BAR BULLETIN
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Roadrunner on the First Day of Spring, by Robert J. Johnston (see page 3)

www.rjphotographynm.com

Inside This Issue

ADAMS+CROW

SAMANTHA ADAMS AND ARLYN CROW ARE NOW ADAMS+CROW LAW FIRM

MS. ADAMS brings to the firm more than 17 years of legal and insurance industry experience. She started in 1990 as a legal secretary/paralegal in Wisconsin, and then later worked as a senior litigation claims representative in New Mexico. She served the last 14 years, first as a law clerk and ultimately as a shareholder, at the Modrall Sperling Law Firm. Sam's civil litigation practice includes commercial business disputes; employment and education law matters; construction defect cases; insurance coverage disputes; and all manner of tort issues. She has significant experience in federal/state district and appellate courts as well as numerous administrative tribunals.

MR. CROW has litigated hundreds of civil matters over his 14 years in the legal industry and has had the unique and advantageous opportunity of representing both large and small businesses, as well as individuals, throughout the United States and the State of New Mexico. His practice spans such diverse areas as shareholder, business and contract disputes; mergers and acquisitions; insurance and reinsurance industry disputes; mining and oil rig accidents; construction defect and accident claims; wrongful death and personal injury suits; and professional negligence issues.

Both Sam and Arlyn are licensed to practice law in New Mexico, with experience in all levels of State Court, the U.S. District Court for the District of New Mexico and the Tenth Circuit Court of Appeals.

With over 30 years of collective legal/insurance industry experience, Sam and Arlyn are now Adams+Crow Law Firm.

+ OFFICE **505.427.3227**
+ FAX **505.212.0439**
+ **5051 JOURNAL CENTER BLVD. NE, ALBUQUERQUE, NM 87109**
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+ EMAIL **ARLYN@ADAMSCROW.COM**
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12
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17
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18
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August

11
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16
Cibola County Free Legal Clinic:
10 a.m.–2 p.m., 13th Judicial District Court, Grants, 505-287-8831

17
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Albuquerque, 1-877-266-9861

24
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

September

7
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

7
Civil Legal Clinic
10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque, 1-877-266-9861

About the Cover Image: *Roadrunner on the First Day of Spring*
Robert Johnston recently graduated from the University of New Mexico School of Law. Johnston has been a photographer for approximately six years after gaining interest in the practice while an undergraduate student at Eastern New Mexico University. He enjoys finding beauty in the every day and bringing it to the forefront for all to enjoy. To view more of his work, visit www.rjphotographynm.com.

Notices

Court News

Sixth Judicial District Court

Announcement of Vacancy

A vacancy on the Sixth Judicial District Court, Luna County, will exist as of Aug. 27 due to the retirement of Hon. Daniel Viramontes, effective Aug. 26. The assignment for this position is a general bench assignment, Division IV, and will be located in Deming. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Alfred Mathewson, chair of the Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may found at lawschool.unm.edu/judsel/application.php. The deadline is 5 p.m., Sept. 14. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The District Court Judicial Nominating Committee will meet at 8:30 a.m., Sept. 22, to interview applicants for the position at the Luna County Judicial Complex, 855 South Platinum Avenue, Deming. The Commission meeting is open to the public and anyone who has comments will have an opportunity to be heard.

U.S. Court of Appeals for the Tenth Circuit

Notice of Bankruptcy Judge Vacancy, District of Colorado

The U.S. Court of Appeals for the Tenth Circuit seeks applications for a bankruptcy judgeship in the District of Colorado. Bankruptcy judges are appointed to 14-year terms pursuant to 28 U.S.C. §152. The position is located in Denver, Colo., and will be available Jan. 4, 2017, pending successful completion of a background investigation. The current annual salary is $186,852. For qualification requirements and other details about the vacancy, visit www.ca10.uscourts.gov > About the Court > Employment or call 303-844-2067. To be considered, applications must be received by Aug. 15.

State Bar News

Attorney Support Groups

- Aug. 15, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)
- Sept. 12, 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#.
- 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 avoid the appearance of impropriety at all times.

Business Law Section

Nominations Open for 2016 Business Lawyer of the Year

The Business Law Section has opened nominations for its annual Business Lawyer of the Year award, to be presented on Nov. 18 after the Section's Business Law Institute CLE. Nominees should demonstrate professionalism and integrity, superior legal service, exemplary service to the Section or to business law in general, and service to the public. Self-nominations are welcome. A complete description of the award and selection criteria are available at www.nmbar.org/BusinessLaw. The deadline for nominations is Oct. 3. Send nominations to Breanna Henley at bhenley@nmbar.org. Recent recipients include Leonard Sanchez, John Salazar, Dylan O'Reilly and Susan McCormack.

Intellectual Property Law Section

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.

Young Lawyers Division

State Bar Open House for Students and Lawyers

The Young Lawyers Division and UNM School of Law Student Body Association invite all State Bar members and students to meet, mingle and exchange information about opportunities within the State Bar at the annual State Bar Open House from 5:30–7:30 p.m., Sept. 13, at the State Bar Center. Food and beverages will be served. R.S.V.P. with Breanna Henley at bhenley@nmbar.org by Sept. 9.

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

Albuquerque Bar Association

Presidents' Dinner

Join the Albuquerque Bar Association for the President's Dinner in recognition of friendship, support and service to the Association. The dinner will be Aug. 27 (hors d'oeuvres at 6 p.m., dinner and program at 7 p.m.) at the UNM Championship Course Pavillion, 3601 University Blvd. SE, Albuquerque. The dinner will include a four course wine pairing by Chef Christophe Descarpentries of Petit Louis Bistro. Other programming will include a past presidents interview montage, recognition for 2016 Liberty Award recipient Michelle Giger and a tribute to John Robb. Individual tickets are $100. Tables of 10 are $1,000. Sponsorships are available. R.S.V.P. by Aug. 18 at tbeckmann@abqbar.org or by calling 505-842-1151

Address Changes

All New Mexico attorneys must notify both the Supreme Court and the State Bar of changes in contact information.

Supreme Court
Email: attorneyinfochange@nmcourts.gov
Fax: 505-827-4837
Mail: PO Box 848
Santa Fe, NM 87504-0848

State Bar
Email: address@nmbar.org
Fax: 505-797-6019
Mail: PO Box 92860
Albuquerque, NM 87199
Online: www.nmbar.org

Federal Bar Association, New Mexico Chapter

Annual Meeting in Santa Fe

The New Mexico Chapter of the Federal Bar Association will hold its annual meeting at 9:45 a.m., Aug. 19, at the Buffalo Thunder Resort during the State Bar Annual Meeting—Bench & Bar Conference. The meeting will include election of officers for 2016–2017, a treasurer's report, changes to chapter bylaws and an outline of proposed activities for the upcoming year. All current and prospective FBA members are urged to attend.

Save the Date—Second Annual CLE at the Movies in October

The New Mexico Chapter of the Federal Bar Association is proud to offer a special showing of the movie *Citizen Four*, the real life thriller giving audiences a riveting insight into Edward Snowden's decision to reveal classified document about the National Security Agency. A CLE panel discussion (3.2 G) will follow the movie with Hon. Gregory Fouratt, Dana Gold, Nancy Hollander and Robert Gorence. The event will be at 1 p.m., Oct. 14, at the Regal Winrock Stadium 16 in Albuquerque. The cost is $50 for non-FBA members, $40 for FBA members, and $15 for students. A limited number of free tickets for law students is available. For more information or to register, send your name and bar number to nmfedbar@gmail.com.

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

H. Vearle Payne American Inn of Court

Accepting New Membership Requests

The H. Vearle Payne American Inn of Court in Albuquerque is currently accepting new membership requests from attorneys and judges (active or retired) for its 2017 season which begins Sept. 13 and runs through May 9, 2017. The Inn meets on the second Tuesday of each month, excluding December, for dinner and discussions about pertinent topics. Judges and practitioners in the Albuquerque and surrounding areas interested in enhancing skills and networking should send a letter of interest to Administrator, H. Vearle Payne American Inn of Court, PO Box 40577, Albuquerque, NM 87196-0577 or hvpinnofcourt@outlook.com. Dues are are $370 for master benchers (10 or more years in practice or a judge), $310 for barristers (5–10 years in practice) and $245 for associates (up to 4 years of practice). Dues cover national membership fee, all dinners and CLE credits.

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.

Featured
Member Benefit

State Bar Center Meeting Space

An auditorium, one large conference room, six small conference rooms, visiting attorney offices, and classrooms/meeting rooms provide ideal accommodations for meeting, trainings, conferences, and mediations or arbitrations.

For more information, call 505-797-6000.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline
Attorneys/Law Students
505-228-1948 • 800-860-4914
Judges 888-502-1289
www.nmbar.org/JLAP

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.

NEW MEXICO LAWYERS AND JUDGES ASSISTANCE PROGRAM (JLAP)

"Through JLAP, I've been given the freedom to become the person that I've always wanted to be. This program saved my life and my family."
–SM

"Thanks to JLAP, I am happier, healthier and stronger than I have ever been in my entire life!"
–KA

Free, confidential assistance to help identify and address problems with alcohol, drugs, depression, and other mental health issues.

Help and support are only a phone call away.
Confidential assistance – 24 hours every day.

Judges call 888-502-1289
Lawyers and law students call 505-228-1948 or 800-860-4914
www.nmbar.org

STATE BAR of NEW MEXICO

Constitution Day

~ September 17, 2016 ~

In the spirit of Constitution Day and to aid in the fulfillment of Public Law 108-447 Sec. 111 Division J - SEC. 111(b), the YLD organizes a public education program that provides participating New Mexico fifth-grade classes with U.S. Constitution booklets to keep and an educational lesson from a licensed New Mexico attorney.

Statewide attorney volunteers are needed for this program! Roughly hour-long educational lessons will take place during the week of Sept. 12–16 at elementary schools across New Mexico.

Please accept this offer to earn pro bono hours and connect with New Mexico's youth. Educator feedback reflects that this is a worthwhile program and an exciting and inspiring experience for students. More than 25,000 New Mexico students have been served during this program's lifetime.

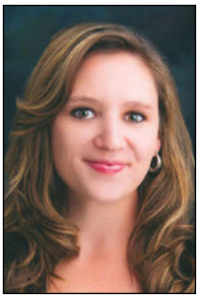
For more information and to volunteer,
visit www.nmbar.org/ConstitutionDay

Deadline to participate is Aug. 22.

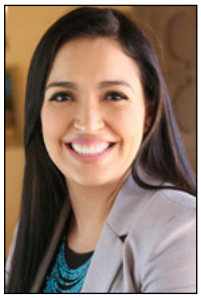
State Bar of New Mexico
Young Lawyers Division


Scott K. Brown

Scott K. Brown of Lewis Roca Rothgerber Christie LLP was admitted to the State Bar of New Mexico. Brown represents commercial, agricultural and private lenders, healthcare companies and other businesses in a broad array of transactions and litigation. In addition to New Mexico, he is admitted to practice in Arizona and Colorado. Brown attended Brigham Young University (B.A., 1997) and the BYU J. Reuben Clark Law School (J.D., 2000).


Katharine C. Downey

Katharine C. Downey, a litigator with the Sutin, Thayer & Browne law firm in New Mexico, has earned her AV rating from Martindale-Hubbell. Downey has been with the Sutin firm since 2013 and practices primarily in employment law, bankruptcy, creditor rights and education law. She is a member of the American Bar Association and the State Bar Bankruptcy Law Section and Young Lawyers Division. She serves on the board of the Albuquerque Bar Association. Downey attended the University of New Mexico (*summa cum laude*) and the University of Colorado School of Law.


Veronica C. Gonzales-Zamora

Veronica C. Gonzales-Zamora has joined David Walther Law. Gonzales-Zamora is a native New Mexican and a graduate of the University of the New Mexico School of Law. She is interested in the unsettled areas of law that New Mexico domestic relations cases entail. Gonzales-Zamora brings rigorous skills to her new position, developed as a law clerk for the New Mexico Supreme Court and her work with the Children's Law Center and the Pueblo of Nambe Tribal Court. She intends to develop a subspecialty in appellate practice and to serve as guardian ad litem in family law cases.


Scott D. Gordon

Scott D. Gordon has been selected as a member of America's Top 100 Attorneys for the State of New Mexico. Gordon is a board-certified specialist in civil trials and in employment and labor law. Since 1986, he has been the first chair trial attorney in numerous jury trials and bench trials including the trials of discrimination, wrongful termination, breach of contract and personal injury claims. He practices with Rodey, Dickason, Sloan, Akin & Robb, PA.

Frank E. (Dirk) Murchison (Taos)
2016 Southwest Super Lawyers: alternative dispute resolution


Wade L. Jackson

Wade L. Jackson has joined Sutin, Thayer & Browne in Albuquerque and will concentrate on the areas of business, tax, corporate, public finance, economic development and state and local government law. Jackson most recently served for five years as general counsel and legislative coordinator for the State of New Mexico Economic Development Department.


Danny Jarrett

Danny Jarrett was recently recognized by the New Mexico Association of Commerce & Industry for his volunteer work with the 2016 Outstanding Service Award. He is the office managing principal of the Albuquerque office of Jackson Lewis PC. He is a past chair of ACI's Workplace Issues & Legal Reform Committee as well as vice chair of ACI's Executive Committee. He attended the University of New Mexico (B.S., 1989; J.D., 1996). He is admitted to practice in New Mexico, the Santa Clara Pueblo Tribal Court, the U.S. Supreme Court and the 10th Circuit Court of Appeals, District of New Mexico.


Carolyn Ramos

Carolyn Ramos has been selected to attend the Hispanic National Bar Association's Latina Commission 2016 Leadership Academy in Chicago this fall. Ramos is an attorney, shareholder and director with the Albuquerque firm of Butt Thornton & Baehr PC where her litigation and trial practice focuses on the defense of transportation, product, sports venue liability and other personal injury cases. She is a member of the National and New Mexico Hispanic Bar associations and sits on the board of the New Mexico Defense Lawyers Association.


Randall D. Roybal

Randall D. Roybal was recently elected to a three year term as an emeritus board member of the Association of Judicial Disciplinary Counsel, the professional association of judicial disciplinary agency directors, prosecutors, investigators and commission counsel representing 44 states and Canada. He is a past three-term president of the Association. Roybal is the executive director and general counsel for the New Mexico Judicial Standards Commission, where he has worked for more than 18 years. He has been a practicing attorney in New Mexico since 1991 and attended the University of Notre Dame Law School.

Harry Garfield Wilcox Jr., 69, died on June 27 in Roswell. He was born Feb. 1, 1947, in Alamogordo to Harry Garfield Sr. and Virginia Wilcox. Wilcox began working with the family business started by his father, Wilcox Electric, which later became known as Apple Electric when they moved to Phoenix. During this time, Wilcox attended Grand Canyon University to pursue seminary studies. He later pursued a law degree attending Oral Roberts University. Wilcox later relocated back to New Mexico, joining the district attorney's office in Lincoln County. He then joined the public defender's office where he practiced for four years before moving to Australia. Wilcox furthered his studies at Melbourne University and obtained his master's degree in law. He was then accepted and admitted to the Victorian Bar as a barrister. Wilcox enjoyed traveling, boating, fishing, skiing and various sports including golf, cricket and Australian rules football with his family. During his early years, he participated in local rodeos as a bull rider. Being a musician and singer, Wilcox formed his own band known as Children of the Night. He played music and recorded records with his uncle, Calvin Boles who operated Yucca records in Alamogordo. Wilcox was preceded in death by his parents, Harry Garfield Sr. and Virginia Wilcox; ex-wife and mother of two of his children Felicia Barba Wilcox. He is survived by sons Todd Holmes of Alamogordo, Harry Wilcox III "Tres" of Roswell, and Harrison Wilcox of Melbourne, Australia; Carolyn Wilcox (mother of Harrison) of Melbourne, Australia; and brother, Randy Wilcox of Farmington.

Editor's Note: The contents of Hearsay and In Memoriam are submitted by members or derived from news clippings. Send announcements to notices@nmbar.org.

Legal Education

August

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

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

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

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

27 **2015 Federal Practice Tips and Advice From U.S. Magistrate Judges**
2.0 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective May 20, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,903	Las Cruces Medical v. Mikeska	COA 33,836	05/20/16
No. 35,900	Lovato v. Wetsel	12-501	05/18/16
No. 35,898	Rodriguez v. State	12-501	05/18/16
No. 35,897	Schueller v. Schultz	COA 34,598	05/17/16
No. 35,896	Johnston v. Martinez	12-501	05/16/16
No. 35,894	Griego v. Smith	12-501	05/13/16
No. 35,893	State v. Crutcher	COA 34,207	05/12/16
No. 35,891	State v. Flores	COA 35,070	05/11/16
No. 35,895	Caouette v. Martinez	12-501	05/06/16
No. 35,889	Ford v. Lytle	12-501	05/06/16
No. 35,886	State v. Otero	COA 34,893	05/06/16
No. 35,885	Smith v. Johnson	12-501	05/06/16
No. 35,884	State v. Torres	COA 34,894	05/06/16
No. 35,882	State v. Head	COA 34,902	05/05/16
No. 35,880	Fierro v. Smith	12-501	05/04/16
No. 35,873	State v. Justin D.	COA 34,858	05/02/16
No. 35,876	State v. Natalie W.P.	COA 34,684	04/29/16
No. 35,870	State v. Maestas	COA 33,191	04/29/16
No. 35,864	State v. Radosevich	COA 33,282	04/28/16
No. 35,866	State v. Hoffman	COA 34,414	04/27/16
No. 35,861	Morrisette v. State	12-501	04/27/16
No. 35,863	Maestas v. State	12-501	04/22/16
No. 35,857	State v. Foster	COA 34,418/34,553	04/19/16
No. 35,858	Baca v. First Judicial District Court	12-501	04/18/16
No. 35,853	State v. Sena	COA 33,889	04/15/16
No. 35,849	Blackwell v. Horton	12-501	04/08/16
No. 35,835	Pittman v. Smith	12-501	04/01/16
No. 35,828	Patscheck v. Wetzel	12-501	03/29/16
No. 35,825	Bodley v. Goodman	COA 34,343	03/28/16
No. 35,822	Chavez v. Wrigley	12-501	03/24/16
No. 35,821	Pense v. Heredia	12-501	03/23/16
No. 35,814	Campos v. Garcia	12-501	03/16/16
No. 35,804	Jackson v. Wetzel	12-501	03/14/16
No. 35,803	Dunn v. Hatch	12-501	03/14/16
No. 35,802	Santillanes v. Smith	12-501	03/14/16
No. 35,771	State v. Garcia	COA 33,425	02/24/16
No. 35,749	State v. Vargas	COA 33,247	02/11/16
No. 35,748	State v. Vargas	COA 33,247	02/11/16
No. 35,747	Sicre v. Perez	12-501	02/04/16
No. 35,746	Bradford v. Hatch	12-501	02/01/16
No. 35,722	James v. Smith	12-501	01/25/16
No. 35,711	Foster v. Lea County	12-501	01/25/16
No. 35,718	Garcia v. Franwer	12-501	01/19/16
No. 35,717	Castillo v. Franco	12-501	01/19/16
No. 35,702	Steiner v. State	12-501	01/12/16
No. 35,682	Peterson v. LeMaster	12-501	01/05/16
No. 35,677	Sanchez v. Mares	12-501	01/05/16
No. 35,669	Martin v. State	12-501	12/30/15
No. 35,665	Kading v. Lopez	12-501	12/29/15
No. 35,664	Martinez v. Franco	12-501	12/29/15
No. 35,657	Ira Janecka	12-501	12/28/15
No. 35,671	Riley v. Wrigley	12-501	12/21/15
No. 35,649	Miera v. Hatch	12-501	12/18/15
No. 35,641	Garcia v. Hatch Valley Public Schools	COA 33,310	12/16/15
No. 35,661	Benjamin v. State	12-501	12/16/15
No. 35,654	Dimas v. Wrigley	12-501	12/11/15
No. 35,635	Robles v. State	12-501	12/10/15
No. 35,674	Bledsoe v. Martinez	12-501	12/09/15
No. 35,653	Pallares v. Martinez	12-501	12/09/15
No. 35,637	Lopez v. Frawner	12-501	12/07/15
No. 35,268	Saiz v. State	12-501	12/01/15
No. 35,522	Denham v. State	12-501	09/21/15
No. 35,495	Stengel v. Roark	12-501	08/21/15
No. 35,479	Johnson v. Hatch	12-501	08/17/15
No. 35,474	State v. Ross	COA 33,966	08/17/15
No. 35,466	Garcia v. Wrigley	12-501	08/06/15
No. 35,422	State v. Johnson	12-501	07/17/15
No. 35,372	Martinez v. State	12-501	06/22/15
No. 35,370	Chavez v. Hatch	12-501	06/15/15
No. 35,353	Collins v. Garrett	COA 34,368	06/12/15
No. 35,335	Chavez v. Hatch	12-501	06/03/15
No. 35,371	Pierce v. Nance	12-501	05/22/15
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No. 34,932	Gonzales v. Sanchez	12-501	10/16/14
No. 34,907	Cantone v. Franco	12-501	09/11/14
No. 34,680	Wing v. Janecka	12-501	07/14/14
No. 34,775	State v. Merhege	COA 32,461	06/19/14
No. 34,706	Camacho v. Sanchez	12-501	05/13/14
No. 34,563	Benavidez v. State	12-501	02/25/14
No. 34,303	Gutierrez v. State	12-501	07/30/13
No. 34,067	Gutierrez v. Williams	12-501	03/14/13
No. 33,868	Burdex v. Bravo	12-501	11/28/12
No. 33,819	Chavez v. State	12-501	10/29/12
No. 33,867	Roche v. Janecka	12-501	09/28/12
No. 33,539	Contreras v. State	12-501	07/12/12
No. 33,630	Utley v. State	12-501	06/07/12

Certiorari Granted but Not Yet Submitted to the Court:

(Parties preparing briefs)			Date Writ Issued
No. 34,363	Pielhau v. State Farm	COA 31,899	11/15/13
No. 35,063	State v. Carroll	COA 32,909	01/26/15
No. 35,121	State v. Chakerian	COA 32,872	05/11/15
No. 35,116	State v. Martinez	COA 32,516	05/11/15
No. 35,279	Gila Resource v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,289	NMAG v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,290	Olson v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,318	State v. Dunn	COA 34,273	08/07/15
No. 35,278	Smith v. Frawner	12-501	08/26/15
No. 35,427	State v. Mercer-Smith	COA 31,941/28,294	08/26/15
No. 35,446	State Engineer v. Diamond K Bar Ranch	COA 34,103	08/26/15
No. 35,451	State v. Garcia	COA 33,249	08/26/15
No. 35,499	Romero v. Ladlow Transit Services	COA 33,032	09/25/15
No. 35,437	State v. Tafoya	COA 34,218	09/25/15
No. 35,515	Saenz v. Ranack Constructors	COA 32,373	10/23/16
No. 35,614	State v. Chavez	COA 33,084	01/19/16
No. 35,609	Castro-Montanez v. Milk-N-Atural	COA 34,772	01/19/16
No. 35,512	Phoenix Funding v. Aurora Loan Services	COA 33,211	01/19/16
No. 34,790	Venie v. Velasquez	COA 33,427	01/19/16
No. 35,680	State v. Reed	COA 33,426	02/05/16
No. 35,751	State v. Begay	COA 33,588	03/25/16

Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission)			Submission Date
No. 34,093	Cordova v. Cline	COA 30,546	01/15/14
No. 34,287	Hamaatsa v. Pueblo of San Felipe	COA 31,297	03/26/14
No. 34,798	State v. Maestas	COA 31,666	03/25/15
No. 34,630	State v. Ochoa	COA 31,243	04/13/15
No. 34,789	Tran v. Bennett	COA 32,677	04/13/15
No. 34,997	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,993	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,826	State v. Trammel	COA 31,097	08/26/15
No. 34,866	State v. Yazzie	COA 32,476	08/26/15
No. 35,035	State v. Stephenson	COA 31,273	10/15/15
No. 35,478	Morris v. Brandenburg	COA 33,630	10/26/15
No. 35,248	AFSCME Council 18 v. Bernalillo County Comm.	COA 33,706	01/11/16
No. 35,255	State v. Tufts	COA 33,419	01/13/16
No. 35,183	State v. Tapia	COA 32,934	01/25/16
No. 35,101	Dalton v. Santander	COA 33,136	02/17/16
No. 35,198	Noice v. BNSF	COA 31,935	02/17/16
No. 35,249	Kipnis v. Jusbasche	COA 33,821	02/29/16
No. 35,302	Cahn v. Berryman	COA 33,087	02/29/16
No. 35,349	Phillips v. N.M. Taxation and Revenue Dept.	COA 33,586	03/14/16
No. 35,148	El Castillo Retirement Residences v. Martinez	COA 31,701	03/16/16
No. 35,386	State v. Cordova	COA 32,820	03/28/16
No. 35,286	Flores v. Herrera	COA 32,693/33,413	03/30/16
No. 35,395	State v. Bailey	COA 32,521	03/30/16
No. 35,130	Progressive Ins. v. Vigil	COA 32,171	03/30/16
No. 34,929	Freeman v. Love	COA 32,542	04/13/16
No. 34,830	State v. Le Mier	COA 33,493	04/25/16
No. 35,438	Rodriguez v. Brand West Dairy	COA 33,104/33,675	04/27/16
No. 35,426	Rodriguez v. Brand West Dairy	COA 33,675/33,104	04/27/16
No. 35,297	Montano v. Frezza	COA 32,403	08/15/16
No. 35,214	Montano v. Frezza	COA 32,403	08/15/16

Writ of Certiorari Quashed:

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

Petition for Writ of Certiorari Denied:

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

Opinions

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

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

Effective July 29, 2016

Published Opinions

No. 34493	2nd Jud Dist Bernalillo CV-10-14028, MB OIL v CITY OF ABQ (reverse)	7/25/2016
No. 33691	3rd Jud Dist Dona Ana CR-09-562, STATE v J CASTRO (reverse and remand)	7/27/2016
No. 33840	9th Jud Dist Curry CR-11-686, STATE v T MORGAN (affirm)	7/27/2016
No. 33639	5th Jud Dist Chaves CR-11-368, STATE v J MONAFO (reverse and remand)	7/28/2016
No. 34426	1st Jud Dist Rio Arriba CV-08-139, BANK OF NY v J ROMERO (reverse and (remand)	7/28/2016

Unpublished Opinions

No. 34107	3rd Jud Dist Dona Ana CV-10-1979, L ARREOLA v C ORTIZ (affirm)	7/25/2016
No. 34551	AD AD ADM-15-8, SOUTHWEST v D PADILLA (reverse)	7/25/2016
No. 35268	13th Jud Dist Valencia CR-13-450, STATE v P MENDOZA (affirm)	7/25/2016
No. 34849	9th Jud Dist Curry CR-13-424, STATE v A CHAVEZ (affirm)	7/25/2016
No. 35479	9th Jud Dist Roosevelt LR-15-5, STATE v J ZAPATA (affirm)	7/26/2016
No. 34987	11th Jud Dist San Juan JQ-12-35, CYFD v SHERYL J (affirm)	7/27/2016
No. 35162	2nd Jud Dist Bernalillo LR-14-16, STATE v T ROJAS (affirm)	7/27/2016
No. 35300	2nd Jud Dist Bernalillo CV-14-619, E SANCHEZ v N TORRES (dismiss)	7/27/2016
No. 34976	5th Jud Dist Lea JQ-14-2, CYFD v ASHLEY L (affirm in part and remand)	7/28/2016
No. 35088	2nd Jud Dist Bernalillo DM-00-365, M GOSLOW v C PEREA (affirm)	7/28/2016
No. 35167	5th Jud Dist Eddy CR-15-48, STATE v E RODRIGUEZ (affirm in part, reverse in part)	7/28/2016
No. 34639	2nd Jud Dist Bernalillo JQ-14-192, CYFD v RACHANDA A (affirm in part, reverse in part)	7/28/2016
No. 34970	4th Jud Dist San Miguel CV-13-455, A TAPIA v D QUINTANA (affirm)	7/28/2016
No. 35312	13th Jud Dist Sandoval DM-12-474, J ZAZPE v R ZAZPE (dismiss)	7/28/2016

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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Dated July 28, 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 10, 2016

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

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.

Ethics Advisory Opinion

From the State Bar of New Mexico's Ethics Advisory Committee

Formal Opinion: 2016-01

Topic: Lawyer's Ability to Represent Medical Cannabis Businesses

Rules Implicated: 16-102 NMRA (2015)

Disclaimer:
The Ethics Advisory Committee of the State Bar of New Mexico ("Committee") is constituted for the purpose of advising inquiring lawyers on the application of the New Mexico Rules of Professional Conduct in effect at the time the opinion is issued (the "Rules") to the specific facts as supplied by the inquiring lawyer or, in some instances, upon general issues facing members of the bar. The Committee does not investigate facts presented to it and generally assumes the facts presented are true and complete. The Committee does not render opinions on matters of substantive law. Lawyers are cautioned that should the Rules subsequently be revised or facts differ from those presented, a different conclusion may be reached by the Committee. The Committee's opinions are advisory only, and are not binding on the inquiring lawyer, the disciplinary board, or any tribunal. The statements expressed in this opinion are the consensus of the Committee members who considered the issue.

Question Presented:
Can a New Mexico lawyer comply with the Rules of Professional Conduct in representing non-profit producers, courier and manufacturers of medical cannabis and approved laboratories?

Summary Answer:
Yes, but a lawyer may not counsel or "assist" a client to commit a crime.

Analysis:
The issue before the Committee was whether a law firm can represent non-profit producers, couriers and manufacturers of medical cannabis and approved laboratories. This presented a novel question to the Committee. It involves issues of federalism, public policy and the meaning of "assistance" under rule 16-102(D) NMRA. As other states have dealt with this issue and the Committee conducted a thorough review of opinions on the subject[1].

The Committee is in agreement, as are all of the related opinions available, that a lawyer may "represent" a medical cannabis business in so far as to advise it on the legality of its proposed activities. This is squarely covered under our Rule 16-102(D):

> **D**. Course of conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent or misleads the tribunal. *A lawyer may, however, discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.* (emphasis added)

What is much less clear is whether a lawyer can actually "represent" such a business for substantive business-related purposes, such as creating an LLC, negotiating contracts, or other possible tax and business representation. The Committee is in agreement that this determination rests within the same section of the Rule, specifically the language admonishing a lawyer from "counsel[ing] a client to engage, or assist[ing] a client in conduct that the lawyer knows is criminal." *Id.* As producing and distributing any type of cannabis, including medical cannabis permitted under state laws, is illegal under federal law, 21 U.S.C. § 841(a)(1), a lawyer may not provide prohibited counseling or assistance.

The Committee looked at several jurisdictions in its analysis and notes that the Arizona State Bar Committee on the Rules of Professional conduct came to a different conclusion. However, in the Committee's opinion, that opinion is based on a value judgment of the current state of federal laws and prosecutions and not on a true reading of the Rules of Professional Conduct. The Arizona Committee seems to add what this Committee feels are irrelevant factors (3) and (4) to the analysis, when it based its conclusion on the fact that:

> [N]o prior Arizona ethics opinions or cases have addressed the novel issue presented by the adoption of the Act — whether a lawyer may ethically "counsel" or "assist" a client under the following conditions: (1) the client's conduct complies with a state statute expressly authorizing the conduct at issue; (2) the conduct may nonetheless violate federal law; (3) the federal government has issued a formal "memorandum" that essentially carves out a safe harbor for conduct that is in "clear and unambiguous compliance" with state law, at least so long as other factors are not present (such as unlawful firearm use, or "for profit" commercial sales); and (4) no court opinion has held that the state law is invalid or unenforceable on federal preemption grounds.

While the Committee understands Arizona's desire to allow this type of representation, it does not feel that factors (3) and (4) overcome the fundamental fact of illegality under current federal law. Similarly, the Illinois State Bar came up with this seemingly inconsistent conclusion:

> The negotiation of contracts and the drafting of legal documents for such a client are means of assisting the client in establishing a medical marijuana business. Therefore, an attorney who performs such work would be assisting the client in conduct that violates federal criminal law, even though such conduct is permissible under the new state law. But as quoted above, a lawyer may provide such assistance if the lawyer is assisting the "client to make a good-faith effort to determine the validity, scope, meaning or application of the law."

> As Preamble [14] notes, "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." The Committee believes that it is reasonable to permit Illinois lawyers, whose expertise in draftsmanship and negotiations is of great value to the public, to provide the same services to medical marijuana clients that they provide to other businesses. One of the purposes of legal representation is to enable clients to engage in legally regulated businesses efficiently, and that purpose is advanced by their retention of counsel to handle matters that require legal expertise. A lawyer who concludes that a client's conduct complies with state law in a manner consistent with the application of federal criminal law may provide ancillary services to assure that the client continues to do so. Illinois Professional Conduct Advisory Opinion 14-07 (October, 2014)

The Committee is in agreement that the more accurate position, which comports with our Rule 16-102, is clearly stated in Maine's Opinion:

> Maine and its sister states may well be in the vanguard regarding the medicinal use and effectiveness of marijuana. However, *the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not*. So long as both the federal law and the language of the Rule each remain the same, an attorney needs to perform the analysis required by the Rule and determine whether the particular legal service being requested rises to the level of assistance in violating federal law. Maine Board of Overseers of the Bar, Professional Ethics Commission Opinion #199 (2010) (emphasis added). *See also* Connecticut Bar Association Professional Ethics Committee, Informal Opinion 2013-02 (same).

The Colorado Bar Association Ethics Committee, in a formal opinion, encapsulated the inherent tensions, but also sided with the letter of the Rules of Professional Conduct:

> Public policy considerations favor lawyers providing the full range of legal advice authorized under Colo. RPC 2.1 so that their clients may comply with Colorado's marijuana use laws. "[I]t too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs." *Hickman v. Taylor*, 329 U.S. 495, 514 (U.S. 1947) (Jackson, J., concurring). Nevertheless, unless and until there is a change in applicable federal law or in the Colorado Rules of Professional Conduct, a lawyer cannot advise a client regarding the full panoply of conduct permitted by the marijuana amendments to the Colorado Constitution and implementing statutes and regulations. To the extent that advice were to cross from advising or representing a client regarding the consequences of a client's past or contemplated conduct under federal and state law to counseling the client to engage, or assisting the client, in conduct the lawyer knows is criminal under federal law, the lawyer would violate Rule 1.2(d). Formal Opinion 125 (2013). *See also* Disciplinary Board of Hawai'i Supreme Court Formal Opinion 49 (2015)(same).

Of note, after the ethics opinion cited above, the Supreme Court of Colorado added a comment to its rule permitting lawyers to "assist a client in conduct that the lawyer reasonably believes is permitted [under state law]," and directs that the lawyer "shall also advise the client regarding related federal law and policy." Colo. RPC 1.2 (2012), Comment 14[2]. Similarly, the Connecticut Superior Court amended its Rules on July 1, 2014, adding that lawyers may "counsel or assist a client regarding conduct expressly permitted by Connecticut law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct." Connecticut Rule of Professional Conduct 1.2(d), explaining in the Commentary that this change "is intended to permit counsel to provide legal services to clients without being subject to discipline under these Rules notwithstanding that the services concern conduct prohibited under federal or other law but expressly permitted under Connecticut law, e.g., conduct under An Act Concerning the Palliative Use of Marijuana, Public Act 12-55, effective Oct. 1, 2012." *Id.*

The Committee agrees with the Maine and Colorado opinions that assistance to these medical cannabis businesses would violate the Rules of Professional Conduct as currently written. The Committee has also determined that attorneys with multiple licenses or on inactive status in New Mexico are equally subject to our Rules of Professional Conduct for activities conducted in other jurisdictions. Therefore, the Committee cautions New Mexico attorneys representing medical cannabis businesses in states that may specifically permit such representation under their rules that this does not alter the lawyer's responsibilities under our Rules of Professional Conduct.

The Committee is unable to agree as to the exact parameters of "assistance." At one end of the spectrum, the Committee is in general agreement that negotiating contracts for the purchase of cannabis would be directly assisting the client to engage in a criminal activity. At the other end of the spectrum, some Committee members opined that forming a general alternative medical business, which *could possibly* include the prescribing and distributing of medical cannabis would not be such assistance. However, even with this example some Committee members felt there was impermissible assistance. Overall, the Committee feels that attorneys must analyze the issue of "assistance" for themselves, based upon the specific facts of the situation, bearing in mind that that line may be tested through a disciplinary complaint.

Conclusion: A New Mexico lawyer may represent non-profit producers, courier and manufacturers of medical cannabis and approved laboratories, to the extent that representation is not in the form of impermissible counseling to engage in or providing "assistance" in the commission of crimes.

Endnotes

1 The Committee has also taken note of two facts, though determined neither is dispositive to the question presented. Those facts are: 1) The New Mexico Supreme Court recently declined to adopt proposed Rule 16-102(E) which expressly permitted a lawyer to "counsel or assist a client regarding conduct expressly permitted by the [Medical Cannabis Act], ¶¶26-2B-1-7 NMSA"; and 2) lawyers throughout the country, including New Mexico, are currently representing medical cannabis businesses in myriad of ways.

2 Of further note, the U.S. District Court for Colorado declined to adopt this new comment to the rule, specifically excluding it except as to permit practitioners in the U.S. District Court to advise clients regarding the "validity, scope and meaning" of Colorado's marijuana laws. Local Rule D.C.COLO.LAttyR 2(b)(2) (Dec. 1, 2015). This federal local rule created a significant split in the ethical rules applicable to state and federal practitioners in Colorado.

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-016

No. S-1-SC-34613 (filed April 14, 2016)

PHILLIP G. RAMIREZ, JR.,
Plaintiff-Petitioner,
v.
STATE OF NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT, DORIAN DODSON, in her individual and official capacities, RON WEST, in his individual and official capacities, BARBARA AUTEN, in her individual and official capacities, ROGER GILLESPIE, in his individual and official capacities, TED LOVATO, in his individual and official capacities, TIM HOLESINGER, in his individual and official capacities, DANIEL BERG, in his individual and official capacities,
Defendants-Respondents,
and
NEW MEXICO ATTORNEY GENERAL'S OFFICE,
Intervenor.

ORIGINAL PROCEEDING ON CERTIORARI
CAMILLE MARTINEZ-OLGUIN, District Judge

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Opinion

Judith K. Nakamura, Justice

{1} We are called to decide whether a New Mexico National Guard member may assert a claim against the State as employer under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4335 (2012). Phillip Ramirez, a member of the New Mexico Army National Guard, was employed by the New Mexico Children, Youth and Families Department (CYFD). In July 2005, Ramirez was ordered to federal active duty and deployed to Iraq. After Ramirez returned to work in New Mexico, CYFD terminated his employment. Ramirez sued CYFD, asserting a

USERRA claim. A jury found that CYFD took adverse employment actions against Ramirez because of his military service and awarded him monetary damages. The Court of Appeals reversed the damages award, concluding that CYFD as an arm of the State was immune to Ramirez's USERRA claim. *Ramirez v. State ex rel. Children, Youth & Families Dep't*, 2014-NMCA-057, ¶¶ 1, 27, 326 P.3d 474, *cert. granted*, 2014-NMCERT-005. We disagree. By enacting NMSA 1978, Section 20-4-7.1(B) (2004), the Legislature specifically extended "[t]he rights, benefits and protections" of USERRA to members of the New Mexico National Guard who are ordered to federal or state active duty for a period of thirty or more consecutive days. In so doing, the Legislature consented to suits brought against state employers who violate the protections guaranteed by USERRA. Accordingly, we reverse and reinstate the district court's judgment and damages award.

I. BACKGROUND

A. USERRA

{2} Congress enacted USERRA to encourage noncareer military service, to minimize disruptions in the lives and communities of those who serve in the uniformed services, and "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(1)-(3). Congress created USERRA pursuant to its War Powers set forth in Article I, Section 8, Clause 11 of the United States Constitution. *Bedrossian v. Nw. Mem'l Hosp.*, 409 F.3d 840, 843-44 & n.2 (7th Cir. 2005). In pertinent part, USERRA provides:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4311(a). USERRA's antidiscrimination rights apply to states as employers. *See* 38 U.S.C. § 4303(4)(A)(iii) (defining the term "employer" to include "a State"). To enforce these guarantees, USERRA creates a private right of action for qualified service members to recover monetary damages against a state as an employer. 38 U.S.C. § 4323(a)(3), (d)(1)(B)-(C).

{3} Congress originally conferred jurisdiction on the federal district courts to adjudicate USERRA actions brought by private individuals against state employers. Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149, 3165 (1994) (providing that "[i]n the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority") (current version at 38 U.S.C. § 4323(b)). In *Seminole Tribe of Florida v. Florida*, however, the Supreme Court rejected Congress's authority under the powers granted by Article I of the United States Constitution to abrogate a state's sovereign immunity and subject nonconsenting states to suit in federal court. 517 U.S. 44, 72 (1996). Because Congress enacted USERRA pursuant to its War Powers granted by Article I, Section 8, *Seminole Tribe* cast doubt on the federal courts' jurisdiction to adjudicate USERRA actions for monetary damages against states as employers. *See, e.g.*, *Palmatier v. Mich. Dep't of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997) (dismissing a USERRA claim against the Michigan entities for lack of jurisdiction).

{4} In 1998, Congress amended USERRA's jurisdictional provision concerning claims against state employers to provide that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 211(a), 112 Stat. 3315, 3329 (1998) (codified as amended at 38 U.S.C. § 4323(b)(2)). With this amendment, Congress sought to channel private USERRA claims against state employers to state courts. *See* 38 U.S.C. § 4323(b)(2). Given this background, Ramirez asserted a USERRA claim against CYFD in New Mexico district court.

B. Ramirez's USERRA claim

{5} Ramirez joined the New Mexico National Guard on August 22, 1991. On April 9, 1997, CYFD hired him as a surveillance officer. In November 2005, Ramirez was deployed to Iraq where he led a platoon charged with providing security escort to supply convoys. After his service in Iraq, Ramirez was transferred to Kuwait, where on May 13, 2006, he was promoted to Sergeant First Class. Ramirez returned to Gallup in November 2006.

{6} Ramirez resumed employment with CYFD on January 2, 2007 under the supervision of Daniel Berg and Tim Holesinger. Within a few months of his return, Ramirez's relationship with his supervisors deteriorated. Berg and Holesinger allegedly harassed and reprimanded Ramirez for being insubordinate. On May 8, 2008, CYFD terminated his employment.

{7} On May 19, 2008, Ramirez filed a lawsuit in the Eleventh Judicial District Court against CYFD, the former secretary of CYFD, Holesinger, Berg, and others at CYFD who supervised Ramirez, alleging a USERRA claim for monetary relief and other claims arising under federal and state law. CYFD moved to dismiss Ramirez's USERRA claim on grounds that, as a state agency, it was immune to USERRA claims brought by private individuals. The record indicates that the district court did not specifically rule on that motion and commenced a jury trial on, inter alia, Ramirez's USERRA claim. During trial, CYFD moved for a directed verdict with respect to the USERRA claim. The district court denied that motion. The jury found that Ramirez's military service was a motivating factor for the adverse employment actions taken by CYFD and returned a verdict in his favor, awarding him $36,000 in damages for lost earnings. The district court entered the judgment and award in favor of Ramirez.

{8} CYFD appealed, and the Court of Appeals reversed. *Ramirez*, 2014-NMCA-057, ¶ 1. In a divided opinion, the Court of Appeals held that CYFD, as a state agency, was immune to Ramirez's USERRA claim. *See id.* The Court of Appeals determined that the Legislature had not waived New Mexico's sovereign immunity with respect to Ramirez's USERRA claim because the Legislature had not spoken with "the requisite specificity required to determine . . . [an] inten[tion] to waive the State's constitutional sovereign immunity to private USERRA suits for damages." *Id.* ¶ 19. The Court of Appeals also held that CYFD was immune to Ramirez's USERRA claim because, in the absence of a state's consent to suit, Congress lacks the power to abrogate a state's sovereign immunity when acting pursuant to its War Powers. *Id.* ¶¶ 17-18.

{9} We granted Ramirez's petition for a writ of certiorari to consider whether New Mexico is immune to private USERRA suits for damages, exercising our appellate jurisdiction provided by Article VI, Section 3 of the New Mexico Constitution and NMSA 1978, Section 34-5-14(B)

(1972). We also granted the New Mexico Office of the Attorney General's motion to intervene and allowed amicus curiae briefs from the United States, the Reserve Officers Association of America, and the American Civil Liberties Union of New Mexico.

II. DISCUSSION

A. State sovereign immunity should be determined at the outset of litigation

{10} The procedural history of Ramirez's USERRA claim in the district court gives us pause. In its motion to dismiss, CYFD argued that the USERRA claim should be dismissed for lack of subject matter jurisdiction because CYFD was immune from suit. CYFD requested a hearing on that motion, and the district court held a hearing on February 9, 2010. At the hearing, the district court announced it would issue a written ruling. The record, however, contains no indication that the district court ruled on CYFD's motion, and CYFD maintains that the district court did not so rule.

{11} When the State moves to dismiss a plaintiff's claim by raising the affirmative defense of sovereign immunity invoking the lack of subject matter jurisdiction, the district court must rule on that motion before allowing the claim to proceed. *See Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶ 12, 120 N.M. 133, 899 P.2d 576 ("Subject matter jurisdiction is [a court's] power to adjudicate the general questions involved in the claim."). This is a matter of both principle and practice. First, sovereign immunity protects the State not only from liability but also from suit. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002). Courts may not allow a plaintiff to impose on the State the expense of litigating a claim to which it is immune. *See id.* at 765 ("[S]tate sovereign immunity serves the important function of shielding state treasuries and thus preserving the [state's] ability to govern." (internal quotation marks and citation omitted)). Second, if the State properly invokes its sovereign immunity to a pending claim, "any [ruling] regarding that claim is advisory to the extent that it addresses issues other than immunity." *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). And "[w]e avoid rendering advisory opinions." *City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 18, 124 N.M. 640, 954 P.2d 72. Third, as a matter of judicial administration, if the State raises the defense of sovereign immunity to a claim, that issue should be decided well before the claim goes to a jury—not after a jury has rendered a verdict. *See Gonzales*, 1995-NMSC-036, ¶ 12.

{12} In this case, we conclude that the Legislature consented to private USERRA actions for damages. Hence, the risks associated with not deciding a state sovereign immunity defense at the outset did not materialize. Nevertheless, we reiterate that the defense of state sovereign immunity should be adjudicated at the outset of litigation, instead of permitting the issue to be decided after the expense of trial.

B. USERRA and state sovereign immunity

1. Standard of review

{13} We review de novo whether New Mexico is immune in its own courts to a claim for damages arising under federal law. *See Manning v. Mining & Minerals Div. of Energy, Minerals & Nat. Res. Dep't*, 2006-NMSC-027, ¶ 9, 140 N.M. 528, 144 P.3d 87. Further, whether the Legislature waived New Mexico's sovereign immunity with respect to USERRA claims filed by private individuals in state court is an issue of statutory interpretation that is also subject to de novo review. *Moongate Water Co. v. City of Las Cruces*, 2013-NMSC-018, ¶ 6, 302 P.3d 405.

2. State sovereign immunity and congressional legislation enacted under the War Powers Clause

{14} As framed by the parties, this case principally concerns whether the War Powers Clause grants Congress the power to abrogate a state's sovereign immunity to suit in its own courts. To enforce the rights furnished to private individuals by USERRA against state employers, Congress subjects the states to private actions for money damages in their own courts. *See* 38 U.S.C. § 4323(b)(2). The parties dispute whether this statutory provision is beyond Congress's power to enact.

{15} This case concerns New Mexico's sovereign immunity to federal causes of action for monetary damages in its own courts—an immunity that derives from the federal Constitution. *See Alden v. Maine*, 527 U.S. 706, 732-33 (1999) ("Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design."); *Cockrell v. Bd. of Regents of N.M. State Univ.*, 2002-NMSC-009, ¶¶ 4-8, 132 N.M. 156, 45 P.3d 876 (discussing *Alden* at length). New Mexico's immunity to suit for damages is a fundamental aspect of its sovereignty and is held by virtue of its "admission into the Union upon an equal footing with the other States." *Alden*, 527 U.S. at 713.

{16} Because New Mexico's sovereign immunity is grounded in the federal Constitution, it exists only where the states' sovereign immunity was not relinquished either "by the plan of the Convention or certain constitutional Amendments." *Id.*; *see also* The Federalist No. 81 (Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . .") (emphasis added). For example, "[i]n ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government." *Alden*, 527 U.S. at 754 (citing *Principality of Monaco v. State of Miss.*, 292 U.S. 313, 328-29 (1934) (collecting cases)).

{17} In *Alden*, the Supreme Court addressed the issue of state sovereignty at the Constitutional Convention and specifically examined whether any provision of Article I grants Congress the power to subject nonconsenting states to private suits for damages in their own courts. *See* 527 U.S. at 730-31. The Supreme Court determined that Congress only has such a power "if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." *Id.* at 730-31 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781 (1991)). After analyzing the "history, practice, precedent, and the structure of the Constitution," the Supreme Court held that "the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." *Id.* at 754.

{18} In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), the Supreme Court retreated from the broad holdings of *Seminole Tribe* and *Alden* that nothing in Article I empowers Congress to subject a state to suit by a private party for monetary relief without its consent. *Katz* concluded after looking to the history of the Bankruptcy Clause, U.S. Const. art I, § 8, cl. 4, and bankruptcy legislation considered and enacted in the wake of the Constitution's ratification that the Bankruptcy Clause enables Congress to abrogate state sovereign immunity in bankruptcy proceedings. *See* 546 U.S. at

377 ("The ineluctable conclusion, then, is that States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" (quoting U.S. Const. art I, § 8, cl. 4)). *Katz*, therefore, applied the framework articulated in *Alden* to conclude that Congress's power under the Bankruptcy Clause includes a limited power to abrogate state sovereign immunity. *See id.* In so doing, *Katz* opened the door to arguments that constitutional history and structure show that Congress, by acting pursuant to other Article I powers, may subject the states to private suits absent their consent.

{19} Encouraged by the Supreme Court's holding in *Katz*, Ramirez, the New Mexico Office of the Attorney General (as an intervenor), and the United States (as an amicus curiae) argue that Congress's War Powers include the power to subject states to private suits for monetary relief without their consent. They maintain that this putative power sounds in the plan of the Convention.

{20} We decline to decide whether, pursuant to the constitutional structure outlined at the Convention and ratified thereafter, the states implicitly consented to Congress's authority under its War Powers to override their sovereign immunity. The resolution of that constitutional question is unnecessary to the disposition of this case; therefore, we do not address it. *See Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 ("It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so." (internal quotation marks and citation omitted)). Instead, we address whether the New Mexico Legislature waived New Mexico's sovereign immunity to private suits seeking monetary relief for a state employer's alleged violation of a right guaranteed by USERRA.

3. Determining waiver of state sovereign immunity

{21} New Mexico's privilege to assert its sovereign immunity in its own courts "does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." *Alden*, 527 U.S. at 754-55. Sovereign immunity does not bar all judicial review of state compliance with federal law in New Mexico courts. For instance, a private individual may bring a federal cause of action seeking prospective, injunctive relief against a state officer. *See Gill v. Pub. Emps. Ret. Bd. of Pub. Emps. Ret. Ass'n of N.M.*, 2004-NMSC-016, ¶¶ 1, 28, 135 N.M. 472, 90 P.3d 491 (applying the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to private suits against state officials).

{22} Furthermore, the Legislature may consent to suits against the State. *See Cockrell*, 2002-NMSC-009, ¶ 13 ("[I]t is within the sole province of the Legislature to waive the State's constitutional sovereign immunity."). "The rigors of sovereign immunity are thus 'mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.'" *Alden*, 527 U.S. at 755 (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). The Legislature may waive New Mexico's sovereign immunity with respect to causes of action that it creates. *See, e.g.*, NMSA 1978, § 14-2-12 (1993) (providing for enforcement, including the award of monetary damages, for a claim arising under the Inspection of Public Records Act); NMSA 1978, § 28-1-13(D) (2005) (providing for the State's monetary liability for injury to a person under the Human Rights Act). The Legislature may also waive New Mexico's immunity to federal causes of action that Congress creates through the exercise of its Article I powers. *See Cockrell*, 2002-NMSC-009, ¶ 13.

{23} This case turns on whether the Legislature waived the State's immunity to suit by enacting Section 20-4-7.1(B), which applies the rights created by USERRA to qualifying members of the New Mexico National Guard. *Cockrell* guides the resolution of this question. In *Cockrell*, this Court stated "that any waiver of the State's constitutional sovereign immunity must be clear and unambiguous." 2002-NMSC-009, ¶ 24. There, we specifically considered whether NMSA 1978, Section 37-1-23(A) (1976) waived the State's sovereign immunity in actions for overtime wages asserted under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (2012). *Cockrell*, 2002-NMSC-009, ¶¶ 16-24. Section 37-1-23(A) grants immunity to governmental entities "from actions based on contract, except actions based on a valid written contract." This Court concluded that this statute did not clearly and unambiguously indicate the Legislature's intent to make state entities amenable to suits asserting FLSA claims in state courts. *Cockrell*, 2002-NMSC-009, ¶ 24. We accordingly held that "Section 37-1-23 does not waive the State's constitutional sovereign immunity." *Cockrell*, 2002-NMSC-009, ¶ 22.

{24} We first look to the text of a statute to determine whether the Legislature's waiver of immunity is clear and unambiguous. For example, in *Cockrell* we first addressed whether the text of Section 37-1-23(A) indicated an express waiver of immunity. 2002-NMSC-009, ¶ 18. This Court determined that an FLSA claim, which is purely statutory, is not "based on a valid written contract" within the meaning of Section 37-1-23(A), even where there is a valid contract for employment incorporating the protections of the FLSA. *Cockrell*, 2002-NMSC-009, ¶ 18. Accordingly, this Court concluded that "Section 37-1-23 does not provide an express waiver of immunity for . . . FLSA claim[s]." *Cockrell*, 2002-NMSC-009, ¶ 18.

{25} With respect to a textual indication of waiver, we clarify that the Legislature is not required to employ certain magic words or a specific formulaic recital to express its intention to consent to suit in state court. In *Luboyeski v. Hill*, for example, this Court concluded that the State waived its immunity to private suits brought to enforce the New Mexico Human Rights Act under its provision that "'the state shall be liable the same as a private person.'" 1994-NMSC-032, ¶ 14, 117 N.M. 380, 872 P.2d 353 (quoting Section 28-1-13(D) (1987)). Other jurisdictions have also declined to adopt a magic-words test to discern a waiver of state sovereign immunity. *See, e.g.*, *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003) ("[W]e do not insist that the statute [waiving sovereign immunity] be a model of perfect clarity." (internal quotation marks and citation omitted)); *Klonis v. State, Dep't of Revenue*, 766 So. 2d 1186, 1189 (Fla. Dist. Ct. App. 2000) ("Although a waiver of sovereign immunity by a legislative enactment must be clear, specific, and unequivocal, no particular magic words are required."). Like these courts, we do not favor any particular language by which the Legislature may render the State amenable to suit in its own courts.

{26} This Court may also discern a clear and unambiguous waiver by examining the purpose of a statute. The clear and unambiguous standard does not confine our statutory analysis to the text alone. For example, in *Cockrell*, after considering whether Section 37-1-23(A) expressly waived immunity, this Court addressed whether the statute "implicitly evidence[d] a legislative intent to waive immunity from FLSA claims." 2002-NMSC-009, ¶ 19. *Cockrell* "recognized that the purpose of

the legislative enactment containing Section 37-1-23 was to reinstate the sovereign immunity which had been abolished by *Hicks v. State*, subject to certain exceptions." *Cockrell*, 2002-NMSC-009, ¶ 22 (internal quotation marks and citation omitted). This Court determined that the purpose of the limited waiver of immunity expressed in Section 37-1-23(A) was to encourage parties who contract with state entities to do so in writing in order to ensure clear terms and to verify that the "governmental entity is authorized to enter into [the] contract." *Cockrell*, 2002-NMSC-009, ¶ 22 (alteration in original) (internal quotation marks and citation omitted). *Cockrell* concluded that the purposes of Section 37-1-23(A) did not support making state entities amenable to suit in state courts for alleged violations of the FLSA. *See Cockrell*, 2002-NMSC-009, ¶¶ 21-22.

{27} We clarify that the method that this Court employs to determine whether the Legislature waived New Mexico's immunity to suit in its own courts is not the method employed by the federal courts to discern a waiver of state sovereign immunity to suit in federal court. While the federal courts may hesitate to look beyond the statutory text to discern a state's consent to suit in the federal courts, *see, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 673 (1973), in *Cockrell*, this Court appropriately examined both the text and the purpose of a statute to determine the Legislature's intent to consent to suit in its own court. 2002-NMSC-009, ¶¶ 21-22. The federal courts' determination of waivers of sovereign immunity to suit in federal court is guided by federalism concerns that do not bear upon this Court's determination of the Legislature's consent to suit in the courts of New Mexico. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984) ("A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued . . . . [B]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate. . . ." (internal quotation marks and citation omitted)). Unlike the federal courts, when this Court interprets a statute to determine the Legislature's intent to waive sovereign immunity, we are concerned with the State's amenability to suit in *its own* courts. Thus, as in *Cockrell*, this Court will examine both statutory text and purpose to determine whether the Legislature clearly intended to waive the State's sovereign immunity to a federal cause of action in its own courts.

{28} We also make clear that any determination by this Court that the Legislature consented to suit in its own courts does not also mean that the Legislature consented to suit in the federal courts. *See Pennhurst*, 465 U.S. at 100 n.9 (noting that the United States Supreme Court "consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts"); *Great N. Life Ins.*, 322 U.S. at 54 ("[I]t is not consonant with our dual system for the Federal courts . . . to read the consent to embrace Federal as well as state courts.").

4. New Mexico waived sovereign immunity to USERRA claims

{29} Ramirez contends that by enacting Section 20-4-7.1(B), the Legislature waived state sovereign immunity to his USERRA action. We agree. Section 20-4-7.1(B) provides as follows: "The rights, benefits and protections of the federal Uniformed Services Employment and Reemployment Rights Act of 1994 shall apply to a member of the national guard ordered to federal or state active duty for a period of thirty or more consecutive days." The Legislature enacted this provision in 2004, with knowledge of *Alden*'s holding that "the powers delegated to Congress under Article I . . . do not include the power to subject nonconsenting States to private suits for damages in state courts." *See Alden*, 527 U.S. at 712; 2004 N.M. Laws, ch. 37 § 1 (codified at § 20-4-7.1(B)). *See also Inc. Cty. of Los Alamos v. Johnson*, 1989-NMSC-045, ¶ 4, 108 N.M. 633, 776 P.2d 1252 (presuming that the legislature is well informed as to existing law).

{30} Under Section 20-4-7.1(B), the Legislature provided that members of the New Mexico National Guard who are ordered to active duty for at least thirty consecutive days will benefit from every applicable right that USERRA creates. Two of these rights are pertinent here. First, USERRA guarantees members of a uniformed service the right not to be denied "any benefit of employment by an employer on the basis" of their membership in a uniformed service. 38 U.S.C. § 4311(a). Second, USERRA creates a private right of action for damages against a state employer to remedy violations of USERRA's substantive antidiscrimination protections. *See* 38 U.S.C. §§ 4323(a)(3), (d)(1)(B)-(C), 4311(a).

{31} Section 20-4-7.1(B) guarantees both the substantive antidiscrimination right and the right of action against a state employer to members of the national guard ordered to federal or state active duty for a period of thirty or more consecutive days. Section 20-4-7.1(B) adopts the rights guaranteed by USERRA without limitation. The statutory provision contains no suggestion that it only extends *some* of the rights created by USERRA. *See* § 20-4-7.1(B). It does not suggest that the Legislature intended to extend USERRA's substantive antidiscrimination right to members of the New Mexico National Guard but to withhold USERRA's right to a remedy for damages. *See id.* We therefore have no reason to construe the statute as not conferring USERRA's right of action against state employers to national guard members.

{32} Other relevant statutes counsel against such a construction, and we read statutes in pari materia to ascertain legislative intent. *See State v. Davis*, 2003-NMSC-022, ¶ 12, 134 N.M. 172, 74 P.3d 1064. The Legislature has made clear that "[t]he intent of the New Mexico Military Code and all laws and regulations of the state affecting the military forces is to reasonably conform to all laws and regulations of the United States affecting the same subjects, except as otherwise expressly provided with respect to military justice." NMSA 1978, § 20-1-2 (1987). Furthermore, it has long been the policy of New Mexico to provide a private right of action for damages against the State as an employer for the failure to reemploy a qualifying service member who returns to state employment from active duty. *See* NMSA 1978, Section 28-15-3 (1941, amended 1971) (creating a private right of action to enforce the substantive rights created by NMSA 1978, Section 28-15-1 (1941)). To be sure, Sections 28-15-1 and 28-15-3 would not provide Ramirez with a remedy because those provisions guard against a state employer's failure to reemploy a qualifying service member and Ramirez was reemployed by CYFD. Ramirez complained of separate adverse employment actions, including termination, taken by CYFD because of his military service. Nevertheless, the Legislature's creation of a private right of action for qualifying service members to recover from the discrimination of not being reemployed because of their uniformed service strongly supports that, by enacting Section 20-4-7.1(B), the Legislature intended to create a right of action for qualifying service

members to recover from other forms of employment discrimination. Thus, in light of both the Legislature's longstanding willingness to confer a private right of action against state employers on service members who return from active duty and suffer the employment discrimination of not being reemployed because of their military service (as indicated by Section 28-15-3) and the Legislature's intent that New Mexico law conform to federal law with respect to the military forces (as expressed by Section 20-1-2), it is clear that Section 20-4-7.1(B) confers on members of the New Mexico National Guard who are ordered to federal or state active duty for a period of thirty or more consecutive days a private right of action for damages against the State to remedy a violation of USERRA's substantive antidiscrimination rights.

{33} Other courts, when confronted with the same issue, have interpreted statutes similar to Section 20-4-7.1(B) and Section 20-1-2 to indicate a legislative intent to waive immunity to private USERRA actions. *See Scocos v. State Dep't of Veteran Affairs*, 819 N.W.2d 360, 366-67 (Wis. Ct. App. 2012) (holding that a statute providing that the discharge from federal active duty of persons restored to state employment is subject to all federal laws affecting any private employment was sufficient to authorize the plaintiff's claims against the state under USERRA); *Panarello v. State*, 2009 WL 3328484, at *4 (R.I. Super. Jan. 22, 2009) ("This Court will not reach the constitutional question raised above because it is clear that the [Wisconsin Legislature] waived the State's sovereign immunity by necessary implication when it incorporated USERRA, without qualification, within its general laws.").

{34} When the Legislature creates a right of action for damages against the State it thereby makes the State liable to suit. *See Luboyeski*, 1994-NMSC-032, ¶ 14 (holding that the Human Rights Act's provisions permitting plaintiffs to obtain damages and attorney's fees from the State waived the State's sovereign immunity created by the Tort Claims Act). When enacting Section 20-4-7.1(B), the Legislature furnished qualifying members of the New Mexico National Guard a right of action against state employers for money damages if they are denied any benefit of employment by a state employer on the basis of their membership in the national guard or their service to this State and the United States. Therefore, we conclude that the Legislature consented to private USERRA suits for damages against state employers.

{35} Our analysis differs from the reasoning of the Court of Appeals. The Court of Appeals first determined that the War Powers Clause does not grant Congress the power to subject nonconsenting states to private suits for damages in their own courts. *Ramirez*, 2014-NMCA-057, ¶¶ 17-18. The Court of Appeals then reasoned that Sections 20-1-2 and 20-4-7.1(B), which serve to confer the rights created by USERRA on qualifying members of the New Mexico National Guard, cannot have extended USERRA's jurisdictional provision that a private right of action may be brought in a state court. Accordingly, the Court of Appeals concluded that neither Section 20-1-2 nor Section 20-4-7.1(B) waived New Mexico's sovereign immunity to private USERRA actions seeking monetary damages. *Ramirez*, 2014-NMCA-057, ¶ 25.

{36} Unlike the Court of Appeals, we do not decide whether the War Powers Clause grants Congress the power to abrogate state sovereign immunity. Whether USERRA's jurisdictional provision that enforcement actions "may be brought in a State court" is *ultra vires*, and, consequently, whether the Legislature could have validly extended that jurisdictional provision, are issues inapposite to the proper resolution of this case. 38 U.S.C. § 4323(b)(2). New Mexico's district courts are courts of general jurisdiction. *Trujillo v. State*, 1968-NMSC-179, ¶ 3, 79 N.M. 618, 447 P.2d 279. Their power to adjudicate claims is grounded in the New Mexico Constitution, not in a federal statute. N.M. Const., art. VI, § 13.

{37} In the light of the text and purpose of Section 20-4-7.1(B), the Legislature clearly conferred USERRA's antidiscrimination rights on qualifying members of the New Mexico National Guard and extended USERRA's private right of action for damages against state employers that violate those antidiscrimination rights. In so doing, the Legislature waived New Mexico's immunity to suit.

III. CONCLUSION

{38} For the foregoing reasons, we reverse the decision of the Court of Appeals and reinstate the district court's judgment and damage award.

{39} IT IS SO ORDERED.

JUDITH K. NAKAMURA, Justice

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

Certiorari Denied, May 3, 2016, No. S-1-SC-34777

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-049

No. 32,235 (filed May 21, 2014)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
BRIAN M. DORAIS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
STEPHEN D. PFEFFER, District Judge

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Opinion

Michael D. Bustamante, Judge

{1} Brian Dorais (Defendant) was arrested in 2006 for driving under the influence of intoxicating liquor and/or drugs. Convicted after a jury trial in magistrate court, he timely appealed to the district court. After a trial de novo, he was convicted again and, in May 2008, sentenced to ninety days of incarceration and five years of probation. Defendant did not file a notice of appeal from the 2008 judgment. Four years later, Defendant was arrested again and the State sought to revoke his probation. After a hearing, however, the parties agreed that Defendant should have originally been sentenced to only three years of probation. As a result, the State dismissed the motion for revocation of probation and the district court entered a "Stipulated Corrected Sentence" reflecting a probation period of three years. Defendant then filed a notice of appeal from the Stipulated Corrected Sentence. Defendant now argues that his constitutional right to confront witnesses was violated in his district court trial. He also argues that he was denied his right to a speedy trial and that Rule 6-506(B) NMRA—the "six month rule"—was violated.

{2} The State makes a number of arguments to the effect that the district court lacked jurisdiction to enter the Stipulated Corrected Sentence and that this Court lacks jurisdiction to hear this appeal. We do not address these arguments because we conclude that the *Duran* presumption permits us to review Defendant's claims of error in the lower courts. We affirm the district court's denial of Defendant's motions to dismiss on speedy trial and six month rule grounds. But, concluding that Defendant's confrontation rights were violated, we reverse and remand for a new trial.

I. DISCUSSION

A. This Court has Jurisdiction to Hear Defendant's Appeal

{3} Before we address Defendant's challenges to his conviction, we address the State's contention that this Court lacks jurisdiction to hear the appeal. The State's argument is based on the somewhat convoluted procedural history behind the appeal. Hence, we first outline that history.

{4} The first trial was held in magistrate court in August 2007. The second trial was held four months later in district court. At the sentencing hearing, the district court orally stated that it would sentence Defendant to thirty days in jail and three years of probation, but when the judgment and sentence was filed a month later, it reflected a sentence of ninety days in jail and five years of probation. No notice of appeal or affidavit of waiver of appeal was filed at that point. *See* Rule 5-702(B) NMRA ("defense counsel shall . . . file with the court . . . (1) a notice of appeal . . .; or (2) an affidavit . . . signed and sworn to by defendant and witnessed by counsel stating defendant's decision not to appeal").

{5} Almost four years later, Defendant was arrested for driving while intoxicated and the State filed a motion to revoke probation. Defendant denied the probation violation and argued that the judgment and sentence did not reflect the district court's oral sentence of three years of probation. The district court scheduled a hearing for April 30, 2012. On the date of the hearing, however, the State dismissed the probation violation, stating that "[t]he probationary period for this matter has expired, and the act for which the State filed the motion to revoke probation . . . was committed subsequent to the expiration of probation." The same day, the district court issued an order of release and a "Stipulated Corrected Sentence." The Stipulated Corrected Sentence was substantially the same as the original judgment and sentence, except that the term of incarceration was thirty days and the period of probation was three years, consistent with the district court's oral sentence four years earlier. The district court also remanded the case to the magistrate court "with instructions to close the file on this matter[,]" stating that "[t]he probationary time has expired on the sentence passed by this [c]ourt in this matter." Defendant filed a notice of appeal to the Court of Appeals within thirty days of the entry of the Stipulated Corrected Sentence.

{6} The State focuses on the fact that Defendant appealed from the Stipulated Corrected Sentence entered four years after the original judgment and argues that this Court lacks jurisdiction over the appeal for four reasons. First, the district court itself lacked jurisdiction to issue the Stipulated Corrected Sentence under the rules of criminal procedure and therefore that action was void. *See* Rule 5-801(A), (B) NMRA (stating the rules for correction of an illegal sentence and modification of a sentence); *State v. Lucero*, 2001-NMSC-024, ¶ 7, 130 N.M. 676, 30 P.3d 365 (stating that the "time requirement for the filing of a motion to modify a sentence is jurisdictional"). Second, appeal of the Stipulated Corrected Sentence is moot "because Defendant has fully served his term of incarceration and probation regardless of [which] judgment and sentence . . .

controls." Third, the Stipulated Corrected Sentence did not render Defendant an aggrieved party because Defendant was not harmed or prejudiced by the corrected sentence. Fourth, neither the district court's exercise of personal jurisdiction over Defendant nor any error in the district court renders an appeal from the original judgment and sentence timely. These arguments depend, for the most part, on analysis of the rules governing modification of sentences under Rule 5-801 as well as New Mexico case law evincing an interest in finality and clarity of judgments. *See, e.g.*, *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 29, 142 N.M. 89, 163 P.3d 476 (recognizing the public interest in finality of judgments); *State v. Soutar*, 2012-NMCA-024, ¶ 13, 272 P.3d 154 (stating that an oral sentence is not a final order); Rule 5-801(A), (B). We need not enter the thicket presented by these arguments, however, because we conclude that the presumption of ineffective assistance of counsel set out in *State v. Duran* permits this Court to address the merits of Defendant's appeal. 1986-NMCA-125, 105 N.M. 231, 731 P.2d 374.

{7} In *Duran*, this Court created a conclusive presumption of ineffective assistance of counsel "where defense counsel fails to timely file either a notice of appeal or an affidavit of waiver of appeal [as] required by [Rule 5-702(B)]." *Duran*, 1986-NMCA-125, ¶ 3. When the presumption applies, this Court may hear an appeal on the merits notwithstanding the untimely filing of the notice of appeal. *Id.* ¶ 6. Since *Duran*, the presumption has been applied "routinely" to reach the merits of untimely appeals. *State v. Vigil*, 2014-NMCA-__, ___ P.3d ___, ¶ 7 (No. 32,166, Mar. 12, 2014). As noted, Defendant here filed neither an appeal nor an affidavit of waiver after the original judgment and sentence was entered. Nor did Defendant's counsel file an affidavit stating that Defendant had been advised of his right to appeal and refused to file a notice of appeal or affidavit of waiver, which would have prevented a conclusion that the attorney was ineffective. *See Duran*, 1986-NMCA-125, ¶ 4 (stating that an attorney may file an affidavit to avoid being "faced with a 'Hobson's choice' of filing a frivolous appeal or facing the consequences of being labeled as 'ineffective' "). Therefore, the essential conditions for applying the *Duran* presumption have been met. But does the presumption still apply after four years of inaction by Defendant? We conclude that it does for three reasons.

{8} The first and foremost reason that the passage of time alone does not prevent application of the *Duran* presumption is based on the fundamental premise of that case: that the rights implicated by the presumption—the right to appeal and the right to effective assistance of counsel—protect a defendant's fundamental liberty interest in a fair trial. *See State v. Leon*, 2013-NMCA-011, ¶ 17, 292 P.3d 493 (stating that the "guiding factor" behind cases extending the *Duran* presumption is the presence of a "fundamental liberty interest, in combination with circumstances in which a defendant has not waived his right to appeal"). This interest is no less significant after the deadline for appeal than it was before the deadline, nor does it diminish over time. *Cf. State v. Romero*, 1966-NMSC-126, ¶ 24, 76 N.M. 449, 415 P.2d 837 ("It is only logical that a void conviction cannot be vitalized by the lapse of time." (discussing timing requirements for Rule 1-060(B) NMRA motions for relief from judgment)).

{9} Second, in adopting the conclusive presumption, the *Duran* court declined the state's invitation to set an "outside time limit" on application of the presumption. 1986-NMCA-125, ¶¶ 5, 6 (choosing not to adopt an outside time limit on the presumption pursuant to the State's argument). In addition, the court noted that "there have been cases reinstated on our docket by the federal courts or by our [S]upreme [C]ourt because defendants have, in factual hearings held years after the appeal should have been taken, established their entitlement to delayed appeals. These cases sometimes take years to reach us." *Id.* ¶ 5. Thus, the *Duran* holding—which has been "firmly rooted in this State's jurisprudence" for almost thirty years—itself contemplated the possibility of encompassing within the presumption appeals filed years beyond the deadline. *State v. Cannon*, 2014-NMCA-___, ¶ 9, ___ P.3d ___ (No. 32,127, Mar. 13, 2014).

{10} Third, concluding that the *Duran* presumption does not apply simply based on the number of years that have passed is akin to concluding that a defendant waived the right to appeal through inaction. This conclusion would be inconsistent with the principles governing waiver of constitutional rights, which are well developed in our case law. Although "[a] defendant may waive fundamental constitutional rights[,]" *State v. O'Neal*, 2009-NMCA-020, ¶¶ 11-12, 145 N.M. 604, 203 P.3d 135, any waiver of those rights must be done knowingly, intelligently, and voluntarily. *See State v. Padilla*, 2002-NMSC-016, ¶ 18, 132 N.M. 247, 46 P.3d 1247 (" 'A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege' which must be made in a knowing and voluntary manner.' " (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938))). There must be evidence in the record demonstrating that a waiver of rights was voluntary and intelligent: "[A] knowing and voluntary waiver cannot be inferred from a silent record." *Id.* ¶ 19. And, it is the State's burden to demonstrate that the right was waived. *See State v. Boeglin*, 1983-NMCA-075, ¶ 24, 100 N.M. 127, 666 P.2d 1274 ("[T]he burden of proof to establish a waiver of a constitutional right rests upon the [s]tate."). Finally, "in the absence of a clear showing of waiver, this Court on appeal will indulge in every reasonable presumption against the waiver of a fundamental constitutional right, and will not presume acquiescence in its loss." *State v. Rodriguez*, 2009-NMCA-090, ¶ 20, 146 N.M. 824, 215 P.3d 762 (internal quotation marks and citation omitted); *cf. State v. Mascarenas*, 1972-NMCA-106, ¶ 15, 84 N.M. 153, 500 P.2d 438 (stating that "[t]he concept of waiver by inaction has been criticized").

{11} It follows from these principles that waiver of the right to appeal cannot be inferred from mere inaction. Rather, there must be evidence that a defendant knew of his right to appeal and voluntarily gave it up. This concept is embodied in Rule 5-702(B)(2), which requires an affirmative statement of waiver in the absence of a notice of appeal. Furthermore, as recognized in *Duran*, should a defendant "neither authorize[] an appeal nor sign[] an affidavit of waiver[,]" an attorney may file his or her own affidavit to that effect to avoid being found ineffective, thus preventing application of the *Duran* presumption. 1986-NMCA-125, ¶ 4. Hence, an affidavit by an attorney stating that the defendant took no action after being advised of the right to appeal functions as evidence of that defendant's waiver of that right.

{12} Applying these principles here, it is clear that the State has not met its burden. In fact, the State does not explicitly address whether Defendant knowingly waived his

right to appeal.[1] Instead, in the context of a different argument, it points to the fact that Defendant's counsel requested a recording of the sentencing hearing on the day that the judgment and sentence was entered in 2008 as evidence that Defendant was aware of the discrepancy between the oral sentence and original judgment and sentence shortly after the judgment was entered. To the extent we construe this assertion as a request to infer that Defendant knowingly failed to file an appeal, we conclude that the inference is too speculative to overcome the strong presumption against waiver of the right to appeal. *See Rodriguez*, 2009-NMCA-090, ¶ 20.

{13} We also note that the district court did not advise Defendant of his right to appeal at the sentencing hearing. *See* Rule 5-702(A) ("At the time of imposing . . . sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal."). Although whether the district court advised a defendant of his or her right to appeal is not dispositive as to waiver, it is a factor that may be considered in determining whether the right was knowingly waived. *See Padilla*, 2002-NMSC-016, ¶¶ 18, 20 (stating, "To determine the validity of a waiver, a reviewing court must consider the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (internal quotation marks and citation omitted) and discussing the district court's failure to advise the defendant of his right to appeal in its analysis of whether the defendant knowingly waived that right). Here, in part because the advice was lacking, there is no evidence that Defendant was aware of his right to appeal the district court's judgment and sentence to this Court. There being no affidavit of waiver as required by Rule 5-702(B), nor an affidavit by Defendant's counsel, nor other evidence that Defendant knowingly and voluntarily waived his right to appeal, we conclude that the passage of four years after entry of the original judgment and sentence does not constitute a waiver of Defendant's right to appeal. Having concluded that the *Duran* presumption permits us to do so, we next address the merits of Defendant's appeal.

B. The District Court did not Err in Denying Defendant's Motions to Dismiss on Speedy Trial and Six Month Rule Grounds

{14} Defendant argues that his conviction should be reversed because his right to be tried in accordance with the six month rule and his right to a speedy trial were violated. *See* Rule 6-506(B)(1) (stating that "[t]he trial of a criminal citation or complaint shall be commenced within one hundred eighty-two (182) days after . . . the date of arraignment or the filing of a waiver of arraignment of the defendant[,]" or other triggering events); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]"); N.M. Const. art. II, § 14 (same). We begin by outlining the events leading to Defendant's trial, then address the asserted six month rule and speedy trial violations in turn.

{15} Defendant was charged by criminal complaint on June 5, 2006. He pled not guilty in magistrate court on June 29, 2006. The six month rule therefore required that trial occur no later than December 28, 2006. *See* Rule 6-506(B). A trial was scheduled for November 9, 2006, but Defendant appeared late and the magistrate court vacated the setting. Because Defendant was late, the magistrate court had him arrested for failure to appear, although the failure to appear charge was later dismissed by the magistrate court. A new trial was scheduled for January 2, 2007, but that setting was reset for January 30, 2007, because the courthouse was closed due to snow on January 2. Defendant asserts that he intended to enter into a plea agreement on January 30, 2007, but the parties did not agree to the terms. No plea agreement was entered and Defendant requested a continuance.

{16} A new trial setting for March 27, 2007, was subsequently vacated and reset for May 7, 2007. Three days before trial, counsel for Defendant moved for a continuance, stating that "[t]he [d]efense now waives any speedy[]trial defense." After his motions for dismissal based on violations of the six month rule and speedy trial rights were denied in the magistrate court, Defendant was convicted at a jury trial on August 13, 2007.

{17} Defendant timely appealed to the district court and renewed his motions to dismiss based on the previously-asserted violations of the six month rule and speedy trial rights. After a hearing, the district court denied both motions based on its conclusion that (1) arrest of Defendant on November 9, 2006, triggered a new six-month period in which to bring him to trial in magistrate court; and (2) Defendant waived adherence to the six month rule when he requested a continuance on January 30, 2007. *See* Rule 6-506(B)(5) (stating that "if the defendant is arrested for failure to appear, . . . the date of arrest or surrender of the defendant" is the triggering event for the six-month period in which to begin trial).

{18} On appeal, we review the district court's analysis of the six month rule de novo. *See State v. Rayburns*, 2008-NMCA-050, ¶ 7, 143 N.M. 803, 182 P.3d 786. In doing so, we assess the district court's findings of fact "with the deference of the substantial evidence standard." *Id.* Defendant first argues that the district court erred in concluding that his arrest at the November 9, 2006, trial restarted the six-month period in which to bring him to trial "[b]ecause [Defendant] did not willfully fail to appear[] [and, therefore,] the warrant was issued in error." But the rule under which the warrant was issued does not require that the bench warrant be based on a willful failure to appear. *See* Rule 6-207(A) NMRA ("If any person who has been ordered by the magistrate judge to appear at a certain time and place . . . fails to appear at such specified time and place[,] . . . the court may issue a warrant for the person's arrest."). Instead, the mere fact of Defendant's absence at the appointed place and time permitted

[1]The State's only argument against the application of *Duran* is based on its assertion that the "presumption of ineffective assistance of counsel does not arise on second appeals that are not guaranteed as of right." The State's position is contrary to the holding of *Cannon*, in which this Court recently considered whether the presumption applied to untimely appeals from a de novo trial in district court after appeal of a magistrate court decision. 2014-NMCA-___, ¶ 1. Concluding that "a de novo trial in district court is subject to the same procedural rule that the *Duran* presumption was premised on—namely, Rule 5-702(B)[,]" the Court held that "it follows that the *Duran* presumption would apply to untimely notices of appeal from a de novo trial in district court." *Cannon*, 2014-NMCA-___, ¶ 5; *cf. State v. Carroll*, 2013-NMCA-___, ¶ 9 (No. 32,909, Oct. 21, 2013) (stating that "[NMSA 1978,] Section 39-3-3(A)(1) [(1972)] is intended to include a defendant's right to appeal a district court's review of an on-record metropolitan court decision."). Thus *Cannon* is conclusive of this argument.

the magistrate court to issue the bench warrant and order Defendant arrested. Because the triggering event specified in the six month rule—arrest for failure to appear—is also unqualified in any way, once Defendant was arrested, the six-month clock began anew. *See* Rule 6-506(B)(5).

{19} Defendant's second argument challenges the district court's finding that Defendant waived application of the six month rule at the January 30, 2007, hearing. After review of the record, we conclude that the district court's finding is supported by substantial evidence. The motion for continuance filed after the January 30, 2007, hearing by defense counsel did not state explicitly that Defendant waived adherence to the rule. However, the State's witness testified that Defendant's counsel requested a continuance of the January 30, 2007, trial setting, which was granted by the magistrate court with the condition that Defendant waive the six month rule. The witness testified that Defendant's counsel agreed during the hearing to this condition. We will not second-guess the district court's resolution of this conflict. *See State v. Roybal*, 1992-NMCA-114, ¶ 9, 115 N.M. 27, 846 P.2d 333 ("It [is] for the [district] court as fact-finder to resolve any conflict in the [evidence] and to determine where the weight and credibility lay."). In sum, we conclude that Defendant's arrest on November 9, 2006, restarted the six-month period in which to initiate trial and that Defendant, through counsel, waived the application of the rule at the January 30, 2007, hearing. Denial of Defendant's motion to dismiss on six month rule grounds was therefore not improper.

{20} We now turn to Defendant's allegation that his constitutional right to a speedy trial was violated based on the delay of fourteen months between his arrest and trial. "The right to a speedy trial is a fundamental right of the accused." *State v. Garza*, 2009-NMSC-038, ¶ 10, 146 N.M. 499, 212 P.3d 387. Whether a defendant has been deprived of the right requires a case-by-case analysis. *Id.* ¶ 11. Using the factors set out in *Barker v. Wingo*, 407 U.S. 514 (1972), courts must assess "(1) the length of delay, (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) the actual prejudice to the defendant." *Garza*, 2009-NMSC-038, ¶ 13 (internal quotation marks and citation omitted). On appeal, "we give deference to the [district] court's factual findings. Weighing and balancing the *Barker* factors is a legal determination that we review de novo." *State v. Maddox*, 2008-NMSC-062, ¶ 8, 145 N.M. 242, 195 P.3d 1254, *abrogated on other grounds by Garza*, 2009-NMSC-038, ¶¶ 47-48.

{21} The first factor—length of the delay—is both "a threshold inquiry that triggers the rest of the analysis and . . . part of the balancing test itself." *State v. Fierro*, 2012-NMCA-054, ¶ 35, 278 P.3d 541 (internal quotation marks and citation omitted). Thus, we determine first whether the fourteen-month delay is presumptively prejudicial. *Id.* ¶¶35-36. If so, we proceed to analyze the other *Barker* factors. *Id*. Here, the district court determined that this case was a simple one, and the parties do not dispute this finding. A delay of fourteen months is presumptively prejudicial in cases of this complexity. *See Salandre v. State*, 1991-NMSC-016, ¶ 22, 111 N.M. 422, 806 P.2d 562 (holding that a nine month delay is presumptively prejudicial for simple cases), *holding modified by Garza*, 2009-NMSC-038, ¶ 48 (revising the presumptively prejudicial benchmark for simple cases to twelve months).

{22} Having concluded that the *Barker* inquiry is necessary, we would ordinarily proceed to a detailed examination of whether the length of delay, reasons for delay, and assertion of the right weigh in Defendant's favor. Where there is no evidence of prejudice caused by the delay, however, we need not assess these factors, because "the absence of prejudice outweighs other factors that may weigh in a defendant's favor." *State v. Brown*, 2003-NMCA-110, ¶ 17, 134 N.M. 356, 76 P.3d 1113. This is the case here.

{23} There are "three interests under which we analyze prejudice to the defendant: . . . to prevent oppressive pretrial incarceration[,] . . . to minimize anxiety and concern of the accused[,] and . . . to limit the possibility that the defense will be impaired." *Maddox*, 2008-NMSC-062, ¶ 32 (quoting *Barker*, 407 U.S. at 532). "Although the [s]tate bears the ultimate burden of persuasion, [the d]efendant does bear the burden of production on this issue, and his failure to do so greatly reduces the [s]tate's burden." *State v. Urban*, 2004-NMSC-007, ¶ 18, 135 N.M. 279, 87 P.3d 1061. In addition, there must be a showing of a "nexus between the undue delay and the prejudice claimed." *Brown*, 2003-NMCA-110, ¶ 17 (internal quotation marks and citation omitted). Defendant argues that the delay in bringing him to trial (1) impaired his defense, and (2) caused him to "experience[] unusual hardship" and anxiety.

{24} First, Defendant maintains that because of the delay, there was no video of the initial traffic stop, and consequently, "[t]he jury was . . . left to rely on the impaired and faulty memory of the arresting officer." As support for his position, he points to the arresting officer's testimony about the video.

> Q. And did you engage your video equipment at that time?
> A. I believe I did, but I don't have a copy of the tape.

But this testimony tells us nothing about how the lack of the video was caused by the State's delay, or about how the video would have been important to Defendant's defense. *See id.* ¶ 17 (requiring a "nexus" between the delay and error); *State v. Todisco*, 2000-NMCA-064, ¶ 23, 129 N.M. 310, 6 P.3d 1032 (stating that the prejudice "must be substantial and demonstrable" (internal quotation marks and citation omitted)). There is no evidence that Defendant sought to use the video at trial but could not. We conclude that Defendant's assertions are too speculative to constitute evidence of prejudice. *See Brown*, 2003-NMCA-110, ¶ 20 (rejecting a defendant's argument as to prejudice as "conjecture"); *cf. Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104 ("We will not search the record for facts, arguments, and rulings in order to support generalized arguments.").

{25} Second, Defendant argues that he experienced undue anxiety and hardship because he "was incarcerated at least three different times" and had to borrow money to pay over $5000 in bail for the failure to appear charge. But the penalties for the failure to appear charge are attributable to Defendant's own conduct, not to the State. In addition, Defendant fails to provide evidence tying the other periods of incarceration to delay on the State's part. *See Brown*, 2003-NMCA-110, ¶ 17 (requiring a "nexus" between the delay and error). "[B]ecause the record does not support a finding of prejudice to Defendant, we need not analyze the remaining factors." *Id.* ¶ 21. The district court did not err in denying Defendant's motion to dismiss on speedy trial grounds.

C. Defendant's Rights Under the Confrontation Clause Were Violated

{26} Defendant next argues that his right to confront the witnesses against him at trial was violated. Both the federal and New Mexico constitutions provide that

"[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" *See* U.S. Const. amend. VI; N.M. Const. art. II, § 14 ("the confrontation clause"). Defendant argues that it was improper to permit the State to admit a report of his blood alcohol content based on testimony by a State Laboratory Division (SLD) employee who did not analyze the blood sample. Thus, his argument is grounded in the United States Supreme Court's holding in *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2713 (2011), in which the Court held that "[a]s a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness."

{27} As a preliminary matter, we address the State's argument that *Bullcoming* does not apply here because it was "issued long after Defendant's judgment of conviction became final." We disagree and therefore apply *Bullcoming* to conclude that Defendant's rights protected by the confrontation clause were violated.

{28} *Bullcoming* was decided in 2011, three years after the original judgment and sentence was filed in this case. The State, apparently assuming that *Bullcoming* announced a new rule, contends that it does not apply here because its holding is not retroactive. *See State v. Mascarenas*, 2000-NMSC-017, ¶ 24, 129 N.M. 230, 4 P.3d 1221 ("An appellate court's consideration of whether a rule should be retroactively or prospectively applied is invoked only when the rule at issue is in fact a 'new rule.' "); *State v. Nunez*, 2000-NMSC-013, ¶ 114, 129 N.M. 63, 2 P.3d 264 ("[I]t seems apparent that a change of law by an appellate court will have no retroactive application to any case that is finalized before the date the court's decision is filed."). Defendant counters that *Bullcoming* did not announce a new rule and "merely reiterated that the principles set forth in *Melendez-Diaz* [*v. Massachusetts*] are and have always been the correct interpretation of the law." *See* 557 U.S. 305, 311 (2009). We do not address these arguments, because, even if we assume without deciding that *Bullcoming* announced a new rule and is not retroactive, *Bullcoming* applies here because Defendant's appeal was pending when *Bullcoming* was filed. We explain.

{29} "[A] change in the law generally applies to cases pending on direct appeal, as long as the issue was raised and preserved below." *Kersey v. Hatch*, 2010-NMSC-020, ¶ 19, 148 N.M. 381, 237 P.3d 683. When we apply the *Duran* presumption, we treat a late appeal as though it had been filed within the applicable deadline. *See State v. Leon*, 2013-NMCA-011, ¶ 20, 292 P.3d 493, *cert. quashed,* 2013-NMCERT-010, 313 P.3d 251 (stating that, as a result of applying the *Duran* presumption, the Court would "consider his appeal as if timely filed"); *State v. Peppers*, 1990-NMCA-057, ¶ 23, 110 N.M. 393, 796 P.2d 614 (stating that as a result of the *Duran* presumption, the Court would "treat defendant's appeal as if the notice had been filed in a timely fashion"); Rule 12-201(A) NMRA. Hence, we treat Defendant's appeal as though it had been filed in June 2008, which means that we also consider it pending at the time *Bullcoming* was decided.

{30} Treating Defendant's appeal this way is consistent with the principle underlying *Duran*—that a defendant should not be denied an appeal by his or her attorney's incompetence. *See Duran*, 1986-NMCA-125, ¶ 3 (recognizing the holding of *Evitts v. Lucey*, 469 U.S. 387, 389-400 (1985) "to the effect that criminal defendants are not to be deprived of an appeal as of right where a procedural defect results from ineffective assistance of counsel on appeal."). If we did not treat an untimely appeal as "relating back" to the appeal deadline date, defendants whose appeals we considered via the *Duran* presumption would be denied the benefit of cases decided between that date and the actual date of appeal, while defendants who timely filed their appeals would not. This anomalous result is contrary to the very foundation on which *Duran* is based.

{31} Having concluded that *Bullcoming* applies, we turn to the merits of Defendant's confrontation clause claim. Under that case, a testimonial statement "may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Bullcoming*, 131 S. Ct. at 2712-13. Consistent with *Melendez-Diaz* and its progeny, the parties do not dispute that the SLD blood alcohol content report was testimonial. U.S. at 311; *see State v. Bullcoming*, 2010-NMSC-007, ¶ 18, 147 N.M. 487, 226 P.3d 1 *rev'd on other grounds by Bullcoming,* 131 S. Ct. at 2713. In addition, the State does not argue that the analyst who conducted the test and certified the results was unavailable or that Defendant had an opportunity to confront him before trial.

{32} Instead, the State argues that *Bullcoming* is inapposite because the testifying witness was a "supervising analyst." Relying on Justice Sotomayor's concurrence in *Bullcoming*, the State argues that there is no confrontation clause violation where the testifying witness is "a supervisor who observed an analyst conducting a test [and] testified about the results or a report about such results." *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring). But there is no evidence that the testifying witness observed the conduct of the test. Indeed, the facts here are nearly exactly like those in *Bullcoming*, to wit: (1) a certified report showing Defendant's blood alcohol content was admitted into evidence, (2) the analyst who certified the results of the blood testing did not testify, (3) another SLD employee—who reviewed the analyst's documentation but did not observe the testing—testified, including about the results of the test. *See Bullcoming,* 131 S. Ct. at 2709-11. Discerning no material difference between the facts here and those in *Bullcoming*, we conclude that Defendant's right to confront the analyst whose certified statement was admitted into evidence was violated. We therefore reverse Defendant's conviction and remand this matter to the district court for a new trial. *See State v. Martinez*, 1996-NMCA-109, ¶ 21, 122 N.M. 476, 927 P.2d 31 (remanding for new trial where the defendant's confrontation right was violated).

II. CONCLUSION

{33} For the foregoing reasons, the district court's denial of Defendant's motions to dismiss for violation of the six month rule and speedy trial right is affirmed. Because Defendant's right to confront the SLD analyst who prepared the report admitted against him was violated, however, we reverse the conviction and remand for a new trial.

{34} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

J. MILES HANISEE, Judge

Certiorari Denied, May 11, 2016, No. S-1-SC-35851

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-050

No. 33,378 (filed March 17, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
MARIO CARMONA,
Defendant-Appellee.

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

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Opinion

J. Miles Hanisee, Judge

{1} The State appeals the district court's order suppressing its expert's opinion that Defendant's DNA was contained in samples taken from an alleged victim by a now-deceased Sexual Assault Nurse Examiner (SANE). We affirm.

BACKGROUND

{2} In 2003, nine-year-old P.W. told her mother that Defendant (whom P.W.'s mother had invited to stay overnight at her house as a guest) entered P.W.'s bedroom at night and licked her vagina and anus. P.W.'s mother called the police, who took P.W. and her mother to St. Joseph's Hospital (now known as the Women's hospital) to be examined. P.W. was examined by Lydia Vandiver (SANE Vandiver), who swabbed P.W. for DNA evidence and collected her clothing, bedding, and other personal effects.

{3} Defendant was charged by grand jury indictment with three counts of criminal sexual contact of a minor (CSCM) in the third degree, in violation of NMSA 1978, § 30-9-13(A) (2003). After his arrest, Defendant was sent to Colorado to serve the remainder of a sentence for an unrelated criminal conviction. In 2011, Defendant was released and his prosecution in New Mexico resumed. On the State's motion, the district court ordered that Defendant submit to a buccal swab to facilitate comparison of his DNA to that present in the samples collected from P.W. eight years earlier by SANE Vandiver.

{4} In 2013, and with the case still pending, SANE Vandiver died. Defendant moved to suppress the DNA evidence and a report prepared by the State's expert witness, Alanna Williams, comparing the evidence collected by SANE Vandiver with that from Defendant's buccal swab. Defendant argued that without SANE Vandiver's in-court testimony, (1) the State could not establish a chain of custody for the swabs or the relevance of Ms. Williams' opinion; and (2) admitting the DNA evidence gathered from P.W.'s body by SANE Vandiver would violate his right to confront the witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution.

{5} At a hearing on Defendant's motion to suppress, P.W. testified about her physical examination, during which SANE Vandiver "removed [her] clothing, [then] shook them out onto a plastic tarp or paper in order to collect any hairs or DNA samples that might be in there." When asked about SANE Vandiver's collection of the DNA evidence, P.W. stated that she first observed SANE Vandiver remove swabs from labeled glass vials. P.W. described the swabs as "like Q-tips, but long[.]" SANE Vandiver "swabbed me in various areas, such as my anus, my vagina, into the crack of my butt and places like that where the DNA might have been." When finished, SANE Vandiver "put [the swabs] back in the vial and screwed them up and [then] put them . . . in a bag, in a manil[]a envelope." P.W. did not recall SANE Vandiver swabbing any other areas of her body.

{6} Constance Monahan, a statewide SANE coordinator and director of the Albuquerque SANE Collaborative at the time of the alleged assault, also testified. Ms. Monahan knew SANE Vandiver at the time P.W. was examined in 2003. Ms. Monahan testified that SANE Vandiver was the clinical coordinator for the Albuquerque SANE program, and a "key nurse instructor[]" for New Mexico's statewide SANE training program. Ms. Monahan was also aware that SANE Vandiver received specialized training for pediatric examinations at Para Los Niños under the tutelage of Dr. Renee Ornelas, and that SANE Vandiver worked as a contract clinician and attended various seminars on forensic nursing. As well, SANE Vandiver provided formal SANE training to nurses statewide and personally performed sexual assault examinations at various hospitals in Albuquerque.

{7} Regarding the manner by which evidence was collected during a typical sexual assault examination, Ms. Monahan stated that

> [the SANE] would . . . meet the patient at the clinic, and then there would be a general process from—or guidelines, in terms of the questions asked . . . [the SANE] then move[s the patient] into an exam room [to] do the evidence collection and the medical documentation of injury, and then the discharge.

As to evidence collection kits, and in particular the so-called "fast track kits" used at the time and employed by SANE Vandiver to examine P.W., Ms. Monahan testified as follows:

> The New Mexico sexual assault evidence kit is a standardized packaging and process for evidence collection from sexual assault victims, whatever their age. Inside the kit is a series of envelopes and brown bags and directions and forms . . . [that are] standardized in New Mexico.

> . . . .
> The envelopes [in the fast track kit] were preprinted to indicate the orifice or the location of the body. . . . The swabs were inside already in the envelopes. So when the nurse opened up the kit, she would reach for the smaller envelope and inside, the swabs would be there.
> . . . .
> The primary purpose would be for consistency, to treat all victims, patients the same way, and it would be to standardize[] the process, so that we were all doing it the same way in New Mexico.

{8} According to Ms. Monahan, SANE Vandiver performed a third of the total examinations in any given month at the hospital where the SANE program was based. Ms. Monahan testified that SANE Vandiver averaged around "[ten] to [twenty] shifts a month" and within her shifts typically handled anywhere from "ten to fifteen [cases] a month over the course of two and [one-]half years."

{9} Ms. Monahan's own job duties included acting as the custodian of evidence collected by SANEs, including SANE Vandiver. It was expected that once a SANE had removed and utilized swabs, returned them into and sealed the kit, that SANE would next place the kit inside an empty locker or a locked refrigerator through a slot. That evidence was then accessible only by Ms. Monahan, who possessed the lone access key. Once a week, Ms. Monahan would collect logs and samples from the locker and refrigerator, place them into a large duffel bag, and deliver the bag to the Albuquerque Police Department crime laboratory. Ms. Monahan testified that this process was followed for P.W.'s swabs, and that she recognized SANE Vandiver's signature on evidence logs she retrieved. Ms. Monahan personally delivered the evidence SANE Vandiver collected from P.W. to police investigators on April 29, 2003.

{10} Additionally, the State proffered testimony of various chain-of-custody witnesses and of its DNA analyst, Ms. Williams, who would testify that the chain of custody regarding the swabs she examined indicated that they were those used to collect evidence from P.W. by SANE Vandiver. Based on a comparison of a profile developed from DNA found on the swabs and a profile developed from DNA on Defendant's buccal swab, Ms. Williams would conclude that Defendant's DNA was present on the swabs taken from P.W. by SANE Vandiver. The State further explained that Ms. Williams' testimony would be based on the labels affixed to the envelopes containing swabs that SANE Vandiver had used on P.W.

{11} Defendant's attorney argued that introduction of Ms. Williams' testimony would violate the Confrontation Clause because

> the SANE examiner has a tremendous amount of discretion in terms of how to conduct the test . . . SANE kits are not medical procedures; it's evidence collection. It's equivalent to a technician taking picture[s] at a scene or collecting bullet casings. . . . And it's testimonial, because it's offered for prosecution. It's collected for prosecution, and therefore the credibility and motives of the people involved are at issue[.]

{12} On multiple rationales, the district court granted Defendant's motion to suppress. First, applying Rule 11-401 NMRA, the district court determined that the DNA evidence was not relevant. Second, it ruled that the State "failed to establish a reliable chain of custody." Third, it concluded that admitting the DNA evidence would violate Defendant's right to "confront and cross-examine witnesses[.]" The State appeals.

DISCUSSION

The Confrontation Clause Prohibits the Introduction of a Hearsay Statement When Its Declarant Is Unavailable to Testify in Person and Its Primary Purpose Is to Establish or Prove Past Events Potentially Relevant to Later Criminal Prosecution

{13} We review the district court's determination that evidence is inadmissible under the Confrontation Clause de novo. *State v. Zamarripa*, 2009-NMSC-001, ¶ 22, 145 N.M. 402, 199 P.3d 846. To assess whether admission of the DNA evidence collected by SANE Vandiver or Ms. Williams' expert testimony would violate the Confrontation Clause, we first summarize the holding in *Crawford v. Washington*, 541 U.S. 36 (2004), the seminal United States Supreme Court case in this area. Second, we explain the "primary purpose" test for determining the scope and application of the Confrontation Clause first set out in *Davis v. Washington*, 547 U.S. 813 (2006). Third, we discuss the United States Supreme Court's application of the "primary purpose" test in the context of scientific evidence and expert testimony. Finally, we apply our own Supreme Court's more recent decision in *State v. Navarette*, 2013-NMSC-003, 294 P.3d 435. Our analysis of modern Confrontation Clause jurisprudence points squarely to the following conclusion: the Confrontation Clause prohibits the admission of DNA evidence collected by an unavailable SANE and any expert testimony based thereon when the primary purpose animating the SANE's collection of such evidence is to assist in the prosecution of an individual identified at the time of the collection.

1. *Crawford* Eliminated a Reliability-Focused Confrontation Clause Analysis and Established a Context-Based Evaluation to Ascertain Whether a Statement Amounts to Testimonial Hearsay

{14} The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. In *Ohio v. Roberts*, the Supreme Court interpreted the Confrontation Clause to permit the admission of an unavailable witness's hearsay statements (assuming other grounds for admissibility are met) if the statement bears "adequate indicia of reliability." 448 U.S. 56, 66 (1980) (internal quotation marks omitted), *overruled by Crawford*, 541 U.S. at 42, 68-69. This interpretation of the Confrontation Clause prevailed until the Court decided *Crawford* and adopted a stricter interpretation of the right at stake. 541 U.S. at 68-69.

{15} *Crawford* observed that the text of the Confrontation Clause illustrates its purpose: combating the use of *ex parte* statements against the accused. *Id.* at 51. That text indicates the Clause's limits, as well: it only "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' " *Id.* (citation omitted). *Crawford* inferred that the term "witness" as used in the Clause applied only to a particular category of witness testimony, and not to any and every out-of-court statement—in other words, not all hearsay, only "testimonial hearsay." *Id.* at 51, 53. *Crawford* concluded that the Confrontation Clause prohibits the introduction of testimonial hearsay unless the accused has had the opportunity to cross-examine the declarant. *Id.* at 54.

{16} *Crawford* also identified "[v]arious formulations of this core class of 'testimonial' statements[:]"

> *ex parte* in-court testimony or its functional equivalent—that

> is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]

Id. at 51-52 (alteration, internal quotation marks, and citations omitted). Although the Court noted that "testimony at a preliminary hearing, before a grand jury, . . . a former trial; [or statements during] police interrogations" were all sufficient to trigger the Confrontation Clause, *id.* at 68, the Court declined to predefine any necessary criteria for determining whether a given piece of evidence is "testimonial." *See Ohio v. Clark*, ___ U.S. ___, ___, 135 S. Ct. 2173, 2179 (2015) ("[O]ur decision in *Crawford* did not offer an exhaustive definition of 'testimonial' statements.").

2. In *Davis*, the Supreme Court Held That the "Primary Purpose " for Which a Statement Is Made Determines Whether It Is Testimonial

{17} In *Davis*, the Supreme Court returned its attention to the Confrontation Clause, and articulated a more generalized rule for determining whether a statement constitutes testimonial hearsay when it does not fall within the "core class" of testimonial statements set out in *Crawford*:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822.

{18} *Davis* applied the "primary purpose" test to separate appeals, one raising a Confrontation Clause challenge to the transcript of a 911 call made by a domestic violence victim, the other challenging a "battery affidavit" executed by another victim. *Id.* at 817-20. The Court held that a domestic violence victim's statements to the 911 operator were non-testimonial because they concerned ongoing events involving a "bona fide physical threat[,]" not a description of events that had already passed. *Id.* at 827. "[V]iewed objectively," the Court reasoned, the questions asked of the victim by the 911 operator were designed to solicit answers "necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *Id.* (emphasis omitted). By contrast, the Court found that a "battery affidavit" executed by the victim of domestic violence was testimonial because it provided a "narrative of past events [that] was delivered at some remove in time from the danger [the victim] described. And after [the victim] answered the officer's questions, he had her execute an affidavit, in order, he testified, 'to establish events that have occurred previously.' " *Id.* at 831-32 (alteration and citation omitted).

{19} *Davis* delineates an important distinction between initial information gathered by law enforcement that is not necessarily motivated by a desire for later use in a criminal prosecution, and information gathered once any emergency has been resolved and the police have turned their attention to collecting evidence for use in a criminal prosecution against a known criminal perpetrator. When this latter purpose primarily motivates the activities of law enforcement or other state actors, the future-accused's right under the Confrontation Clause to test a hearsay declarant's testimony during trial is triggered.

3. The Supreme Court's Fractured Application of the "Primary Purpose" Test When Applied to Scientific Evidence and Expert Testimony Leaves Lower Courts With Little Guidance

{20} Even more recently, the Supreme Court applied *Davis*'s "primary purpose" test to chemical analysis reports in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S. Ct. 2705 (2011), and to DNA analysis in *Williams v. Illinois*, 567 U.S. ___, 132 S. Ct. 2221 (2012). Although the Supreme Court was more or less unified in its resolution of *Crawford* and *Davis* (no justice dissented from either judgment), the Court was barely able to assemble a majority of justices in *Melendez-Diaz* and *Bullcoming*. And in *Williams*, the case most directly on point, the Supreme Court was unable to obtain majority support for any one rationale analyzing the Confrontation Clause implications of an expert's reliance on hearsay statements made by an unavailable declarant in reaching her opinion.

a. *Melendez-Diaz* Holds That a Laboratory Certification That Identifies a Substance to Be Cocaine Is Testimonial Hearsay

{21} *Melendez-Diaz* concerned "certificates of analysis" containing sworn statements by laboratory analysts that substances found in bags seized from the defendant contained cocaine. 557 U.S. at 308. The Court held that the certificates fell within the core exemplars of testimonial hearsay identified in *Crawford*: although "denominated by Massachusetts law [to be] 'certificates,' [they] are quite plainly affidavits: declarations of facts written down and sworn to by the declarant before an officer authorized to administer oaths. They are incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Id.* at 310 (alteration and citation omitted) (quoting *Crawford*, 541 U.S. at 51). The Court also found that the statements failed *Davis*'s "primary purpose" test: under the Massachusetts statute providing for the admission of the test results into evidence, the "*sole purpose*" of the certificates "was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance[.]" *Id.* at 311 (internal quotation marks and citation omitted).

{22} Joined by three colleagues, Justice Kennedy dissented. He maintained that the majority had "swe[pt] away an accepted rule governing the admission of scientific evidence . . . based on" *Crawford* and *Davis*, "two recent opinions that say nothing about forensic analysts[.]" *Id.* at 330 (Kennedy, J., dissenting). Justice Kennedy reasoned that the rule allowing for the admission of scientific analysis without requiring the in-person testimony of the analyst had historical pedigree, and that by rejecting it the Court had created more problems than it solved: because so many individuals "play a role in a routine test for the presence of illegal drugs[,]" he worried that classifying all such evidence as testimonial under the Confrontation Clause would have the practical effect of preventing the prosecution from presenting any scientific evidence

whatsoever. *Id.* at 332-33 (Kennedy, J., dissenting). Justice Kennedy concluded that the Confrontation Clause's reference to "witnesses against [the defendant]" limits its application to only lay witnesses "who perceived an event that gave rise to a personal belief in some aspect of the defendant's guilt[,]" *id.* at 344 (Kennedy, J., dissenting), and that the Confrontation Clause was not intended to include "analysts who conduct scientific tests far removed from the crime and the defendant." *Id.* at 347 (Kennedy, J., dissenting).

b. *Bullcoming* Holds That a Report Analyzing Blood and Certifying Its Alcohol Content Is Testimonial Hearsay

{23} In *Bullcoming*, the state sought to admit a State Laboratory Division (SLD) Report of Blood Alcohol Analysis. 564 U.S. at ___, 131 S. Ct. at 2710. The report contained a "certificate of analyst," which contained various statements by a lab technician who was unavailable to testify at the defendant's trial. *Id.* at ___, 131 S. Ct. at 2710-12. The certificate of analyst stated that the blood-alcohol concentration (BAC) in the defendant's blood sample was 0.21 grams per hundred milliliters. *Id.* at ___, 131 S. Ct. at 2710. The certificate also affirmed that the integrity of the sample had not been compromised and that the required procedures for handling and testing the sample had been followed. *Id.* at ___, 131 S. Ct. at 2710-11.

{24} *Bullcoming* ruled the certificate implicated the Confrontation Clause because "[a] document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial." *Id.* at ___, 131 S. Ct. at 2717 (citing *Melendez-Diaz*, 557 U.S. at 311). Even though the certificate of analyst was unsworn, the laboratory analyst was required by statute to prepare the report when provided with a sample by law enforcement, certify the results of the test on a document, and further formalize the document by signing it on a form that makes reference to magistrate and municipal court rules for admitting the report into evidence. *Bullcoming*, 564 U.S. at ___, 131 S. Ct. at 2717. The Supreme Court further noted that operation of the gas chromatograph testing machine "requires specialized knowledge and training. Several steps are involved in the gas chromatograph process, and human error can occur at each step." *Id.* at ___, 131 S. Ct. at 2711. These formalities and the amount of human discretion involved in the creation of the certificate, the Supreme Court concluded, were "more than adequate to qualify [the analyst's] assertions [in the certificate] as testimonial." *Id.* at 2717; *see also State v. Huettl*, 2013-NMCA-038, ¶ 37, 305 P.3d 956 ("What has emerged as clearly impermissible is an expert's testimony which is based solely upon a non-testifying analyst's analysis and conclusions." (citing *Bullcoming*, 564 U.S. at ___, 131 S. Ct. at 2717-18)).

{25} Again writing on behalf of the dissenting justices as in *Melendez-Diaz*, Justice Kennedy denounced as a "hollow formality" the requirement that the technician who prepared the BAC report testify regarding "routine authentication elements for a report that would be assessed and explained by in-court testimony subject to full cross-examination" of the witness who had knowledge of the processes for authenticating the samples. *Bullcoming*, 564 U.S. at ___, 131 S. Ct. at 2723-24 (Kennedy, J., dissenting).

c. *Williams* Upholds the Admission of an Expert's Opinion That the Defendant's DNA Was Found on Swabs Taken From the Victim, But Does Not Offer a Controlling Rationale in Support of Its Holding

{26} In *Williams*, 567 U.S. ___, 132 S. Ct. 2221, the Supreme Court applied the Confrontation Clause to the admission of expert scientific testimony based on hearsay. The victim in *Williams* had been kidnapped and raped by an unknown assailant and was taken to a hospital. *Id.* at ___, 132 S. Ct. at 2229. There, doctors treated the victim's wounds and took a blood sample and vaginal swabs, sealed the swabs, and submitted them to a crime lab for testing. *Id.* At the crime lab, a technician performed a chemical test on the swabs, confirmed the presence of semen, resealed the kit, and placed it in a secure freezer. *Id.* Police then sent the swabs from the victim to Cellmark Diagnostics Laboratory (Cellmark), which contracted with the state to perform DNA testing. *Id.* Cellmark tested the swabs and returned a report to the police containing a male DNA profile derived from semen found on the swabs. *Id.* The police matched the profile produced by Cellmark with an earlier profile derived from a sample taken as a result of the defendant's arrest years before. *Id.* The victim identified the defendant as her assailant during a lineup, and the state charged the defendant with rape, kidnapping, and aggravated robbery. *Id.*

{27} The state did not call as witnesses the technicians at Cellmark who had actually developed a DNA profile from the samples collected from the victim's swabs. *Id.* Instead, the state called the forensic scientist who had used a chemical test to confirm the presence of semen on the vaginal swabs taken from the victim, a forensic analyst who had developed a DNA profile from the blood sample taken from the defendant when he was arrested in 2000, and a third expert who had compared this DNA profile with the profile created by Cellmark. *Id.* The third expert testified that the Cellmark profile matched the profile generated from the sample taken in 2000, stating both that it was common within the scientific community for experts to rely on records generated by other DNA experts, and that she and other experts in her field regularly relied on shipping manifests and other labels in assuming that the DNA evidence they analyzed was authentic. *Id.* at ___, 132 S. Ct. at 2230.

{28} The defendant challenged the admission of the expert's comparison of the two samples, arguing that the expert's reliance on testing performed by Cellmark's employees (who did not testify) violated the Confrontation Clause. *Id.* The state responded that the defendant's right was not violated because Defendant had an opportunity to cross-examine the analyst who had developed a profile from the 2000 sample and the analyst who had compared the results of the 2000 sample with the Cellmark profile. *Id.* at ___, 132 S. Ct. at 2231. The state also argued that under Rule 703 of the Federal Rules of Evidence, "an expert is allowed to disclose the facts on which the expert's opinion is based even if the expert is not competent to testify to those underlying facts." *Id.* at ___, 132 S. Ct. at 2231. The prosecutor concluded that "any deficiency in the foundation for the expert's opinion doesn't go to the admissibility of that testimony, but instead goes to the weight of the testimony. " *Id.* (alterations, internal quotation marks, and citation omitted). The trial court agreed and overruled the defendant's objection to the expert's comparison of the two DNA profiles. *Id.*

{29} *Williams* rejected the defendant's arguments in a split opinion with no controlling rationale. A plurality of four justices—the same four who dissented in *Melendez-Diaz* and *Bullcoming*—would have held that the expert's testimony was not hearsay (and therefore not subject to scrutiny under the Confrontation Clause) because it was not offered for the truth of the matter asserted. *Id.* at ___, 132 S. Ct. at

2236-41 (plurality opinion). This plurality reasoned as follows:

> [The] expert witness referred to the report not to prove the truth of the matter asserted in the report, i.e., that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood. Thus . . . the report was not to be considered for its truth but only for the distinctive and limited purpose of seeing whether it matched something else. The relevance of the match was then established by independent circumstantial evidence showing that the . . . report was based on a forensic sample taken from the scene of the crime.

Id. at ___, 132 S. Ct. at 2240-41 (internal quotation marks and citation omitted).

{30} In the alternative, the plurality concluded that the defendant's Confrontation Clause right was not violated even if the Cellmark DNA analysis had been admitted into evidence to prove that the Defendant's DNA had been found in vaginal swabs from the victim because the analysis "plainly was not prepared for the primary purpose of accusing a targeted individual." *Id.* at ___, 132 S. Ct. at 2243 (plurality opinion). The plurality identified two non-testimonial purposes behind the DNA evidence: (1) "catch[ing] a dangerous rapist who was still at large"; and (2) because the DNA analysis is divided among numerous technicians, "it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures[,]" not accusing the defendant of wrongdoing. *Id.* at ___, 132 S. Ct. at 2243-44. The plurality also identified three factors that minimized any likelihood that the evidence had been fabricated: First, the plurality noted that "no one at Cellmark could have possibly known that the profile that it produced would turn out to inculpate [the defendant]—or for that matter, anyone else whose DNA profile was in a law enforcement database." *Id.* Second, it is possible to detect whether the DNA sample used by Cellmark had been degraded based on the profile itself; it was not necessary to conduct an independent examination of the DNA swabs themselves. *Id.* at ___, 132 S. Ct. at 2244. Third,

> [a]t the time of the testing, [the defendant] had *not yet been identified* as *a suspect*, and there is no suggestion that anyone at Cellmark had a sample of his DNA to swap in by malice or mistake. And given the complexity of the DNA molecule, it is inconceivable that shoddy lab work would somehow produce a DNA profile that just so happened to have the precise genetic makeup of [the defendant], who just so happened to be picked out of a lineup by the victim. The prospect is beyond fanciful.

Id. at ___, 132 S. Ct. at 2244 (emphasis added).

{31} Unlike in *Melendez-Diaz* and *Bullcoming*, Justice Thomas concurred with the previously dissenting justices and thereby provided the controlling fifth vote to affirm the Illinois Supreme Court's judgment upholding Defendant's conviction. He disagreed with the plurality's first conclusion that the Cellmark report was not hearsay. *Id.* at ___, 132 S. Ct. at 2256 (Thomas, J., concurring in judgment). Justice Thomas wrote that "statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose." *Id.* at ___, 132 S. Ct. at 2257 (Thomas, J., concurring in judgment). He reasoned that

> [t]o use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.

Id. (internal quotation marks and citations omitted).

{32} Justice Thomas concluded that the Cellmark report implicated the Confrontation Clause—i.e., it was hearsay—because the state's expert's opinion was entirely reliant on assertions in the Cellmark report that "the profile [Cellmark] reported was in fact derived from [the victim's] swabs, rather than from some other source." *Id.* at ___, 132 S. Ct. at 2258 (Thomas, J., concurring in judgment). Justice Thomas nonetheless concurred in the result, because in his view "[t]he Cellmark report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained." *Id.* at ___, 132 S. Ct. at 2260 (Thomas, J., concurring in judgment).

{33} The four-justice dissent—comprised of the *Melendez-Diaz* and *Bullcoming* majority but without Justice Thomas—would have held the Cellmark report to be testimonial because it was "identical to the [blood sample report] in *Bullcoming* (and [the drug content test in] *Melendez-Diaz*) in all material respects." *Id.* at ___, 132 S. Ct. at 2266 (Kagan, J., dissenting) (internal quotation marks and citation omitted). The dissent argued that the Cellmark report was "made to establish some fact in a criminal proceeding—here, the identity of [the victim's] attacker." *Id.* (internal quotation marks and citation omitted). The dissent similarly reasoned that, like the gas chromatographical test for blood alcohol content in *Bullcoming*, "the Cellmark analysis has a comparable title; similarly describes the relevant samples, test methodology, and results; and likewise includes the signatures of laboratory officials." *Id.* at ___, 132 S. Ct. at 2266-67 (Kagan, J., dissenting).

{34} Amplifying the ideological split in Confrontation Clause analyses generated post-*Crawford* regarding scientific evidence, the plurality charged that the dissent would have no qualms with the prosecutor asking its expert whether "there [was] a computer match generated of the male DNA profile produced by Cellmark to a male DNA profile that had been identified as having originated from [the defendant.]" *Id.* at ___, 132 S. Ct. at 2236 (plurality opinion) (emphasis omitted); *see also id.* at ___, 132 S. Ct. at 2267 (Kagan, J., dissenting). But because the prosecutor had instead asked the expert whether "there [was] a computer match generated of the male DNA profile found in semen from the vaginal swabs of [the victim] to a male DNA profile that had been identified as having originated from [the defendant]," the dissent concluded that admitting the state's expert witness's testimony violated the defendant's Confrontation Clause right. *Id.* at ___, 132 S. Ct. at 2236 (plurality opinion) (emphasis omitted); *id.* at ___, 132 S. Ct. at 2267 (Kagan, J., dissenting).

4. Under *Bullcoming* and Our Supreme Court's Controlling Interpretation of *Williams*, SANE Vandiver's Absence Requires the Exclusion of Ms. Williams' Expert Opinion That Defendant's DNA Was Found on Swabs Taken From P.W.

{35} In *Navarette*, our Supreme Court read *Williams* to stand for (among others) the

following propositions: (1) "that a statement can only be testimonial if the declarant made the statement primarily intending to establish some fact with the understanding that the statement may be used in a criminal prosecution[,]" *id.* ¶ 8; (2) "even if a statement . . . does not target a specific individual, the statement may still be testimonial[,]" 2013-NMSC-003, ¶ 10; and (3) "an out-of-court statement that is disclosed to the fact-finder as the basis for an expert's opinion is offered for the truth of the matter asserted[,]" *id.* ¶ 13, and is therefore subject to exclusion if its primary purpose is testimonial.

{36} *Navarette* answered whether the Confrontation Clause "preclude[s] a forensic pathologist from relating subjective observations recorded in an autopsy report as a basis for the pathologist's trial opinions, when the pathologist neither participated in nor observed the autopsy performed on the decedent." *Id.* ¶ 1. Our Supreme Court held that the statements were subject to exclusion because the autopsy was performed as part of a homicide investigation and the pathologist who had performed the autopsy had a statutory duty to report possible deaths by homicide to law enforcement. *Id.* ¶¶ 15-17. The Court reasoned that "the medical examiner's findings as to the cause of death and as to soot, stippling, and gunpowder all went to the issues of whether [the victim's] death was a homicide and, if so, who shot him. These issues reflected directly on [the defendant's] guilt or innocence." *Id.* ¶ 17.

{37} Here, the basis for Ms. Williams' opinion that Defendant's DNA was found on P.W.'s body is SANE Vandiver's hearsay statements that the swabs came from P.W. As our Supreme Court noted, such "basis" evidence amounts to the admission of out-of-court statements to prove the truth of the matter they assert (i.e., to prove that the DNA was found on P.W.'s body) and therefore must be subjected to Confrontation Clause scrutiny. *See id.* ¶ 13. We are not persuaded by the State's argument that Ms. Williams relied on the swabs themselves, not SANE Vandiver's statements on the envelopes containing the swabs. Had Ms. Williams testified that she had found Defendant's DNA on swabs (and did not disclose that the swabs were taken from P.W.), her testimony would be irrelevant because it would not make it any more or less probable that Defendant had in fact touched P.W. *See* Rule 11-401(A) ("Evidence is relevant if it . . . has any tendency to make a fact more or less probable than it would be without the evidence[.]"). It is Ms. Williams' reliance on the statements identifying P.W. as the source of the swabs that supplies relevance to Ms. Williams' expert testimony. Without SANE Vandiver's statements linking the swabs Ms. Williams tested to the examination of P.W. (and the portions of P.W.'s body on which a swab was used), Ms. Williams' testimony would be that Defendant's DNA was found on various swabs of unknown origin.

{38} The context of SANE Vandiver's examination of P.W. leaves no doubt that the statements were made with the primary purpose of establishing a fact—that Defendant's DNA was found on P.W.—for use in a future criminal proceeding against Defendant. *See Navarette*, 2013-NMSC-003, ¶ 8 ("[A] statement can only be testimonial if the declarant made the statement primarily intending to establish some fact with the understanding that the statement may be used in a criminal prosecution.") First, P.W. had already identified Defendant as the one who touched her inappropriately before she was examined by SANE Vandiver, so it cannot be argued that the swabs were used in order to identify and apprehend P.W.'s unknown, dangerous assailant. Second, because P.W. was not in need of emergency medical treatment, there is no basis to conclude that the swabs were taken in "surrounding circumstances" that suggest a nontestimonial primary purpose. *See State v. Mendez*, 2010-NMSC-044, ¶¶ 37-39, 148 N.M. 761, 242 P.3d 328 (holding that a hearsay statement made to a SANE by a victim who testifies at trial is admissible under Rule 11-803(4) NMRA based upon the statement's medical purpose despite the otherwise primarily testimonial purpose of a SANE examination). Third, as Ms. Monahan testified, the "primary purpose" of the SANE kits was to create reliable, consistent DNA evidence for testing and use in future criminal prosecutions. As was the case with the medical examiner in *Navarette*, SANE Vandiver would have reasonably expected that her collection of swabs from P.W. and her placement of those swabs in envelopes labeled "vagina," and "anus," all go to the issue of whether Defendant improperly touched P.W., and therefore "reflect[] directly on [Defendant's] guilt or innocence." 2013-NMSC-003, ¶ 17.

{39} In recently addressing nearly identical circumstances in *Commonwealth v. Jones*, 37 N.E.3d 589 (Mass. 2015), the Supreme Judicial Court of Massachusetts was asked whether the Confrontation Clause permitted "the [c]ommonwealth to introduce, through the testimony of an expert witness who was not present when the victim's 'rape kit' examination was performed, evidence concerning how the various swabs that the expert tested were collected." *Id.* at 592. *Jones*, like this case, involved allegations that the defendant had touched the alleged victim's genitals. *Id.* at 594. And as is the case here, the commonwealth in *Jones* sought to prove the defendant's guilt by offering expert opinion testimony that the defendant's DNA was found in the area surrounding the alleged victim's genitals. *Id.* Finally, like the State here, the commonwealth in *Jones* did not offer at trial the testimony of the nurse who personally examined the alleged victim. *Id.* at 595. Rather, the trial court "permitted the [c]ommonwealth's first expert witness, who was not present during the examination . . . to testify to her 'understanding' of how the three swabs had been collected." *Id.* Like Ms. Williams here, the commonwealth's expert's "understanding" of how the three swabs were collected was "based . . . on information the expert learned from the 'evidence collection inventory list' purportedly completed by the nurse who conducted the 'rape kit' examination." *Id.*

{40} Citing the same Supreme Court authority our Supreme Court in *Navarette* applied and we apply today, *compare Navarette*, 2013-NMSC-003, ¶¶ 7-21, *with Jones*, 37 N.E.3d at 596, 600, the *Jones* court found that the defendant's Confrontation Clause rights were violated because the statements identifying various swabs and the inventory list affixed to the "rape kit" were in essence "a series of factual statements concerning how the various swabs were collected." *Jones*, 37 N.E.3d at 596. The court reasoned that these statements were "plainly testimonial" because " 'a reasonable person in the speaker's position would anticipate his findings and conclusions being used against the accused in investigating and prosecuting a crime[.]' " *Id.* at 597 (alterations omitted) (quoting *Clark*, ___U.S. at ___, 135 S. Ct. at 2181). Applying both the United States and our Supreme Court's controlling interpretations of the Confrontation Clause, the same logic applies in this case with equal force. SANE Vandiver's statements on the labels affixed to the kit are testimonial hearsay because SANE Vandiver would have reasonably understood those statements' sole purpose to be for use in investigating and prosecuting criminal charges against Defendant. Allowing Ms. Williams

to testify that Defendant's DNA had been found on P.W. based on inferences from labels on the examination kit prepared by SANE Vandiver "would be akin to allowing a chemist to testify to the chemist's 'understanding,' based on information relayed to the chemist in a report drafted by nontestifying police officers, that a substance later determined to be cocaine had been found in the defendant's trouser pocket." *Jones*, 37 N.E.3d at 598.

{41} In support of its argument that introduction of Ms. Williams' expert testimony would not violate the Confrontation Clause, the State cites *Fencher v. State*, 931 So. 2d 184, 186-87 (Fla. Dist. Ct. App. 2006), which held that the admission of an expert's analysis of DNA found on a rape kit collected by an unavailable SANE nurse did not violate the defendant's Confrontation Clause right. But *Fencher* was decided before the Supreme Court had considered the Confrontation Clause implications of scientific evidence and expert testimony in *Melendez-Diaz*, *Bullcoming*, and *Williams*. Moreover, *Fencher*'s holding is based on the rationale that the SANE nurse "merely procured the samples[;]" while others secured a chain of custody and provided the basis for the expert's conclusion that Defendant's DNA was found on the victim. 931 So. 2d at 187. *Bullcoming* expressly rejects this rationale; the SANE nurse who collects samples, like a police officer who notes the speed of a car using a radar gun or a technician who operates a gas chromatograph machine, is not a "mere scrivener." 564 U.S. at ___, 131 S. Ct. at 2714.

CONCLUSION

{42} The relevance and admissibility of Ms. Williams' expert testimony that Defendant's DNA was found on P.W. is based entirely on her reliance on testimonial hearsay identifying P.W., and locations of her body, as the source of evidence collected upon the swabs Ms. Williams later tested. Because the declarant of those statements—SANE Vandiver—is unavailable to testify, allowing Ms. Williams to offer her opinion to the jury would violate Defendant's rights under the Confrontation Clause of the Sixth Amendment. We therefore affirm the district court's order granting Defendant's motion to suppress evidence. The case is remanded to the district court for further proceedings.

{43} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
LINDA M. VANZI, Judge

Protecting Privacy to Enhance Safety

The Volunteer Attorney Program and the New Mexico Coalition Against Domestic Violence are co-hosting a CLE entitled **"Protecting Privacy to Enhance Safety"** from **4:30 pm – 5:30 pm** on **August 22, 2016** at the State Bar of New Mexico (5121 Masthead St. NE, Albuquerque). The CLE (1.0 G pending) will include information on the New Mexico Subpoena Defense Project, including how attorneys can help domestic violence programs respond to and quash subpoenas seeking confidential information. The CLE will be presented by Antoinette Sedillo López, the Executive Director of Enlace Comunitario; Alexandria Taylor, the Executive Director of Valencia Shelter Services; Lisa Weisenfeld, the Policy Coordinator for the New Mexico Coalition Against Domestic Violence; and Catherine Caty Butcher, Esq.

The CLE is free for Subpoena Defense Project attorneys and those who agree to assist with a Subpoena Defense Project case.
If you would like to attend this CLE, please contact Aja Brooks at (505) 814-5033 or ajab@nmlegalaid.org.

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Staff counsel for Farmers Insurance Exchange and Affiliates is seeking a Trial Secretary II with at least two (2) years of experience in personal injury law. Must be detail oriented, work independently, handle high volume and assist the attorneys with trial preparation. Must be proficient in ProLaw, Microsoft Word and Microsoft Windows. Excellent benefits, competitive salary and an enjoyable working environment. Spanish speaking desired, but not required. Please e-mail or fax your resume to: Kathy.lopez@farmers.com Fax No.: (505) 246-2924

Request for Applications City of Albuquerque Legal Secretary Position

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.

Admissions Administrator

The New Mexico Board of Bar Examiners seeks an Admissions Administrator to work under the immediate supervision of the Executive Director and at the direction of the Board in administering bar admissions for New Mexico. The qualified candidate will have strong written and verbal communication skills, attention to detail, and ability to work well with diverse individuals. The duties of the Admissions Administrator include dissemination of information to applicants seeking licensure as New Mexico attorneys, receiving and assisting in evaluating applications for admission, maintaining applicant files, participating in bar exam organization and administration, and other duties as required by the Board and its Executive Director. For the complete job description, visit http://nmexam.org/about-2/hiring-admissions-administrator/.

Experienced Paralegal/ Legal Assistant

Aldridge, Hammar, Wexler & Bradley, P.A., an uptown law firm seeks full-time, experienced Paralegal/Legal Assistant. The candidate must have at least three years' experience, excellent drafting and editing skills, and be a team player. This full-time position is eligible for health insurance, dental, paid time off, retirement plan, and other rewarding benefits. Salary DOE. E-mail resume, cover letter, and references to Manager@ABQLawNM.com. All replies will be maintained as confidential.

Services

Experienced Paralegal

Experienced paralegal available for civil litigation cases, working from my own office. Excellent references. civilparanm@gmail.com.

Office Space

Journal Center Office Suite Available

9128 sf available, 5131 Masthead, Journal Center, next to NM State Bar. Abundant parking, common area, gym, locker room, track & lunchroom onsite. Beautiful building and surroundings, many amenities. Contact Jim Moore, Property Manager, 505-681-0873

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$829.17 PER MONTH PER 1000 sq. ft. of PROFESSIONAL OFFICE SPACE FULL SERVICE. Completely renovated, beautifully landscaped, 10 ft. ceilings, copious amount of parking. There are 5 Suites from 1,080 sq. ft. to a total of 8,585 sq. ft. available. Open floor plans. Ready for occupancy by September 1. Day Properties 505-328-3726. Close to major thoroughfares and I-40.

Office Furniture

Office Furniture

Atkinson & Kelsey, P.A. remodeling sale: All existing furniture identified for sale has been professionally appraised. Six (6) Danner Antique Oak Lawyer's Stacking Bookcases. Each 80" x 37" x 15". $3600 for the set; Two (2) Global Wernicke Co. 5 shelf stacking bookcases, Pattern 113, 86" x 34" x 13" for $500 each; One (1) Macey two shelf, glass/oak Lawyer's Bookcase, 40" x 34" x 12" for $200; One (1) Global Wernicke Co. 4 shelf glass/oak Lawyer's bookcase, Pattern 113, 64" x 34" x 13.5" for $1000; One (1) Antique three shelf oak Lawyer's stacking bookcase (missing base section) 42" x 34" x 9.5" for $600; One (1) antique Lawyer's stacking bookcase 81" x 34" x 12" for $500; One (1) antique Lawyer's stacking bookcase 65" x 34" x 12" for $1200; Three (3) Global Wernicke antique, oak Lawyer's Stacking Bookcases, 82" x 37" x 14.5" for $3600 for set; Two (2) Global Wernicke two shelf Lawyer stacking bookcases 39" x 34" x 12" for $1000 for the pair; One (1) wood Alma desk; 2 pedestal with center drawer for $750; Three (3) antique red mahogany Boling Captain's chairs for $125 each; Four (4) maple captain's chairs for $40 each; One (1) conference table with glass protection cover with thirteen padded office chairs with arms; One (1) LexMark copier xS734 de; Miscellaneous desks, chairs, credenzas. Please contact Virginia R. Dugan at 883-3070 to view furniture.

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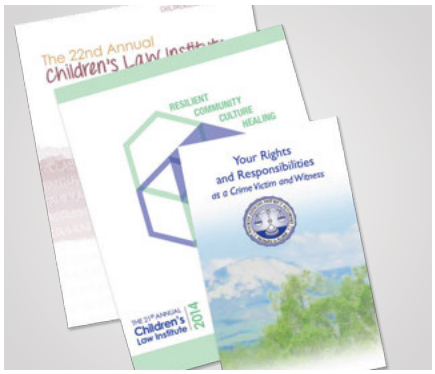

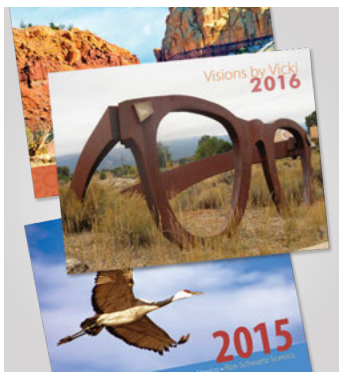

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