable power to grant an extension to the redemption period . . . [where] redemption is not complete because of a clerical error or technical mix-up . . . [and where there is] evidence of fraud, deceit, or collusion" (internal quotation marks and citation omitted)).

CONCLUSION

{13} We affirm the district court's denial of Appellant's request for an extension of the redemption period.

{14} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

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

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-047

No. 33,350 (filed February 11, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ARTHUR J. MESTAS,
Defendant-Appellant.

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

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for Appellant

Opinion

J. Miles Hanisee, Judge

{1} Defendant appeals from the district court's judgment of conviction for burglary and conspiracy to commit burglary after a jury found him guilty of those offenses. The issues Defendant raises require us to again evaluate our burglary jurisprudence in light of *State v. Office of Public Defender ex rel. Muqqddin*, 2012-NMSC-029, 285 P.3d 622. We do so, and affirm.

I. BACKGROUND

{2} On October 1, 2012, Edward Fisher was working as a desk clerk and night monitor at the Motel 6 in Roswell. Mr. Fisher's desk was behind a chest-high counter that separated his office from a lobby open to motel guests and the public. Next to the counter was a locked door that allowed Mr. Fisher and other motel employees to enter and return from the lobby area. A mechanized "shutter" or "shield" was built into a recess in the ceiling above the counter, allowing employees to completely enclose the desk area (thereby preventing any access from the lobby) by pressing a button behind the counter. The desk behind the counter contained a lockable cash drawer.

{3} At about 2:20 a.m., Defendant walked into the motel lobby. Defendant asked Mr. Fisher to reset the motel's wireless internet router; although the testimony is unclear on this point, it seems that Defendant told Mr. Fisher that his wife was having trouble accessing the internet using the motel's wireless network. Mr. Fisher thought Defendant was a motel guest, but in fact Defendant was a former employee of the motel.

{4} Mr. Fisher agreed to reset the router. This required Mr. Fisher to leave his desk, take an elevator to the second floor, unplug the router, wait for thirty seconds, plug the router back in, wait for another thirty seconds to confirm that the router was working, and then return to the ground floor on the elevator. Before he left, Mr. Fisher locked the door separating his desk area from the lobby and the desk drawer containing cash. However, Mr. Fisher did not activate the barrier above the counter.

{5} After Mr. Fisher left his desk, another man entered the lobby. Video evidence offered by the State and viewed by the jury shows the man putting his hands on the counter and lifting his knees onto an overhang just below the counter top. The man further ascended the counter so that his thighs rested on its top; this put the man's arms and torso inside the clerk's room. The man jimmied the lock on the cash drawer and took about $250. The man then closed the drawer, dismounted from the counter, and left the lobby. Defendant followed the man out of the lobby and can be seen walking away from the motel in the same direction as the man who committed the theft. The clerk testified that when he returned to his desk, "it took me a minute to realize we'd been robbed, because they'd closed the drawer again, and the lock had been forced open, instead of turned, so it looked like nothing had been touched."

{6} Defendant was tried in the district court on charges of non-residential burglary in violation of NMSA 1978, Section 30-16-3(B) (1971) and conspiracy to commit burglary in violation of NMSA 1978, Section 30-28-2 (1979). At the close of the State's evidence at trial, Defendant moved for a directed verdict on the burglary and conspiracy charges. The district court denied the motion, stating that a rational jury could infer that the clerk's desk was inside a non-public area that was closed off from the lobby by a locked door. Although the district court noted the fact that Mr. Fisher had not closed the retractable barrier over the counter to prevent access to the desk area altogether, it concluded the open space above the counter was "akin to an open window," and that therefore the non-public clerk's area behind the counter could be burglarized. *See Muqqddin*, 2012-NMSC-029, ¶ 48 (stating that "a burglary can be committed through an open window"). The jury convicted Defendant of both counts.

II. STANDARD OF REVIEW

{7} In separate points of appeal asserting error in the denial of his motion for a directed verdict, Defendant challenges the sufficiency of the evidence as to his conviction for burglary and his conviction for conspiracy to commit burglary. Regarding his burglary conviction under Section 30-16-3(B), Defendant presents a question of statutory construction that we divide into two sub-issues: (1) whether entry into the clerk's office adjacent to and accessible from a public lobby constitutes an "unauthorized entry"; and (2) whether the clerk's office is a "structure" that may be burglarized.

{8} In considering Defendant's argument that his conduct is outside the scope of that described to be burglary by Section 30-16-3, we review the district court's denial of Defendant's motion for a directed verdict de novo. *See State v. Baca*, 2014-NMCA-087, ¶ 5, 331 P.3d 971 ("Statutory construction is a question of law which we review de novo."), *cert. granted*, 2014-NMCERT-008, 334 P.3d 425, *cert. quashed*, 2015-NMCERT-___, ___ P.3d ___ (May 11, 2015). As to Defendant's challenge to the sufficiency of the evidence underlying his conspiracy conviction, we review the record to determine whether

> sufficient evidence was adduced to support the underlying charge. The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction. When considering the sufficiency of the evidence, this Court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence. Instead, we view the evidence as a whole and indulge all reasonable inferences in favor of the jury's verdict while at the same time asking whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt[.]

State v. Sena, 2008-NMSC-053, ¶ 10, 144 N.M. 821, 192 P.3d 1198 (alteration, internal quotation marks, and citations omitted).

III. DISCUSSION

A. The Conduct at Issue Amounted to a "Burglary" as Defined in Section 30-16-3

{9} In *State v. Sanchez*, 1987-NMCA-035, 105 N.M. 619, 735 P.2d 536, this Court upheld two burglary convictions for entering a private area within a structure open to the public with the intent to commit theft or another felony. Judge Apodaca penned a special concurrence, worrying that this Court's jurisprudence was "stepping too far afield" from the conduct our state's burglary statute intended to proscribe. *Id.* ¶ 13 (Apodaca, J., specially concurring). That concern proved prophetic. In *Muqqddin*, our Supreme Court called into question forty years of the Court of Appeals' burglary decisions. *See* 2012-NMSC-009, ¶ 1; *State v. Archuleta*, 2015-NMCA-037, ¶ 6, 346 P.3d 390, *cert. granted*, 2015-NMCERT-001, 350 P.3d 091, *cert. quashed*, 2015-NMCERT-___, ___ P.3d ___ (May 11, 2015). Our Supreme Court criticized this Court's "issu[ance of] numerous opinions that, for the most part, . . . expanded significantly the reach of the burglary statute . . . without any parallel change in the statute." *Muqqddin*, 2012-NMSC-029, ¶ 1.

{10} We interpret *Muqqddin* to require us to reevaluate our burglary precedent. *See, e.g.*, *Baca*, 2014-NMCA-087, ¶ 11 ("[F]ollowing *Muqqddin*, we question the continuing validity of general statements in [*State v.*] *Tower*[, 2002-NMCA-109, 133 N.M. 32, 59 P.3d 1264, *overruled by Archuleta*, 2015-NMCA-037, ¶ 14] indicating that a retail store's notice revoking a person's permission to enter on the premises is sufficient by itself to make his or her presence [in the store] unauthorized under our burglary statute."). As we explain below, *Muqqddin* repudiated much of the analysis this Court employed to decide *Sanchez*. The question presented by this appeal is not whether *Sanchez* remains good law; we think *Muqqddin* has all but abrogated that decision. Rather, the question is whether, on a set of facts quite analogous to those in *Sanchez*, *Muqqddin* requires us to reverse Defendant's conviction in this case. We think not.

{11} Since Defendant was convicted as a co-conspirator and accomplice (i.e., the unknown man, and not Defendant, scaled the counter, accessed the locked drawer, and removed the motel's cash), he challenges his conviction for burglary and conspiracy to commit burglary by contending that his accomplice's conduct falls outside the scope of the burglary statute for two reasons: (1) there is no evidence that his accomplice committed an "unauthorized entry" because the Motel 6 lobby area was open to the public; and (2) the clerk's area adjacent to the motel lobby is not a "structure" that may be burglarized. We address each assertion in turn, and discuss Defendant's contention that he is not responsible for the unknown man's actions in conjunction with his sufficiency challenge to his conviction for conspiracy to commit burglary.

1. Defendant's Accomplice Committed an Unauthorized Entry When He Reached into a Private Area Separated From the Motel's Public Lobby

{12} New Mexico's burglary statute reads: "Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein." Section 30-16-3. Burglary of a "dwelling house" is a third-degree felony. Section 30-16-3(A). All other burglaries are fourth-degree felonies. Section 30-16-3(B).

{13} To determine the applicability of the burglary statute to the evidence of Defendant's conduct adduced at trial, we must first consider whether the "entry" Defendant committed is "unauthorized." *See* Section 30-16-3(A). In other words, we ask whether the entry described by the evidence at trial "is the type of entry the Legislature intended Section 30-16-3 to deter." *Muqqddin*, 2012-NMSC-029, ¶ 59. A given entry is "unauthorized" if it violates or potentially violates the possessory rights (particularly the right to exclude) and privacy interests of a protected structure's rightful occupant. *Id.* ¶¶ 41-43, 60.

{14} It is helpful to understand *Muqqddin* as drawing a distinction between the sorts of *conduct* that qualify as burglary—unauthorized entries—and the *places* that may be burglarized—dwellings, vehicles, watercrafts, aircrafts, or "other structure[s], movable or immovable." Section 30-16-3(B). As to conduct, our Supreme Court held that by removing distinctions based on the time the offense conduct occurred, the Legislature did not intend to drastically expand the scope of existing burglary statutes, but rather to "combin[e] several statutes that were firmly rooted in the common law." *Muqqddin*, 2012-NMSC-029, ¶ 33. Thus, Section 30-16-3 was the Legislature's effort to condense separate codifications of the common law into a single, simplified section of the larceny subchapter of our criminal code. *Muqqddin*, 2012-NMSC-029, ¶¶ 19-21, 33-34. The term "unauthorized entry" dispensed with anachronistic elements that are difficult to apply, such as whether the offense conduct occurred at night or whether or not a particular entry involved a "breaking," *id.* ¶¶ 17-18, while at the same time preserving the "entry" element so as to preserve the common law understanding of burglary as an offense against "the security of habitation or a similar space[.]" *Id.* ¶ 39.

{15} *Muqqddin* attempts to reconcile the Legislature's preservation of the common law understanding of the sort of conduct that constitutes burglary with the Legislature's indisputable intent to expand of the set of locations that may be burglarized to include all "other structures, movable or immovable." *Id.* ¶¶ 27, 34. The solution was to admonish lower courts to employ traditional tools of statutory construction and the rule of lenity to ensure that our burglary statute does not become an automatic "enhancement for any crime committed in any type of structure or vehicle, as opposed to a punishment for a harmful entry." *Id.* ¶ 3.

{16} In *Muqqddin*, our Supreme Court evaluated this Court's expansive application of the term "vehicle" under Section

30-16-3 to prohibit the Defendant's piercing of the gas tank beneath a van with the intent to siphon gas. *See State v. Muqqddin*, 2010-NMCA-069, ¶¶ 5-6, 8, 11, 148 N.M. 845, 242 P.3d 412, *rev'd by* 2012-NMSC-029, ¶ 1. Our Supreme Court rejected our perspective, which would have allowed the state to obtain burglary convictions for acts that did not implicate the security of habitation that the common law offense of burglary was intended to protect. *Muqqddin*, 2012-NMSC-029, ¶ 38. In other words, our reading of the word "vehicle" to include everything within the exterior perimeter of the vehicle as a whole (including objects which could not be occupied by humans, such as the gas tank) expanded the scope of the phrase "unauthorized entry" beyond its common law conception. *Id.* ¶¶ 38, 45 ("Prohibited space is private space. It is the nature of the enclosure that creates the expectation of privacy. Enclosure puts the public on notice. . . . The proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions." (alteration, internal quotation marks, and citation omitted)).

{17} With this understanding of *Muqqddin*, we proceed to analyze the offense conduct that gave rise to Defendant's conviction for violating Section 30-16-3. Defendant argues that because the motel lobby was open to the public, there is no substantial evidence that the unauthorized man entered the motel without authorization, a prerequisite to Defendant's conviction for burglary. As we noted initially, we were presented with a similar set of facts in *Sanchez*, in which we consolidated two separate appeals, one involving the "unauthorized entry into the loading dock area of A.P.K. Auto Parts, a retail store, with intent to steal[,]" the other involving the "unauthorized entry into an office in Presbyterian Hospital in Albuquerque[.]" 1987-NMCA-035, ¶ 2.

{18} Both defendants in *Sanchez* raised the same argument that Defendant makes here: entry into a private area wholly contained within a building otherwise open to the public does not constitute an "unauthorized entry" under Section 30-16-3. *Sanchez*, 1987-NMCA-035, ¶ 3. The defendants cited an Alaska case, *Arabie v. State*, 699 P.2d 890, 893 (Alaska Ct. App. 1985), which reversed a defendant's conviction for burglary for entering a walk-in cooler at the back of a convenience store. *See also Sanchez*, 1987-NMCA-035, ¶ 4 (discussing *Arabie*).

{19} This Court acknowledged that the facts in *Arabie* were "quite similar" to the facts underlying the convictions under review in *Sanchez*. *See Sanchez*, 1987-NMCA-035, ¶ 4. But we concluded that *Arabie*'s reasoning did not control for three reasons: (1) "Alaska's commitment to bringing statutory burglary close to its common law ancestor[,]" (2) the Alaska court's "[c]onsideration . . . [of] the likelihood that the type of entry charged would terrorize occupants[,]" and (3) the Alaska burglary statute uses the term "building" for its catchall while the New Mexico burglary statute uses the word "structure[.]" *Sanchez*, 1987-NMCA-035, ¶¶ 5-8.

{20} *Muqqddin* repudiates much of the logic underpinning our decision in *Sanchez*. *Compare Sanchez*, 1987-NMCA-035, ¶ 6 ("New Mexico, unlike Alaska, has demonstrated no legislative intent to restrict the definition of burglary nor to bring that crime closer to its common law root. In New Mexico, the statutory offense of burglary is one against the security of property, and its purpose is to protect possessory rights." (citing *State v. Rodriguez*, 1984-NMCA-034, 101 N.M. 192, 679 P.2d 1290)), *with Muqqddin*, 2012-NMSC-029, ¶¶ 38-39 ("[W]e reject any further use of *Rodriguez* as persuasive authority. . . . [T]he original common-law purpose of burglary, the protection of the security of habitation or a similar space, is still relevant when construing our modern burglary statute. . . . [B]urglary has a greater purpose than merely protecting property.").

{21} But *Muqqddin* cited with approval Judge Apodaca's special concurrence in *Sanchez*. *See Muqqddin*, 2012-NMSC-029, ¶ 49. And while Judge Apodaca expressed misgivings about the majority's expansive interpretation of Section 30-16-3, he nonetheless agreed that both convictions could be upheld because there was sufficient evidence for the jury to conclude that the defendants burglarized protected spaces, even under a more limited, traditional construction of the burglary statute. *Sanchez*, 1987-NMCA-035, ¶¶ 15-16 (Apodaca, J., specially concurring).

{22} We conclude that Defendant's conduct falls within the scope of the burglary statute, even under the narrower interpretation announced by *Muqqddin*. Unlike *Baca* and *Archuleta*, the "unauthorized" aspect of Defendant's entry is not a violation of a retail store's unenforced members-only policy, *Baca*, 2014-NMCA-087, ¶ 3, or a piece of paper telling the defendant that he was no longer welcome to enter an area otherwise enjoyed by the public at large, *Archuleta*, 2015-NMCA-037, ¶ 3. Here, the "unauthorized entry" at issue is not Defendant's entry of the *motel lobby* with intent to commit a theft, but rather his accomplice's entry into the *clerk's office* adjacent to the lobby. The clerk's office was designed to remain separate from the public lobby area: the only way to enter was through a locked door or over a chest-high counter that could be completely shut with a retractable barrier. This design notified the public that the clerk's office was accessible only to motel employees. In short, it is reasonable to "expect some protection from unauthorized intrusions" into the clerk's area. *Muqqddin*, 2012-NMSC-029, ¶ 45 (internal quotation marks and citation omitted). It follows, then, that climbing the chest-high counter and jimmying open the cash drawer violated the occupant's reasonable expectation of privacy. Accordingly, the entry was "the type of entry the Legislature intended Section 30-16-3 to deter." *Muqqddin*, 2012-NMSC-029, ¶ 59.

2. The Clerk's Area is an "Other Structure" Under Section 30-16-3.

{23} Defendant argues that even if his accomplice's entry into the clerk's office was unauthorized, the space falls within the ambit of *Muqqddin*'s holding that Section 30-16-3 does not protect component parts of the list of enumerated structures that are protected from burglary. *See Muqqddin*, 2012-NMSC-029, ¶ 37. Put differently, Defendant argues that even if the motel as a whole is a structure that can be burglarized, *Muqqddin* precludes a burglary conviction for an unauthorized entry into a component part of a larger, protected structure.

{24} This argument reads too much into *Muqqddin*. Defendant's interpretation of *Muqqddin* would essentially render Section 30-16-3 superfluous: every "whole" is composed of parts; were we to accept Defendant's argument, every entry without authorization into an interior space contained within a location protected by Section 30-16-3 (such as the passenger compartment of a vehicle) with intent to commit a felony would not constitute burglary. Rather, *Muqqddin* qualified Section 30-16-3 so that liability does not stem from whether a structure can be characterized as a "part" of a greater whole, but rather whether the structure is "some sort of enclosure." *Muqqddin*, 2012-NMSC-029, ¶ 44 (citing *State v. Foulenfont*, 1995-NMCA-028, 119 N.M. 788, 895 P.2d 1329). And in order for something to have

some sort of enclosure, it must be "capable of completely confining people and their property." *Foulenfont*, 1995-NMCA-028, ¶ 11.

{25} Here, the clerk's office was capable of completely confining the motel clerk, his desk, and the locked drawer containing cash: a locked door prevented access from the lobby, and the opening above the chest-high counter could be closed and secured. In short, the enclosure's physical characteristics were such "that a reasonable person would expect some protection from unauthorized intrusions." *Muqqddin*, 2012-NMSC-029, ¶ 45 (internal quotation marks and citation omitted).

{26} In *State v. Holt*, 2015-NMCA-073, 352 P.3d 702, *cert. granted*, 2015-NMCERT-___ (No. 35,298, June 19, 2015), we held that the space between a window screen and a closed window on a home was a protected space under *Muqqddin*. *Holt*, 2015-NMCA-037, ¶ 20 (citing *Muqqddin*, 2012-NMSC-029, ¶ 45). We reasoned that a window screen was "a real, non-imaginary device [that] provided protection against intrusion and enclosed protected space." *Holt*, 2015-NMCA-073, ¶ 22 (citing *Muqqddin*, 2012-NMSC-029, ¶ 45). In a dissent, Judge Kennedy characterized the majority's holding as "expanding the boundary of [prohibited] space[s] . . . in a way [*Muqqddin*] took pains to criticize." *Holt*, 2015-NMCA-073, ¶ 27 (Kennedy, J., dissenting). Judge Kennedy was concerned that the majority had revived a statutory interpretation that gave rise to burglary liability for even the slightest intrusion into the "outermost plane of [a] structure," an approach *Muqqddin* rejected. *Holt*, 2015-NMCA-073, ¶¶ 27, 29 (Kennedy, J., dissenting).

{27} We hold that the clerk's office is a protected space under the burglary statute. The crucial question in determining whether an area is protected is whether or not its physical characteristics create an "[e]nclosure [that] puts the public on notice." *Muqqddin*, 2012-NMSC-029, ¶ 45; *see Holt*, 2015-NMCA-073, ¶ 22. The chest-high counter separating the public hotel lobby from the otherwise sealed-off clerk's area was sufficient to create such an enclosure and put the public on notice that it was off-limits. To be sure, had Defendant merely placed his hand on the counter while intending to commit a felony inside the clerk's area, Judge Kennedy's dissent might require us to reverse Defendant's conviction. But this case does not involve a "penetration of mere outer perimeters." *Holt*, 2015-NMCA-073, ¶¶ 29, 34 (Kennedy, J., dissenting).

{28} The fact that the clerk did not close the barrier above the countertop does not alter the outcome of this case. As our Supreme Court noted in *Muqqddin*, the Legislature rejected "oddities" in the common law requiring courts to determine whether a property owner had "invite[d]" the burglary. *See Muqqddin*, 2012-NMSC-029, ¶ 18 (internal quotation marks and citation omitted). In *Muqqddin*, the defendant's burglary conviction is not based on "happenstance" distinctions based on the way he accessed the clerk's office; any unauthorized entry into the separate and non-public clerk's area with intent to commit a theft or other felony would constitute a burglary. *Id.* ¶ 56. Indeed, the *Muqqddin* court expressly noted that its holding would not bar prosecution for the unauthorized entry through "such things as an open window. A window, by its nature, creates an opening in an enclosure[.]" *Id.* ¶ 48. Thus, the question is whether the structure as a whole is protected, not the manner by which a person accesses it without authorization.

{29} We acknowledge that in *Baca*, we "question[ed] the continuing validity of other burglary cases decided before *Muqqddin* that recognize a distinction between areas of a retail store that are considered open or closed to the public." 2014-NMCA-087, ¶ 11. But *Baca* held out the possibility that "areas of retail stores . . . may have privacy or security interests distinct from general shopping areas." *Id.* We think the conduct underlying Defendant's conviction and the physical attributes of the clerk's area implicates the interests identified in *Baca* such that we must uphold Defendant's convictions.

{30} Defendant's final argument is that because *Muqqddin* applied the rule of lenity to resolve the question of whether the "structure" in Section 30-16-3 applied to a gas tank attached to a van and the wheel well of a car, we must likewise apply the rule of lenity to construe the word "structure" not to include the motel clerk's office. But the rule of lenity applies only to "situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute." *State v. Edmondson*, 1991-NMCA-069, ¶ 12, 112 N.M. 654, 818 P.2d 855 (internal quotation marks and citation omitted). Here, we do not think that *Muqqddin*'s interpretation of Section 30-16-3 mandates the application of the rule of lenity to every case involving a structure not specifically enumerated in Section 30-16-3. Rather, the rule of lenity applies when it remains unclear whether Section 30-16-3 prohibits a particular act or protects a given structure.

{31} As we have explained above, Defendant's conduct is the sort of "evil that our society is attempting to deter" with the burglary statute: "the invasion of privacy and the victim's feeling of being personally violated." *Muqqddin*, 2012-NMSC-029, ¶ 42. Defendant's entry into the separate, secured clerk's office is a harmful entry that is readily distinguishable from petty theft or shoplifting because a reasonable person would have understood the clerk's office to be closed to access by the public. And the motel clerk's office is an enclosed space, *see id.* ¶ 44, that a reasonable person would understand to be protected from outside intrusions. *Id.* ¶ 45. Insofar as *Sanchez* can be read to allow a defendant to be convicted for unauthorized entries that do not implicate a property owner's privacy interests and right of habitation (i.e., the right to exclude others), there is no dispute that *Muqqddin* repudiated *Sanchez*. But we need not apply *Sanchez*'s expansive definition of the term "unauthorized entry" and "structure" to uphold Defendant's burglary conviction in this case.

B. Sufficient Evidence Was Adduced at Trial for a Rational Jury to Convict Defendant of Conspiracy to Commit Burglary

{32} Defendant argues that his burglary and conspiracy convictions must be vacated because the evidence at trial showed that an "unidentified second individual crawled over the counter into the area that held the cash box. [Defendant] remained at all times in the public lobby area." In other words, Defendant argues that even if the unknown man committed a burglary, there is insufficient evidence that Defendant conspired to commit the burglary.

{33} The district court instructed the jury that in order to convict Defendant of conspiracy, it had to find beyond a reasonable doubt that

> 1. [D]efendant and another person by words or acts agreed together to commit Burglary;
> 2. [D]efendant and the other person intended to commit Burglary; [and]
> 3. This happened in New Mexico on or about the 1st day of October, 2012.

See also UJI 14-2810 (setting out elements of conspiracy).

{34} The trial record contains substantial evidence from which the jury could infer that Defendant had entered into a conspiratorial agreement with the unidentified male to commit the burglary. First, Defendant created the opportunity for his co-conspirator to commit the crime by asking the motel clerk to reset the internet router. He did so by implying that he was a motel guest, which he was not, and that his wife was experiencing difficulty connecting to the internet using the motel's wireless network. Second, the surveillance video presented by the State at trial showed the unidentified man entering the motel lobby immediately after the clerk left his office and easily locating the cash drawer behind the desk. Third, once the unidentified man removed the cash from the cash drawer, the surveillance footage showed Defendant hurriedly departing the lobby shortly behind and walking in the same direction away from the motel as the unidentified man. Viewed in a light most favorable to the jury's verdict, a rational trier of fact could infer from this evidence that Defendant (a former motel employee) knew the location of the cash drawer and the fact that resetting the wireless router would require the clerk to be away from the office for a sufficient amount of time to create an opportunity to steal the cash and escape without notice. Given the timing of the burglary, a rational jury could infer that Defendant and his accomplice agreed and intended to commit the crime of burglary. Accordingly, sufficient evidence supports Defendant's conviction for conspiracy to commit burglary.

CONCLUSION

{35} The district court did not err in denying Defendant's motion for a directed verdict on his burglary and conspiracy to commit burglary charges. We affirm.

{36} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:
RODERICK T. KENNEDY, Judge
M. MONICA ZAMORA, Judge

Certiorari Denied, May 3, 2016, No. S-1-SC-35832

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-048

No. 33,934 (filed March 2, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CHRIS BAXENDALE,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BRIANA H. ZAMORA, District Judge

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Opinion

Linda M. Vanzi, Judge

{1} Defendant Christopher Baxendale appeals from his convictions for aggravated assault against a household member with a deadly weapon, contrary to NMSA 1978, § 30-3-13 (1995), and aggravated assault with a deadly weapon, contrary to NMSA 1978, § 30-3-2(A) (1963). Defendant challenges the district court's refusal to give his requested instructions on self defense and defense of property. He also contends that his convictions for two counts of aggravated assault with a deadly weapon violate his constitutional right against double jeopardy. We conclude that the district court committed reversible error when it did not instruct the jury on defense of habitation and therefore reverse and remand for a new trial. Consequently, we need not reach Defendant's double jeopardy claim.

BACKGROUND

{2} Defendant and Christina Lee met and began dating in high school. Although never married, they moved in together and had four children over the course of their twelve-year relationship. In 2005 or 2006, Defendant purchased a home on San Jacinto Northeast in Albuquerque, New Mexico, where he, Christina, and their children lived until 2010. Only Defendant's name was on the mortgage; Christina's was not. During the summer of 2010, the couple broke up. Christina took the children to live with her at her mother's home. However, after less than one week, Christina's mother expressed that she could not afford to have Christina and the children living with her. Christina then asked Defendant if she and the children could stay with him until she finished school and could support herself and the children. Defendant agreed, and they maintained this living arrangement until the last day of 2010.

{3} At approximately three o'clock in the afternoon on December 31, 2010, Christina and the children went to her grandmother's home to celebrate New Year's Eve. Christina sent a text message to Defendant, who was at work at that time, to invite him to her grandmother's, but he did not go. Instead, over the course of the evening, Defendant and Christina exchanged a number of text messages, with Defendant indicating his desire that she not return home. Christina replied that that was their home and that's where they lived. Defendant let Christina know that he would not be at home because he was going out with a friend. He followed up with a message to "have fun getting in."

{4} Christina and the children left her grandmother's house at approximately 12:30 a.m., returning to the house on San Jacinto. The house was dark when they arrived. Christina noticed that there was a padlock on a newly welded hook attached to the wrought iron security door in front of the house. She took her oldest daughter to check on the back door, leaving the other three children in her running car in the driveway. She discovered that the back security door similarly had a padlock on a newly welded hook. Although she had a key to the front and back doors, as well as to the wrought iron security doors in front and back, she did not have a key to unlock the padlocks, which had been placed on the security doors sometime after she had gone to her grandmother's house.

{5} Christina put her daughter in the car and proceeded across the street to see if her neighbor had anything she could use to get into the house. The neighbor, Donald "Sonny" Trombley, and a man named Gus accompanied Christina back across the street to her front door. Not wanting to appear as if they were breaking into the house, Sonny suggested that they go to the back door. According to Christina's testimony, when Sonny saw the padlock on the back security door, he went to his house to get something to break the lock off. When he returned, Sonny used a "clamp" tool to break the padlock. According to Sonny, however, he did not use a tool to break the lock; instead, he testified that he broke the lock with his hand. Regardless of how the lock was broken, the testimony indicated that it was indeed broken off approximately ten to fifteen minutes after they had entered the backyard.[1]

{6} As Christina began to open the iron security door, she heard a popping sound. She began to laugh, thinking that Defendant must have put firecrackers somewhere around the handle to the door. Sonny, on the other hand, thought it was a gunshot. Christina then began to unlock the back door, when a second, louder sound rang out. Debris from the wooden door fell into Christina's face and hair. Afraid, Sonny said that it was a gunshot and ran home. Christina, still standing at the door, saw Defendant standing in the house with a shotgun in his hand. Defendant said, "Holy shit," and then followed that up with "you're breaking and entering." After an argument with Defendant, Christina called 911.

[1]Although the time line is unclear, it appears that Gus left sometime before the lock was broken.

{7} Although Defendant did not testify at trial, the State admitted the statement he made to Albuquerque Police Department (APD) Detective Gonterman, as well as testimony by APD Officer Patrick regarding his conversation with Defendant. According to the detective, Defendant stated that he had added the padlocks to the security doors around lunchtime on New Year's Eve. Defendant told the detective that when he spoke to Christina the previous evening, she did not indicate that she and the children would be returning home. According to Defendant's statement, he spent the evening watching television. He decided to take a shower and then retire for the night. While in the shower, he heard a crash or bang outside. Scared, Defendant grabbed his shotgun and ran to the back door. He could not see who was outside. He heard what sounded like the back security door being ripped off. He thought someone was trying to break into his house. He then pointed the shotgun at the back door, aimed high, and shot.

{8} Although Defendant admitted to the officers that he had only fired the shotgun, the State presented testimony from a firearms expert who opined that a second hole in the door could have been caused by a .38 caliber handgun seized from Defendant's home, given the fact that a spent .38 caliber casing was found at the scene. Based on this testimony, the State proceeded on a theory that Defendant had fired two shots at the door—the .38 caliber handgun that produced the "firecracker" sound, and the shotgun, which caused the louder bang and the resultant spray of debris. Defendant does not appear to have challenged this two-shot theory, opting instead to present expert testimony that the shots were fired "in a manner consistent with a defensive position."

{9} Following the presentation of evidence, Defendant requested—in accordance with his theory that the ballistics proved that he fired the two shots from a defensive position—that jury instructions be given on self defense and defense of property. The district court denied the request, finding that the facts did not support either of the requested instructions.

DISCUSSION

Jury Instructions

{10} On appeal, Defendant contends that he was entitled to instructions on self defense and defense of property and that the district court erred in denying his tendered instructions. The propriety of denying a jury instruction is a mixed question of law and fact that we review de novo. *State v. Gaines*, 2001-NMSC-036, ¶ 4, 131 N.M. 347, 36 P.3d 438. A defendant is entitled to an instruction on his or her theory of the case if evidence has been presented that is "sufficient to allow reasonable minds to differ as to all elements of the offense." *State v. Gonzales*, 2007-NMSC-059, ¶ 19, 143 N.M. 25, 172 P.3d 162. "When considering a defendant's requested instructions, we view the evidence in the light most favorable to the giving of the requested instructions." *State v. Contreras*, 2007-NMCA-119, ¶ 8, 142 N.M. 518, 167 P.3d 966 (alteration, internal quotation marks, and citation omitted).

A. Preservation

{11} In order to determine the proper standard of review, we must first determine whether the district court's refusal to give Defendant's tendered instructions on self defense and defense of property was preserved for appeal. *See State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 ("The standard of review we apply to jury instructions depends on whether the issue has been preserved. If the error has been preserved we review the instructions for reversible error. If not, we review for fundamental error." (citation omitted)). Generally, to preserve error on a district court's refusal to give a tendered instruction, the defendant must tender a legally correct statement of the law. *State v. Jernigan*, 2006-NMSC-003, ¶ 10, 139 N.M. 1, 127 P.3d 537; *accord* Rule 5-608(D) NMRA ("[F]or the preservation of error in the charge, . . . a correct written instruction must be tendered before the jury is instructed.").

{12} In this case, Defendant tendered two written instructions: (1) self defense by means of nondeadly force, UJI 14-5181 NMRA; and (2) defense of property, UJI 14-5180 NMRA. The State argued below, and continues to do so on appeal, that Defendant was not entitled to either of these particular jury instructions because he used deadly force when he twice shot firearms at his back door. Specifically, regarding Defendant's request for a defense of property instruction, the State argued to the district court—based on the Committee Commentary to UJI 14-5180—that deadly force may only be used for protection of a person's real or personal property if the interference is accompanied by a deadly force, in which case a self defense instruction would be given instead. In essence, the State's argument is that UJI 14-5180 only applies when a defendant uses nondeadly force in defense of property because the use of deadly force in defense of property would be unreasonable as a matter of law. This view finds support in *Brown v. Martinez*, 1961-NMSC-040, ¶ 22, 68 N.M. 271, 361 P.2d 152, where the Court observed that "[t]he use of a deadly weapon in the protection of property is generally held, except in extreme cases, to be the use of more than justifiable force, and to render the owner of property liable, both civilly and criminally, for the assault." (Internal quotation marks and citations omitted.) Defendant replies that "[t]his is not a deadly force case[,]" contending that he "presented uncontroverted expert testimony that both shots had been fired at an upward angle" and that "[t]he angle of the shots fired suggest[s] that neither shot was fired for the purpose of injuring or killing anyone[.]"

{13} We have previously concluded that deadly force is the force employed, whether or not it results in a lethal effect. *State v. Cardenas*, 2016-NMCA-___, ¶ 18, ___P.3d___ (No. 33,564, Feb. 16, 2016) (noting that deadly force is a "[v]iolent action known to create a substantial risk of causing death or serious bodily harm."); *accord State v. Lucero*, 1998-NMSC-044, ¶ 9, 126 N.M. 552, 972 P.2d 1143 (determining that the brandishing and firing of a deadly weapon into the air was a show of potentially deadly force that "created a substantial risk of death or great bodily harm"). In this case, Defendant shot two firearms, including a shotgun, at his back door, knowing that at least one person was just on the other side of the door. We would be hard-pressed to conclude that Defendant's actions created less of a risk of death or serious bodily harm because of either his intent in pulling the trigger or the fact that he shot from a "defensive position." Further, we note that Defendant's own expert testified that the smaller caliber bullet entered the door "a little over four feet off the ground." We determine, therefore, that the two tendered instructions—setting forth the standards for self defense and defense of property applicable to the use of nondeadly force by a defendant—were deficient in that they incorrectly stated the law as it related to Defendant's actions on the night of the incident.

{14} However, this does not end our analysis. We have held that if the record reflects that the court clearly understood the type of instruction the defendant wanted and understood the tendered instruction

needed to be modified to correctly state the law, then the issue is deemed preserved for appellate review. *State v. Hill*, 2001-NMCA-094, ¶ 7, 131 N.M. 195, 34 P.3d 139. As our Supreme Court has stated, the "rationale for allowing such flexibility regarding preservation is reinforced by the actual purpose of Rule 5-608(D) NMRA, which is to alert the trial court to the defendant's argument." *Jernigan*, 2006-NMSC-003, ¶ 10 (footnote omitted). In this case, it is clear that Defendant was asking for a self defense instruction, as well as an instruction that would justify his actions in defense of his home, given that Defendant listed his residence on San Jacinto as the property he was protecting. While Defendant's argument that the force he used was "defensive" and, therefore, nondeadly, may have been misguided, his use of potentially deadly force in protecting either himself or his home did not make these defenses unavailable. Instead, it simply required the consideration of defense instructions that more accurately stated the law applicable to the facts of this case.

{15} As the State appears to acknowledge in its answer brief, there are two instructions that take into account the amount of force used by Defendant: self defense by means of deadly force, UJI 14-5183 NMRA, and defense of habitation, UJI 14-5170 NMRA. "Defense of habitation has long been recognized in New Mexico." *State v. Boyett*, 2008-NMSC-030, ¶ 15, 144 N.M. 184, 185 P.3d 355. "It gives a person the right to use lethal force against an intruder when such force is necessary to prevent the commission of a violent felony in his or her home." *Id.*; *see also State v. Couch*, 1946-NMSC-047, ¶ 30, 52 N.M. 127, 193 P.2d 405 ("The . . . rule limiting the amount of force which may be lawfully used in defense of other property does not apply in defense of habitation."). Although the defense of habitation instruction appears in the justifiable homicide section of the uniform jury instructions, we conclude that the instruction would have been available to Defendant to request under these circumstances. *See Couch*, 1946-NMSC-047, ¶ 21 (recognizing that the defense is grounded in the theory that "[t]he home is one of the most important institutions of the state, and has ever been regarded as a place where a person has a right to stand his [or her] ground and repel, force by force, to the extent necessary for its protection" (internal quotation marks and citation omitted)). The focal point of the jury instruction's "necessary to kill" language lies on the defendant's intent to prevent the commission of the violent felony using whatever force—including deadly force—is necessary. *Cardenas*, 2016-NMCA-___, ¶ 18. Killing the intruder is not required to permit the use of force to be justified. To hold otherwise would accomplish an absurd result, depriving a defendant of the defense of habitation when the use of deadly force was justified, but its use did not accomplish a fatal result.

{16} Therefore, based on Defendant's theory of the case, presented through his expert witness and in his two motions for directed verdict as well as through his tendered instructions, we conclude that the district court was sufficiently on notice that Defendant was requesting an instruction on self defense and defense of his habitation, and the district court's refusal to give these instructions was preserved for review on appeal. *See State v. Chacon*, 1979-NMCA-154, ¶ 9, 93 N.M. 581, 603 P.2d 320 (holding that, although the defendant's requested self defense instruction might have been technically deficient, under the circumstances of the case, he sufficiently alerted the district court to the need for a self defense instruction).

{17} We note one procedural anomaly that we must address before moving on to consider whether the district court erred in not giving a deadly force self defense instruction and/or a defense of habitation instruction. That is, although Defendant preserved the error below by tendering instructions—albeit deficient—he continues to argue on appeal that the district court's error lies in not giving those specific instructions. To the point, buoyed by his contention that he did not use deadly force, Defendant maintains that the nondeadly force instructions should have been given. As noted above, Defendant's divorcing the use of deadly force from actually causing a fatality is unsupported by law.

{18} Defendant has put forward no argument to this Court that he was entitled to a deadly force self defense instruction or a defense of habitation instruction. We ordinarily do not reach issues that the parties have failed to raise in their briefs. *See In re Doe*, 1982-NMSC-099, ¶¶ 3, 5, 98 N.M. 540, 650 P.2d 824 (stating that "courts risk overlooking important facts or legal considerations when they take it upon themselves to raise, argue, and decide legal questions overlooked by the lawyers who tailor the case to fit within their legal theories" and declining to consider a constitutional argument because it was not raised by the appellants (alteration, internal quotation marks, and citation omitted)); *see also In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We have long held that to present an issue on appeal for review, an appellant must submit argument and authority as required by rule." (emphasis omitted)).

{19} However, we note that in this case, the issue of whether Defendant committed aggravated assault with a deadly weapon was essentially a foregone conclusion, given Christina and Sonny's testimony, the physical evidence, and his own admissions. The only question to be answered by the jury was whether Defendant's actions were somehow justified. Defendant's theories of defense of habitation and self defense were aimed at providing this justification. Crucially, then, in the absence of instructions on Defendant's defense theories, the case was submitted to the jury on "matters so little in dispute that the verdict was almost predetermined." *See State v. Williams*, 1935-NMSC-028, ¶ 7, 39 N.M. 165, 42 P.2d 1111.

{20} A defendant has the fundamental right to present his or her theory of defense to the jury where the evidence supports it. *See Lucero*, 1998-NMSC-044, ¶ 5 ("It is basic that a defendant is entitled to have his or her theory of the case submitted to the jury under proper instructions where the evidence supports it." (alteration, internal quotation marks, and citation omitted)). This concept is supported by the "well-established principle that adequate instruction on self[]defense is the duty of the courts where it finds support in the evidence." *State v. Foxen*, 2001-NMCA-061, ¶ 12, 130 N.M. 670, 29 P.3d 1071; *cf. State v. Bailey*, 1921-NMSC-009, ¶ 30, 27 N.M. 145, 198 P. 529 (stating that the doctrine of self defense and the doctrine of defense of habitation "bear such marked resemblance to each other . . . as to be almost identical").

{21} This duty of the courts should not stop at the district court. *Cf. State v. Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633 (recognizing that "there exists in every court an inherent power to see that a man's fundamental rights are protected in every case" (alterations, internal quotation marks, and citation omitted)). Consequently, in a situation such as this, where the jury instruction issue was preserved below, but not raised on appeal, and where not raising the issue on appeal was clear error, this Court will consider whether

the district court erred in not giving jury instructions on defense of habitation and self defense. We do so with the understanding that failure to instruct the jury on a defendant's theory of the case is reversible error only if the evidence at trial supported giving the instruction. *See State v. Gardner*, 1973-NMSC-034, ¶ 22, 85 N.M. 104, 509 P.2d 871 ("[T]he court need not instruct if there is absence of such evidence.").

B. Entitlement to Defense of Habitation Instruction

{22} An instruction on defense of habitation would require evidence that (1) Defendant believed that the commission of a felony in Defendant's home was immediately at hand, (2) Defendant believed it was necessary to use deadly force against the intruder to prevent the commission of the felony, and (3) Defendant acted reasonably. *Cf. Gonzales*, 2007-NMSC-059, ¶ 21 (outlining the elements of the UJI 14-5170 defense of habitation instruction).

{23} Our Supreme Court has held that the defense of habitation "gives the householder the right to meet force with force, and an attack upon a dwelling, . . . especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle." *Couch*, 1946-NMSC-047, ¶ 29 (internal quotation marks omitted). In *Boyett*, the Court emphasized "that a person has right to defend his or her residence not only when an intruder is already inside the home, but also when an intruder is outside the home and attempting to enter to commit a violent felony." 2008-NMSC-030, ¶ 19; *see also* 2 Wharton's Criminal Law § 131 (15th ed. 2015) ("When a dwelling house is entered or *attempted to be entered by force* . . . , the occupant may use deadly force, if reasonably necessary, to prevent or terminate such entry." (emphasis added)).

{24} Defendant claims that he was entitled to an instruction on the defense of his home because he used necessary force to stop the "forceful entry into [his] home." According to Defendant, he was in the process of taking a shower at approximately 12:30 a.m. when he heard noises coming from his backyard. He went into his kitchen, and he heard a noise that sounded like the iron security door being ripped off. Scared that someone was trying to break into his home, he fired a .38 caliber handgun at the back door. When the suspected intruders continued to try to enter the home, he fired the shotgun. According to his statement to Detective Gonterman, he had no indication that Christina and the children would be returning that night.

{25} The State argues that Defendant was not entitled to an instruction of defense of habitation because the earlier text messages indicated that Christina wanted to come home that night and because he placed the padlocks on the security doors necessitating Christina's use of force to enter the home. Further, the State contends that Defendant remained home after telling Christina that he would be going out for the night and that he sat in the house with the lights out while his family was gone. These facts—while potentially bearing on the ultimate success of Defendant's theory at trial—are not appropriate for consideration of whether the instruction should have been given. *See Contreras*, 2007-NMCA-119, ¶ 8 ("When considering a defendant's requested instructions, we view the evidence in the light most favorable to the giving of the requested instructions." (alteration, internal quotation marks, and citation omitted)).

{26} Viewing the evidence in the light most favorable to Defendant, it appears that he provided sufficient evidence that he was under a reasonable belief that unknown intruders were breaking through his iron security back door in the middle of the night and that he fired two shots in order to prevent the forceful entry into his home. Therefore, we hold that the jury should have been instructed on defense of habitation. "Whether the amount of force used by [the d]efendant was more than the attack warranted was a question for the jury to determine, under proper instructions from the court." *Couch*, 1946-NMSC-047, ¶ 42.

{27} Because we conclude that the district court committed reversible error by not giving a defense of habitation instruction, we need not address whether the evidence supported the giving of a self defense instruction.

CONCLUSION

{28} For the foregoing reasons, we conclude that the district court committed reversible error when it did not instruct the jury on Defendant's defense of habitation theory. Consequently, we need not decide whether Defendant would have been entitled to a self defense instruction or whether his two convictions for aggravated assault with a deadly weapon violated his right against double jeopardy. We therefore reverse Defendant's convictions and remand to the district court for retrial.

{29} IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:
RODERICK T. KENNEDY, Judge
J. MILES HANISEE, Judge

ALBUQUERQUE LAW-LA-PALOOZA

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Request for Applications City of Albuquerque Assistant City Attorney Position

Assistant City Attorney position available within the Safe City Strike Force Division with desired experience in Information of Public Records Act (IPRA), in handling pretrial discovery, motion practice, trial preparation, and trial. We are seeking an attorney to advise on IPRA requests, coordinate IPRA litigation, and handle Pohl motions, contraband forfeitures, and subpoenas within a positive team environment. A minimum of two (2) years' experience, to include knowledge of civil and/or criminal practice and procedures in State and Metropolitan courts, with trial and writing skills, is required. Salary will be based upon experience and the City of Albuquerque Attorney's Personnel and Compensation Plan with a City of Albuquerque Benefits package. Please submit resume to attention of "IPRA Attorney Application"; c/o Ramona Zamir-Gonzalez, Executive Assistant; P.O. Box 2248, Albuquerque, NM 87103, rzamir-gonzalez@cabq.gov. Application deadline is August 15, 2016.

Position Vacancy Announcement

Position/Division: Assistant Trial Attorney (Position Classification Dependent upon experience) (Hiring Salary depends on experience and budget availability); Location: Dona Ana County Building, 845 N. Motel Blvd., Suite D, Las Cruces, NM 88007; Salary Range: $48,980-$61,225/ Annually (Hiring salary depends on experience and budget availability); Requirements: J.D. degree and current license to practice law in New Mexico. Preferred Qualifications: Legal experience totaling up to at least one (1) year. Job Duties: Incumbent handles a variety of misdemeanors and lower level felony cases, such as DWI's and bad check cases; does legal research for felony cases for higher level Attorney's; assists in trial teams; performs non-prosecution duties as assigned and performs other related job duties. Felony work is performed under supervision. Working Conditions: Work is performed in office and courtroom environments. Physical effort and travel may be required. Incumbent may be required to work under stressful situations and/or conditions. Application Deadline: Friday, August 19, 2016 by 5:00 p.m. Submit Application to: 3rd Judicial District Attorney's Office, C/O Whitney Safranek, Human Resources Administrator, 845 N. Motel Blvd., Suite D, Las Cruces, NM 88007; wsafranek@da.state.nm.us. *This position may be offered at the lowest level.*

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City of Albuquerque
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The position is in the Legal Department. POSITION SUMMARY: Perform a variety of responsible legal secretarial/administrative duties in support of an assigned attorney, to include but not limited to preparing and reviewing legal documents and creating and maintaining case files; provide information and assistance, within area of assignment, to the general public, other departments and governmental agencies. MINIMUM EDUCATION AND EXPERIENCE REQUIREMENTS (related education and experience may be interchangeable on a year for year basis. Exception: The legal secretary/assistant experience working under the supervision of a licensed attorney is not interchangeable.): High School Diploma or GED, plus five (5) years of secretarial/administrative assistant experience which must include at least two (2) years of experience as a legal secretary/assistant working under the supervision of a licensed attorney. ProLaw and/or experience with a case management system is preferred. TO APPLY: All applicants must submit, by August 16, 2016, a City Application. Resumes will not be accepted in lieu of the application. An On-Line Application process can be accessed at the web site: http://www.cabq.gov/jobs. Credentials, including transcripts, required certifications, registrations, and/or licenses, if not attached on-line, must be provided at the time of interview.

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CLE Planner

Sept. 9

Animal Law: Wildlife and Endangered Species on Public and Private Lands—The Tipping Point

6.0 G

Friday, Sept. 9, 2016 • 9 a.m.–4:30 p.m.
State Bar Center, Albuquerque

$99 Non-members not seeking CLE credit
$199 Early bird Registration Fee (Registration must be received by August 9, 2016)
$219 Co-sponsoring section members, government and legal services attorneys, and Paralegal Division members
$249 Standard Fee
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***Co-sponsor**: Animal Law Section*

The Endangered Species Act mandates critical habitat designation when determining whether or not to list a species as endangered. It also authorizes acquisition of habitat for the listed species as a method of protecting wildlife against habitat loss, which is the leading cause of decline in animal diversity and populations. A well-organized and well-funded movement is underway in state legislatures and in the U.S. Congress that, if successful, will lead to the takeover of certain federal public lands by the states. Privatization of lands can have an enormous impact on wild animals which don't recognize such boundaries. Attempting to restrict wildlife to islands of available habitat leads to problems in both protection and management of wildlife. This program first explores the land grab movement and then focuses on the practical problems that those working in recovery of endangered species face while trying to work within the complexities of state and federal law.

8:30 a.m.	Registration and Continental Breakfast
9 a.m.	**Welcome** *Moderator/Host: Judith Durzo, Animal Law Section Past Chair*
9:10 a.m.	**The Coveting of Federal Public Land in the 21st Century—The Impact on New Mexico and Its Wildlife** *Guy Dicharry, Animal Law Section Chair*
9:45 a.m.	**Public Land Grab Efforts: Recent Federal and State Legislation and Its Impact on Wildlife** *Ruth Musgrave, Wildlife Policy Consulting Associates*
10:30 a.m.	Break
10:45 a.m.	**Panel Discussion and Q&A: A Closer Look at the Issues** *Guy Dicharry; Ruth Musgrave; Ray Powell, Former New Mexico Land Commissioner; John Crenshaw, New Mexico Wildlife Federation; Judith Durzo*
12 p.m.	Lunch (provided at the State Bar Center)
12:45 p.m.	**Introduction to Afternoon Presentations** *Judith Durzo*
12:50 p.m.	**Field-Related Intricacies of Species Recovery Under the Endangered Species Act** *Chris Parish, California Condor Reintroduction Program*
1:50 p.m.	**From Delay to Wrongheadedness: Mexican Wolf Recovery** *Mike Phillips, Turner Endangered Species Fund*
2:50 p.m.	Break
3:05 p.m.	**Blood Ivory: Wildlife Trafficking in the U.S.** *Ruth Musgrave*
3:45 p.m.	**Panel Discussion and Q&A: A Closer Look at the Issues** *Moderator: Judith Durzo; Panel includes all program speakers*
4:30 p.m.	Adjournment

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