BAR BULLETIN
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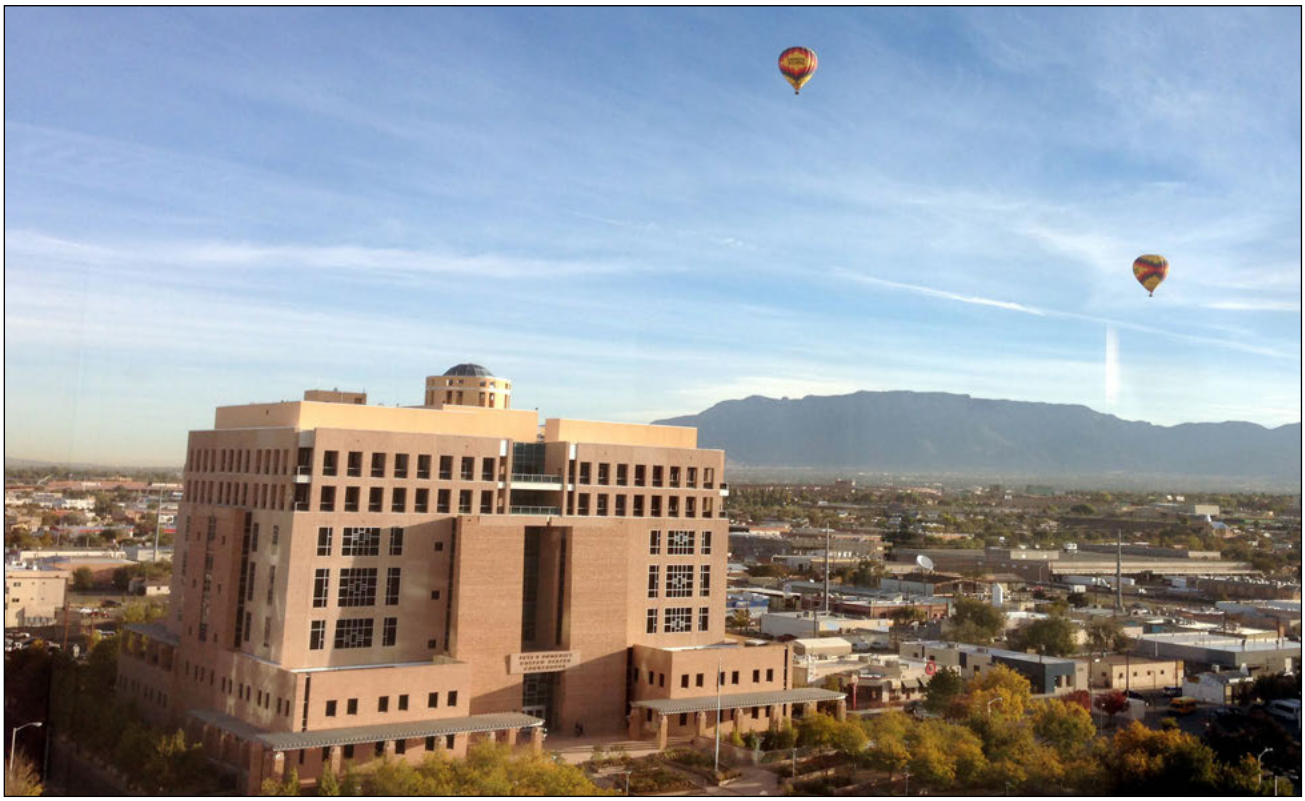

Balloons Over Federal Court, by Rip Harwood (see page 3)

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About the Cover Image: *Balloons Over Federal Court*
Rip Harwood is a long-time Albuquerque civil defense practitioner who enjoys adventure, travel and photography. For more information, email ripharwood@aol.com.

Notices

Court News

Supreme Court of New Mexico

Proposed Amendments for Comment

The Children's Court Rules Committee is considering whether to recommend for the Supreme Court's consideration emergency, out-of-cycle approval of proposed amendments to the Children's Court Rules and Forms. If approved, the amendments would coincide with the effective date of recently approved amendments to the federal regulations that implement the Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963. See Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23). The proposed amendments can be viewed in the Sept. 21 *Bar Bulletin* (Vol. 55, No. 38). Those who want to comment on the proposed new and amended rules and form before the committee submits its final recommendation to the Supreme Court, may do so online at http://nmsupremecourt.nmcourts.gov/ or by sending written comments by mail, email or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, New Mexico 87504 0848
nmsupremecourtclerk@nmcourts.gov
505 827 4837 (fax)

Comments must be received by the Clerk on or before Oct. 3. Note that any submitted comments may be posted on the Supreme Court's website for public viewing.

Board of Bar Examiners

Reciprocal Admission Grows

The Supreme Court of the State of New Mexico has added four new states to the list of jurisdictions with which our bar shares reciprocal admission: New Jersey, New York, North Carolina and West Virginia. The number of states to which experienced New Mexico attorneys may apply without taking the bar exam is now 36, plus the District of Columbia. For more information on reciprocal admission, including links to other states' requirements, visit www.nmexam.org/reciprocity/.

New Mexico Compilation Commission

New Manual Now Available

The New Mexico Compilation Commission announces the availability of the official *2016 New Mexico Criminal and Traffic Law Manual*. In addition to a new lighter weight, exclusive to this official version are the section numbers of new or amended statutes from the official *New Mexico Statutes Annotated 1978*, a table of sections affected by 2016 legislation and Chapter 30, NMSA 1978 Table of Chargeable Criminal Offenses. Pertinent official NMRA excerpts from the Rules of Criminal Procedure, Evidence, and Forms across courts are included. Order by calling 505-827-4821 or 866-240-6550. The cost is $31 for private practitioners and $29 for government attorneys.

Professionalism Tip

With respect to parties, lawyers, jurors, and witnesses:

I will be courteous, respectful and civil to parties, lawyers, jurors and witnesses. I will maintain control in the courtroom to ensure that all proceedings are conducted in a civil manner.

First Judicial District Court

New Tierra Amarilla Phone Numbers

Effective Oct. 3, the Rio Arriba County Court in Tierra Amarilla will have new phone numbers as shown below:

Judge Jennifer L. Attrep, Division V:
phone: 505-455-8325,
fax: 505-455-8323

Rio Arriba County Court Clerk's Office
phone: 505-455-8335,
fax: 505-455-8280

Second Judicial District Court

Exhibit Destruction

Pursuant to 1.21.2.6.17 Records Retention and Disposition Schedules-Exhibits, the Second Judicial District Court will destroy exhibits filed with the Court, the Domestic Matters/Relations and Domestic Violence cases for the years of 1999–2002 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through Oct. 1. Individuals who have cases with exhibits should verify exhibit information with the Special Services Division, at 505-841-6717, from 8 a.m.–5 p.m., Monday–Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by order of the Court.

Sixth Judicial District Court

Judicial Applicants

Two applications were received in the Judicial Selection Office as of 5 p.m., Sept. 14, for the pending judicial vacancy in the Sixth Judicial District Court due to the retirement of Hon. Daniel Viramontes (effective Aug. 26). The District Judicial Nominating Commission met on Sept. 22 at the Luna County District Court in Deming to evaluate the applicants for this position. The Commission meeting was open to the public and those who wanted to make a public comment were heard. The names of the applicants in alphabetical order are:

Edward Lee Hand
Jarod K. Hofacket

Bernalillo County Metropolitan Court

Mediation's 30th Anniversary Celebration

Members of the legal community and the public are cordially invited to a reception celebrating Metro Court's Mediation Division's 30th year of operation. The event will take place from 5:30-7:30 p.m. on Oct. 13 in Metro Court's Rotunda. Join the court as it takes a look back: honoring those who spearheaded the program, recognizing those who have given countless hours to the program's mission and reflecting on the invaluable service mediation provides to the community. R.S.V.P. to Camille Baca at metcrb@nmcourts.gov or 505-841-9897 by Oct. 3.

U.S. District Court, District of New Mexico

Magistrate Judge Appointment

The Judicial Conference of the U.S. has authorized the appointment of a full-time U.S. magistrate judge for the District of New Mexico at Las Cruces. The current annual salary of the position is $186,852.

The term of office is eight years. The full public notice and application forms for the magistrate judge position are posted in the U.S. District Court Clerk's Office of all federal courthouses in New Mexico, and on the Court's website at www.nmd.uscourts.gov. Application forms may also be obtained by calling 575-528-1439. Applications must be received by Sept. 30. All applications will be kept confidential unless the applicant consents to disclosure.

Proposed Amendments to Local Rules of Criminal Procedure

Proposed amendments to the Local Rules of Criminal Procedure of the U.S. District Court for the District of New Mexico are being considered. The proposed amendments apply to D.N.M.LR-Cr. 32, Sentencing and Judgment. A "redlined" version (with proposed additions underlined and proposed deletions stricken out) and a clean version of these proposed amendments are posted on the Court's website at www.nmd.uscourts.gov. Members of the bar may submit comments by email to localrules@nmcourt.fed.us or by mail to U.S. District Court, Clerk's Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, Attn: Local Rules. Comments must be submitted by Sept. 30.

Reappointment of Incumbent United States Magistrate Judge

The current term of office of U.S. Magistrate Judge Gregory B. Wormuth is due to expire on May 17, 2017. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term. The duties of a magistrate judge in this court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be addressed as follows: U.S. District Court, CONFIDENTIAL—ATTN: Magistrate Judge Merit Selection Panel, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102. Comments must be received by Oct. 28.

State Bar News

Attorney Support Groups

- Oct. 3, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the first Monday of the month.)
- Oct. 10, 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. 17, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)

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

Alternative Methods of Dispute Resolution Committee

APD/Community Relations Presentation

The City of Albuquerque ADR Office has been tasked with multiple roles in the ongoing effort to improve relations between APD and the community. The ADR Committee and ADR Coordinator and Assistant City Attorney Tyson Hummell invite members of the legal community to attend the presentation from noon-1 p.m., Oct. 27, at the Second Judicial District Court 3rd Floor Conference Room. The presentation will explore two fundamental aspects of this effort: the previous year-long Albuquerque Collaborative on Police Community Relations and the ongoing Officer/Civilian Mediation Program. There will be ample time for questions and discussion. Attendees should expect an interactive session. R.S.V.P. with Breanna Henley at bhenley@nmbar.org. Lunch is provided. The ADR Committee will meet following the presentation from 1-1:30 p.m.

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

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

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.

Committee on Women and the Legal Profession

#LawMom Luncheon

The Committee on Women and the Legal Profession invites all State Bar members to have lunch and listen to a panel discussion about general issues that parent-attorneys face on a day to day basis. Panelists include attorneys Quianna Salazar-King, Elizabeth Garcia, Patricia Galindo and Michelle Hernandez. The luncheon is from noon-1 p.m., Oct. 19, at the Hispano Chamber of Commerce, located at 1309 4th St SW in Albuquerque. R.S.V.P.s are appreciated but not required. Contact Zoe Lees at zel@modrall.com to indicate your attendance.

Historical Committee

Jewish History in New Mexico

Long before statehood in 1912, Jewish settlers made their homes in all corners of the high desert. Along the way, community members built institutions that influenced many New Mexico communities. Join Naomi Sandweiss, author of *Jewish Albuquerque* and past president of the New Mexico Jewish Historical Society, from noon-1 p.m., Oct. 14, at the State Bar Center to learn more about the rich history of Jewish involvement in New Mexico and some of the fascinating personalities who participated. Lunch will be available at 11:30 a.m. R.S.V.P. with Breanna Henley at bhenley@nmbar.org.

Practice Sections

Proposed In-house Counsel Section

The State Bar seeks input from members interested in an in-house counsel practice section to serve the needs of attorneys who focus their practice on a single or small group of corporate clients, or who serve as in-house counsel for a corporation, government, non-profit or business entity. The section will pledge to promote professionalism, excellence, and understanding and cooperation among those attorneys engaged in this area of practice. The section would be committed to addressing the professional interests of in-house counsel by informing members about issues of particular interest to them, identify and share best practices through various forms of information sharing, and offering social and professional networking opportunities. Those who are interested should email Breanna Henley at bhenley@nmbar.org.

Prosecutors Section

Annual Award Open

The Prosecutors Section recognizes prosecutorial excellence through its annual awards. Awards for 2016 will be presented in the following categories: child abuse (Homer Campbell Award), DWI, drugs, white collar, domestic violence, violent crimes (excluding domestic violence and child abuse cases) and children's court prosecutor. For detailed award criteria and nomination procedures, visit www.nmbar.org/prosecutors. Nominations may be made by anyone and additional letters of support are welcome. Submit nominations to Breanna Henley at bhenley@nmbar.org by Oct. 14.

UNM

Law School Alumni/ae Association

'Supreme Energy' CLE with Max Minzner of the FERC

Three U.S. Supreme Court cases this year consider the federal and state jurisdictional boundary in energy regulation. Federal Energy Regulatory Commission General Counsel Max Minzner will discuss these cases and their implication for the future of energy law and policy in "Supreme Energy: The 2015-2016 FERC Trilogy" (1.0 G) at 5:15 p.m. on Sept. 29 at the UNM Law School. The event is free and open to the public. A reception will follow the presentation. Free parking is available in the Law School "L" parking lot. Early registration is advised and is available online at lawschool.unm.edu or by calling Laura Burns at 505-277-3253. The event is co-sponsored by the UNM School of Law Natural Resources and Environmental Law Program and the Utton Transboundary Resource Center. The reception is sponsored by the State Bar Natural Resources, Energy and Environmental Law Section.

Law Library

Hours Through Dec. 18

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
Holiday Closures	
Nov. 24–25 (Thanksgiving)	

Other Bars

Albuquerque Bar Association

'May It Peeve the Court' Luncheon and CLE

Justice Richard C. Bosson (ret.) will present "May It Peeve the Court" (1.0 G) at the Albuquerque Bar Association's membership luncheon on Oct. 4 at the Embassy Suites Hotel. The luncheon and CLE will be from 11:30 a.m.–1 p.m. (arrive at 11 a.m. for networking). For more information or to register, visit www.abqbar.org.

Albuquerque Lawyers Club

'Wacky World of Startups' Luncheon

Pat McNamara will present "The Wonderful Wacky World of Startups—What It Is, Why You Should Care" at noon on Oct. 5 at Seasons Rotisserie and Grill in Albuquerque. As it turns out, startups aren't just millennials sitting in mom's basement programming the latest dating app. In order to stay relevant and competitive, organizations like GE, Ford and the U.S. Navy are all using tactics similar to startups. For more information, visit www.albuquerquelawyersclub.com. Join the Club for $250 per year which includes nine lunches.

New Mexico Black Lawyers Association

Immigration Law CLE

The New Mexico Black Lawyers Association invites members of the legal community to attend "Immigration and Deportation" (5.0 G, 1 EP) on Nov. 18 from 8 a.m.–4:30 p.m. at the State Bar Center in Albuquerque. Registration is $225 and lunch is included. For more information, or to register online, visit www.newmexicoblacklawyersassociation.org. The deadline to request a refund is Nov. 11.

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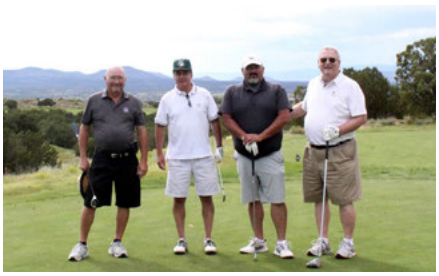
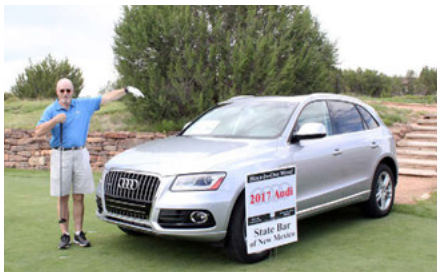
2016 Annual Meeting—Bench & Bar Conference

Annual Meeting Golf Tournament

It was a picture-perfect day for the 2016 Annual Meeting Golf Tournament at the Club at Las Campanas on Thursday, Aug. 18.



Although everyone played for fun, Ed Zendel, Bob Becker, Larry DeYapp and Logan Davidson took home a prize as the winning team. Mike Wagner won closest to the pin and Mary Ann Burmester had the longest drive.



Bar Commissioner Wesley Pool hoped he would lay claim to the hole-in-one prize, a 2017 Audi Q5 provided by Mercedes-Benz of Albuquerque. Unfortunately, no one made the winning shot, but there's always next year!

Opening/Welcome Reception

Attendees, guests, speakers and exhibitors gathered in the Prefunction Foyer on Thursday Evening for the Opening/Welcome Reception. State Bar President J. Brent Moore joined UNM School of Law Deans Sergio Pareja and Alfred Mathewson for a short thank you to the New Mexico legal community.

Bar Commissioner Jerry Dixon catches up with Craig and Donna Orraj.

Brent and Mary Ann Moore

Pueblo of Pojoaque Gov. Joseph Talachy addressed attendees who got a special treat when the Pueblo's world-renowned Hoop Dancers performed.

Past Presidents

From left, J. Brent Moore, William K. Stratvert, Arturo Jaramillo, Hon. Alan Torgerson, Charles Vigil, John F. McCarthy Jr., Robert N. Hilgendorf, Erika E. Anderson, Dan O'Brien, Hon. Henry Alaniz, Drew Clouter, Virginia Dugan, Craig Orraj and Jessica Perez

Saturday CLE Programming

Plenary: If You Post, You May Pay…Ethically

Stuart I. Teicher, "The CLE Performer," kicked off Saturday morning with a lively presentation on ethical issues in social media. He began by informing attendees that social media gives lawyers new ways to get into trouble. Teicher provided examples of ways attorneys can develop their technology-related ethics reflex, like by going on the internet and reviewing your profiles and regularly "checking the chatter" in regard to public or client comments.

Plenary: The Rise of 3-D Technology: What Happened to IP?

3-D printers are used for a wide range of purposes, as small as a cell phone antenna and as large as the manufacturing of a car. Jeffrey H. Albright, Dr. Bradley Jared and Jennifer M. Hogans discussed the consequences that come with this incredible technology. Recently, TSA authorities at the Reno-Tahoe airport found a loaded 3-D plastic gun in luggage. The increased potential for espionage and breaches of cyber security, along with the exponential growth in patents are other current issues.

Plenary: The New Mexico Legal System: Perspectives from the Bench and Bar

Attendees present for the final plenary session of the 2016 Annual Meeting participated in an open discussion with panelists Judge Carl J. Butkus of the Second Judicial District Court, Judge Albert J. Mitchell Jr. of the 10th Judicial District Court, President-elect Scotty A. Holloman, Justice Edward L. Chávez and Bar Commissioner Ernestina R. Cruz. The group discussed the state of the judiciary, bench and bar relations, the valuable role legal professionals play within the New Mexico courts and the administration of justice and the current issues and the future of the legal profession.

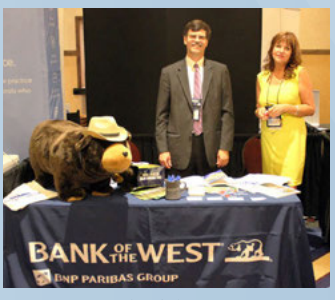
Congratulations to Bean and Associates Professional Court Reporting which won the first annual Exhibitor Spirit Contest

Exhibitors and Sponsors

Almost 40 businesses and vendors had the opportunity to connect with the legal community at the Annual Meeting. The event would not be possible without the generous contributions of these organizations and our sponsors.

UNM School of Law

Arbonne



Bank of the West

To view 2016 Sponsors and Exhibitors and more photos of the Annual Meeting, visit www.nmbar.org/AnnualMeeting.

Notice of Vacancies on Supreme Court Committees

The Supreme Court of New Mexico is seeking applications to fill vacancies on the following Supreme Court committees:

- Appellate Rules Committee
- Board Governing the Recording of Judicial Proceedings (reporter position)
- Board of Bar Examiners
- Board of Legal Specialization
- Children's Court Rules Committee (respondent's attorney and judge positions)
- Code of Professional Conduct Committee
- Courts of Limited Jurisdiction Rules Committee
- Disciplinary Board
- Domestic Relations Rules Committee
- Minimum Continuing Legal Education Board
- New Mexico Commission on Access to Justice
- Rules of Civil Procedure Committee
- Rules of Evidence Committee
- Statewide Alternative Dispute Resolution Commission

Unless otherwise noted above, all licensed New Mexico attorneys are eligible to apply. Anyone interested in volunteering to serve on one or more of these committees may apply by sending a letter of interest and resume by mail to Joey D. Moya, Chief Clerk, PO Box 848, Santa Fe, New Mexico 87504-0848, by fax to 505-827-4837, or by email to nmsupremecourtclerk@nmcourts.gov. The letter of interest should describe the applicant's qualifications and may prioritize no more than 3 committees of interest.

The deadline for applications is Friday, Oct. 21.

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

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New Mexico Criminal Defense Lawyers Association

'Lawyers, Guns and Money' CLE

Warren Zevon's classic rock song comes to life, for your educational benefit, in one information-filled CLE. Join the New Mexico Criminal Defense Lawyers Association in Roswell this fall for the "Lawyers, Guns & Money" (6.0 G, 1.0 EP) seminar on Oct. 14. Learn the ins and outs of touch DNA and guns, challenging ballistics, gun trusts and more. Civil attorneys welcome. To register for this seminar, visit www.nmcdla.org.

New Mexico Defense Lawyers

Annual Awards Luncheon

The New Mexico Defense Lawyers Association will honor two attorneys at its Annual Awards Luncheon and CLE event on Oct. 14 at the Hotel Andaluz in Albuquerque. The 2016 Defense Lawyer of the Year Award will be presented to Lee M. Rogers, Jr. of Atwood Malone Turner & Sabin, PA, and the 2016 Young Lawyer of the Year Award will be presented to Corinne L. Holt of Allen Shepherd Lewis & Syra, PA. The luncheon celebration will be followed by a CLE program featuring nationally recognized speaker and attorney Christopher W. Martin of Martin, Disiere, Jefferson & Wisdom, LLP, on the topic "Jury Selection in the 21st Century: Millennials, Misfits and More." A panel of distinguished judges will then discuss ethics and professionalism topics relevant to jury selection and civil defense practice. The event will conclude with a reception. For more information and registration, visit www.nmdla.org or call 505-797-6021.

Other News

Center for Civic Values

Gene Franchini High School Mock Trial Competition Needs Judges

The Gene Franchini High School Mock Trial Competition needs judges. Registration is now open for judges and administration volunteers for the qualifier competition (Feb. 17–18, 2017) and state competition (March 17–18, 2017). Mock trial is an innovative, hands-on experience in the law for high school students of all ages and abilities. Every year hundreds of New Mexico teenagers and their teacher advisors and attorney coaches spend the better part of the school year researching, studying and preparing a hypothetical courtroom trial involving issues that are important and interesting to young people. Sign up at www.civicvalues.org. For more information, contact Kristen Leeds at the Center for Civic Values at 505-764-9417 or kristen@civicvalues.org.

Santa Fe Neighborhood Law Center

Law and Policy for Neighborhoods CLE

Join the Santa Fe Neighborhood Law Center for it's annual CLE "Law and Policy for Neighborhoods" (10.0 G, 2.0 EP), Dec. 8–9 at the Santa Fe Convention Center. Featured speakers include Chief Justice Charles W. Daniels and recently retired Justice Richard C. Bosson. A discounted rate for early registration is available through Nov. 25. A free continental breakfast and box lunch will be provided both days on site for CLE attendees and faculty. For more information or to register, visit www.sfnlc.com/.

Board of Bar Commissioners Election Notice 2016

Pursuant to Supreme Court Rule 24-101, the Board of Bar Commissioners is the elected governing board of the State Bar of New Mexico. Candidates must consider that voting members of the Board of Bar Commissioners are required to do the following:

Duties and Requirements for Board of Bar Commissioner Members:

- Attend all Board meetings (up to six per year), including the Annual Meeting of the State Bar.
- Represent the State Bar at local bar-related meetings and events.
- Communicate regularly with constituents regarding State Bar activities.
- Promote the programs and activities of the State Bar.
- Participate on Board and Supreme Court committees.
- Evaluate the State Bar's programs and operations on a regular basis.
- Ensure financial accountability for the organization.
- Support and participate in State Bar referral programs.
- Establish and enforce bylaws and policies.

Notice is hereby given that the 2016 election of eight commissioners for the State Bar of New Mexico will close at noon, Dec. 1. Nominations to the office of bar commissioner shall be made by the written petition of any 10 or more members of the State Bar who are in good standing and whose principal place of practice is in the respective district. Members of the State Bar may nominate and sign for more than one candidate. (See the nomination petition on the next page.)

The following terms will expire Dec. 31, 2016, and need to be filled in the upcoming election. All of the positions are three-year terms, except as noted, and run from Jan. 1, 2017–Dec. 31, 2019.

First Bar Commissioner District

Bernalillo County
Two positions currently held by:
- Joshua A. Allison
- Mary Martha Chicoski*

Third Bar Commissioner District

Los Alamos, Rio Arriba, Sandoval and Santa Fe counties
Two positions currently held by:
- Carla C. Martinez**
- Carolyn A. Wolf

Fourth Bar Commissioner District

Colfax, Guadalupe, Harding, Mora, San Miguel, Taos and Union counties
One position currently held by:
- Ernestina R. Cruz

Sixth Bar Commissioner District

Chaves, Eddy, Lee, Lincoln and Otero counties
One position currently held by:
- Erinna M. Atkins (one-year term)

Seventh Bar Commissioner District

Catron, Dona Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties
Two positions currently held by:
- Roxanna M. Chacon
- Frank N. Chavez

*Ineligible to seek re-election
**Not seeking re-election

Send nomination petitions to:
Executive Director Joe Conte
State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199-2860
jconte@nmbar.org

Petitions must be received by 5 p.m., Oct. 24

Direct inquiries to 505-797-6099 or jconte@nmbar.org.

Nomination Petition for Board of Bar Commissioners

We, the undersigned, members in good standing of the State Bar of New Mexico, nominate _____, whose principal place of practice is in the _____Bar Commissioner District, State of New Mexico, for the position of commissioner of the State Bar of New Mexico representing the _____Bar Commissioner District.

Submitted_____, 2016

(1) _____ _____
Signature

_____ _____
Type or Print Name *Address*

(2) _____ _____
Signature

_____ _____
Type or Print Name *Address*

(3) _____ _____
Signature

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Type or Print Name *Address*

(4) _____ _____
Signature

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Type or Print Name *Address*

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Signature

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(6) _____ _____
Signature

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Type or Print Name *Address*

(7) _____ _____
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Type or Print Name *Address*

(8) _____ _____
Signature

_____ _____
Type or Print Name *Address*

(9) _____ _____
Signature

_____ _____
Type or Print Name *Address*

(10) _____ _____
Signature

_____ _____
Type or Print Name *Address*

Legal Education

September

26–29 Bankruptcy From a Government Perspective
19.8 G, 1.5 EP
Live Seminar, Santa Fe
National Association of Attorneys General
www.naag.org

29 Estate Planning for Liquidity
1.0 G
Teleseminar
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

29 Supreme Energy: The 2015-2016 FERC Trilogy
1.0 G
Live Seminar, Albuquerque
UNM School of Law
505-277-3253

30 Powerful Non-Defensive Communication: Cutting Edge Tools for Collaborative Law Professionals
6.7 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

October

1 New Mexico American College of Trial Lawyers Chapter Seminar
2.0 G, 1.0 EP
Live Program
American College of Trial Lawyers
949-752-1801

1 Practical and Ethical Aspects of Law & Technology—The Medical Expense Battle: Admissibility of Amounts Billed vs. Amounts Paid
2.0 G, 1.0 EP
Live Seminar, Santa Fe
American College of Trial Lawyers
mark@klecanlawnm.com

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

3 Negotiating Contracts on Tribal Lands
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

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

5 Attorneys Information Exchange Group 2016 Fall Conference
14.0 G
Live Seminar, Santa Fe
Attorneys Information Exchange Group
www.aieg.com

5 New Mexico Film Industry and Film Tax Credit
1.0 G, 0.5 CPE
Live Seminar, Albuquerque
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

5 Ahead of the Curve: Risk Management for Lawyers
3.0 G
Live Seminar, Albuquerque
CNA/Health Agencies
www.healthagencies.com/lawyers/cna-seminars/

6 Ahead of the Curve: Risk Management for Lawyers
3.0 G
Live Seminar, Santa Fe
CNA/Health Agencies
www.healthagencies.com/lawyers/cna-seminars/

6 2016 New Mexico Health Law Symposium
5.9 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 Employment and Labor Law Institute
6.5 G
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.*

October

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

14 Lawyers, Guns & Money
6.0 G, 1.0 EP
Live Seminar, Roswell
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

14 Navajo Law Seminar
6.0 G, 2.0 EP
Live Seminar, Albuquerque
Sutin, Thayer & Browne PC
sutinfirm.com

14–15 2016 New Mexico Family Law Institute
10.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 Advanced Employment Law
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

20 Annual Conference
6.6 G
Live Seminar
Workers Compensation Association of Southern New Mexico
575-537-1173

21 2016 Administrative Law Institute
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

21 Annual Criminal Law Seminar
10.0 G, 2.0 EP
Live Seminar
El Paso Criminal Law Group Inc.
915-534-6005

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

26 Damages in Personal Injury
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

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

28 2016 Appellate Bench and Bar Conference
5.0 G
Live Seminar, Santa Fe
Center for Legal Education of NMSBF
www.nmbar.org

November

1 **Journalism, Law & Ethics (2016 Annual Meeting)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

1 **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

1 **The Rise of 3-D Technology: What Happened to IP? (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

1 **Animal Law: Wildlife and Endangered Species on Public and Private Lands—The Tipping Point 6.0 G**
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

2 **Estate Planning for Religious and Philosophical Beliefs of Clients**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

2 **Top 8 Title Defects—Cured**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

3 **Indian Law in 2016:What Indian Law Practitioners Need to Know**
1.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **ADR Institute: Mindful Mediation Skills for the Lawyer (and Non-Lawyer) Handling Conflict Resolution**
5.2 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Acquisitions of Subsidiaries and Divisions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Charter School Law in New Mexico**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

10 **Estate Planning and Retirement Benefits**
4.0 G
Live Seminar
Santa Fe Estate Planning Council
www.sfestateplanning.com

11 **Ethics and Identifying Your Client: It's Not Always 20/20**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Top Estate Planning Techniques**
6.6 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com

16 **The Art of Effective Speaking for Lawyers**
4.5 G, 1.2 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Sophisticated Deposition Strategies**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

17 **2016 Attorney-Client Privilege Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Ethics and Dishonest Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Immigration and Deportation**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Black Lawyers Association
www.newmexicoblacklawyers association.org

22 **Effective Use of Trial Technology (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

28 **CLE at Sea Trip, Western Caribbean Cruise (Nov. 28–Dec. 4)**
10.0 G, 2.0 EP
Center for Legal Education of NMSBF
www.nmbar.org

30 **Navigating the Amenability Process in Youthful Offender Cases (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Environmental Regulations of the Oil and Gas Industry (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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 September 16, 2016

Published Opinions

No. 34869	2nd Jud Dist Bernalillo CV-14-6777, 2727 SAN PEDRO v BERNALILLO COUNTY ASSESSOR (vacate and remand)	9/13/2016
No. 34269	1st Jud Dist Santa Fe CV-12-2654, P WIRTH v SUN HEALTHCARE (affirm in part, reverse in part and remand)	9/15/2016
No. 31162	2nd Jud Dist Bernalillo CV-07-8296, K BADILLA v WALMART STORES (affirm)	9/15/2016

Unpublished Opinions

No. 33955	5th Jud Dist Lea CR-13-368, CR-12-421, STATE v R HARDY (affirm)	9/13/2016
No. 33956	5th Jud Dist Lea CR-12-421, STATE v R HARDY (affirm)	9/13/2016
No. 35481	2nd Jud Dist Bernalillo CR-15-868, STATE v M GONZALES (reverse and remand)	9/13/2016
No. 35503	13th Jud Dist Valencia CR-13-389, STATE v T CARRILLO (affirm)	9/13/2016
No. 35131	7th Jud Dist Sierra CR-14-19, STATE v J RIZOR (affirm)	9/14/2016
No. 35287	10th Jud Dist Quay CV-15-41, B FREEDMAN v BOARD OF COUNTY COMMISSIONERS (affirm)	9/14/2016
No. 35316	2nd Jud Dist Bernalillo LR-14-60, STATE v M CHAVEZ (affirm)	9/14/2016
No. 35496	WCA-10-68541, M BURNS v PROCLEAN OF ARIZONA (affirm)	9/14/2016
No. 33423	5th Jud Dist Lea CR-12-579, STATE v J RIVERA (affirm in part, reverse in part)	9/14/2016
No. 35666	12th Jud Dist Lincoln CR-13-8, STATE v F APODACA (affirm)	9/14/2016
No. 34126	2nd Jud Dist Bernalillo LR-13-28, STATE v J HALE (affirm)	9/15/2016
No. 34771	6th Jud Dist Luna CR-86-51, STATE v G CASTANEDA (affirm)	9/15/2016
No. 35048	2nd Jud Dist Bernalillo CV-13-5082, M BAKER v PORTO PLUMBING (affirm)	9/15/2016
No. 35550	3rd Jud Dist Dona Ana JQ-14-37, CYFD v ELIZABETH B (affirm)	9/15/2016
No. 35594	WCA-12-63570, WCA-08-2280, A DE JESUS v FROM COVE MANUFA (affirm)	9/15/2016
No. 34171	9th Jud Dist Curry CR-12-295, STATE v T REESER (affirm and remand)	9/15/2016
No. 34467	11th Jud Dist San Juan CV-12-1637, D OLSTAD v J HOPKINS (affirm)	9/15/2016
No. 35105	1st Jud Dist Santa Fe CV-11-468, J BACA v L PETERSON (affirm)	9/15/2016
No. 35169	5th Jud Dist Chaves CR-13-57, STATE v J LERMA (affirm)	9/15/2016
No. 35305	9th Jud Dist Curry CR-12-556, STATE v J FLORES (affirm)	9/15/2016
No. 35577	2nd Jud Dist Bernalillo LR-15-19, STATE v D TEMPLETON (affirm)	9/15/2016

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 Sept. 14, 2 016

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
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Effective September 28, 2016

Pending Proposed Rule Changes Open for Comment:

Rule 10-315	Custody hearing	10/03/16
Rule 10-318	Placement of Indian children	10/03/16
Form 10-521	ICWA notice	10/03/16

Recently Approved Rule Changes Since Release of 2016 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
Rule 1-079	Public inspection and sealing of court records	05/18/16
Rule 1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Civil Forms		
Form 4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Rules of Criminal Procedure for the District Courts		
Rule 5-123	Public inspection and sealing of court records	05/18/16
Rule 5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/16
Rules of Criminal Procedure for the Magistrate Courts		
Rule 6-506	Time of commencement of trial	05/24/16
Rules of Criminal Procedure for the Metropolitan Courts		
Rule 7-506	Time of commencement of trial	05/24/16
Rules of Procedure for the Municipal Courts		
Rule 8-506	Time of commencement of trial	05/24/16
Criminal Forms		
Form 9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Children's Court Rules and Forms		
Rule 10-166	Public inspection and sealing of court records	05/18/16
Rule 10-171	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/16
Form 10-604	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Second Judicial District Court Local Rules		
LR2-400	Case management pilot program for criminal cases	02/02/16

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

Certiorari Granted, June 1, 2016, No. S-1-SC-34775

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-059

No. 32,461 (filed May 22, 2014)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
TREVOR MERHEGE,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY
DREW D. TATUM, District Judge

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Attorney General
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Assistant Attorney General
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for Appellee

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

Opinion

J. Miles Hanisee, Judge

{1} Trevor Merhege (Defendant), appeals from his conviction for criminal trespass contrary to NMSA 1978, Section 30-14-1(B) (1995). The crime of criminal trespass is defined in pertinent part as "knowingly entering or remaining upon the unposted lands of another knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof." Section 30-14-1(B). Defendant asserts that there was insufficient evidence to establish he knew that he lacked consent to enter upon the land of another. Conversely, the State argues that there was sufficient evidence of Defendant's knowledge, specifically relying on the landowner's testimony that he had not given Defendant permission to enter upon his land. It further contends that the principles of finality and mootness preclude this Court from reviewing this appeal. We conclude that we have jurisdiction to hear this appeal. Further, we agree with Defendant that the landowner's testimony was insufficient to establish Defendant's knowledge and reverse his conviction.

BACKGROUND

{2} The relevant facts are not in dispute. On the night of September 3, 2011, Officer Adam Lem of the Portales Police Department was on routine patrol near the intersection of Main Street and East 9th Street. Officer Lem observed Defendant and his friend walking down East 9th Street at approximately 3:40 a.m. Officer Lem got out of his patrol car and yelled, "Hey[,] I want to talk to you." Defendant and his friend did not stop but instead fled on foot around the corner onto Main Street where they proceeded to hop a fence and cut across a private front yard belonging to Gary Watkins. Defendant's friend scaled two fences and jumped over to the neighboring property. Defendant attempted the same maneuver but his clothing became entangled in a chain link fence. Officer Lem caught Defendant when he was entangled in the chain link fence, arrested him, and charged him with resisting and evading an officer, a misdemeanor offense. The charge was later amended to criminal trespass.

{3} Defendant filed a motion to suppress in the magistrate court. The magistrate court granted Defendant's motion and dismissed the case. The State appealed to the district court and Defendant again filed a motion to suppress. After a hearing, the district court denied Defendant's motion and scheduled the matter for trial. Defendant argued that the matter should be remanded for trial in the magistrate court. The district court rejected this argument and proceeded with a trial.

{4} Officer Lem and Watkins testified on behalf of the State. Watkins testified that he had not given Defendant permission to be on his property on September 3, 2011, and had not, as a matter of "custom or . . . habit give[n] people permission to cut across his property at that hour" of the morning. Based upon the evidence presented, the jury found Defendant guilty of criminal trespass.

DISCUSSION

{5} Defendant contends the evidence was insufficient to support his conviction. Before we consider the merits of this argument, we first consider the State's argument that we lack jurisdiction to consider this appeal pursuant to principles of finality and mootness.

I. Finality/Mootness

{6} The State contends that we lack jurisdiction to consider this appeal because Defendant is appealing from an order of conditional discharge pursuant to NMSA 1978, Section 31-20-13(A) (1994). The State asserts that this is a non-final order and that this appeal is moot because Defendant has served his term of probation and been discharged. We disagree.

{7} In *State v. Durant*, 2000-NMCA-066, ¶ 1, 129 N.M. 345, 7 P.3d 495, we discussed whether a conditional discharge order should be considered final for purposes of appeal. We recognized that courts in other jurisdictions have held that conditional discharge orders are non-final when they are not accompanied by sentences and lack significant collateral consequences. *Id.* ¶ 9. We drew a distinction between one defendant's felony case, which could be considered in subsequent habitual offender proceedings, and another defendant's contempt case, which lacked any collateral consequences. *Id.* ¶¶ 9-10. We considered the merits of the first defendant's case and dismissed the second defendant's case. *Id.* ¶ 11.

{8} The crime of criminal trespass is a misdemeanor, not a felony, and thus cannot be considered as a prior felony conviction under our habitual offender statute. *See* § 30-14-1(E) (defining the crime of criminal

trespass as a misdemeanor); NMSA 1978, § 31-18-17(D) (2003) (defining a prior felony conviction for purposes of habitual offender enhancement). Defendant nevertheless contends that he is subject to significant collateral consequences as a result of his conditional discharge. He states that he will be required to disclose the fact of his conviction on applications for employment, college, and other future pursuits. We agree that these are potentially significant consequences even though they are somewhat speculative. *See United States ex rel. Grundset v. Franzen*, 675 F.2d 870, 873 (7th Cir. 1982) (finding a controversy was not moot, reasoning that "[a]lthough the potential legal disabilities facing [the defendant] as a result of his misdemeanor conviction are somewhat more speculative than those facing a convicted felon, the possibility of a disability exists"). We note that a contrary result would effectively immunize the proceedings at trial from appellate review and conclude that we have jurisdiction to consider this appeal.

II. Sufficiency of the Evidence

{9} Turning to the merits, Defendant contends the evidence was insufficient to support his conviction.[1] In reviewing this claim, we examine the record to determine "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. We "view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." *Id.*

{10} Defendant was convicted of criminal trespass contrary to Section 30-14-1(B), which defines the crime as "knowingly entering or remaining upon the unposted lands of another knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof." The jury was instructed that, in order to find Defendant guilty, the State had to prove beyond a reasonable doubt that Defendant "entered property belonging to . . . Watkins without permission" and "knew or should have known that permission to enter had been denied[.]" Defendant contends that the State failed to present sufficient evidence that he knew that Watkins had denied him permission to enter his land.

{11} It is undisputed that Watkins did not give Defendant permission to enter his land. It is also undisputed that Watkins did not deny or withdraw consent to Defendant to enter his land. The determinative question is whether we can presume, as a legal matter, that the general public, including Defendant, had permission to enter upon Watkins' unposted land or whether such entry constitutes a violation of Section 30-14-1(B). In interpreting Section 30-14-1(B), "our main goal is to give effect to the Legislature's intent." *State v. Almanzar*, 2014-NMSC-001, ¶ 14, 316 P.3d 183 (alterations, internal quotation marks, and citation omitted).

> To discern the Legislature's intent, the Court looks first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended. Where the language of a statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.

Id. (alterations, internal quotation marks, and citations omitted).

{12} Where private land is posted with a "no trespassing" sign, a person must possess written permission from the owner or person in control of the land in order to enter upon it. Section 30-14-1(A). A person does not need written permission to enter upon the land of another in the absence of a "no trespassing" sign. Section 30-14-1(B). Instead, a person is allowed to enter upon such land unless he or she "know[s] that . . . consent to enter or remain is denied or withdrawn by the owner or occupant thereof." *Id.* The statute provides that "[n]otice of no consent to enter shall be deemed sufficient notice to the public and evidence to the courts, by the posting of the property at all vehicular access entry ways." *Id.*

{13} In *State v. Duran*, we recognized that "[p]osting of property is only one way to place an individual upon notice that he is not permitted upon another's property." 1998-NMCA-153, ¶ 34, 126 N.M. 60, 966 P.2d 768, *abrogated on other grounds by State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896. We recognized that, even absent any posting, there was "direct and circumstantial evidence" that the defendant in *Duran* knew that he was not authorized to enter upon the property in question. 1988-NMCA-153, ¶ 34. The landowner testified that she told the defendant to "stop bothering her" and phoned the police on a number of occasions concerning the defendant's entry on her property. *Id.* (internal quotation marks and citation omitted)

{14} Here, there was no such evidence. Unlike the landowner in *Duran*, Watkins did not place Defendant on notice that he was not permitted on his property. On the contrary, Watkins testified that he did not know Defendant prior to the night in question and had never communicated with him in any way. We conclude that Watkins did not deny or withdraw consent to enter his land to Defendant.

{15} The fact that the statute specifically refers to the posting of the property at all vehicular access entry ways as being sufficient evidence that the public does not have consent to enter suggests that the lack of such posting reveals that the public *does* have consent to enter. If Watkins had a subjective intent to limit access to his property, he had to reasonably communicate it to the public in general or to Defendant in particular, by posting or by some other means. *Id*. Absent such communication, we agree with Defendant that the State presented insufficient evidence that Defendant knew that he lacked consent to enter upon Watkins' land. As a result, we reverse his conviction for criminal trespass.

CONCLUSION

{16} For the foregoing reasons, we reverse Defendant's conviction and remand to the district court with instructions to vacate Defendant's conviction.

{17} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

CYNTHIA A. FRY, Judge

[1]Defendant also contends the district court erred in failing to remand this case to the magistrate court after reversing the magistrate court's grant of Defendant's motion to suppress. However, "the district court has concurrent original jurisdiction over misdemeanor cases, . . . and the defendant has no right to have the case heard in magistrate court[.]" *State v. Heinsen*, 2005-NMSC-035, ¶ 23, 138 N.M. 441, 121 P.3d 1040. We thus reject this argument.

Certiorari Granted, July 1, 2016, S-1-SC-35846

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-060

No. 33,282 (filed March 1, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
OHN RADOSEVICH,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY
LOUIS E. DEPAULI JR., District Judge

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Opinion

Timothy L. Garcia, Judge

{1} Defendant appeals from his convictions for aggravated assault with a deadly weapon and tampering with evidence. Defendant raises several challenges on appeal related to his criminal charges: the district court's refusal to instruct the jury on the lesser included offense of simple assault; the district court's decision to direct a verdict on the charged offense of assault with the intent to commit murder and then sua sponte instruct the jury on the new and different charge of aggravated assault with a deadly weapon after the close of evidence; and the district court's failure to properly instruct the jury concerning whether the weapon was a deadly weapon for the additional new charge of aggravated assault with a deadly weapon. Next, Defendant argues that if this Court holds there was error in the district court's decision to sua sponte instruct the jury on aggravated assault with a deadly weapon as a lesser included offense of the previously charged offense, then the prohibition against double jeopardy prevents the State from retrying Defendant on that newly added charge. Defendant also asks for a retrial or resentencing on the tampering with evidence charge in the event that this Court holds there was error requiring a retrial on the aggravated assault with a deadly weapon charge, given that the convictions are inextricably linked. Lastly, Defendant argues that the district court erred by admitting bad act evidence introduced through a statement Defendant allegedly made about robbing the neighborhood.

{2} In its answer brief, the State concedes without analysis that the jury should have been instructed to find that Defendant's weapon was a deadly weapon and that, under the circumstances, it was fundamental error not to have done so. The State also concedes without analysis that Defendant's conviction for tampering with evidence should be remanded for a new trial. The State opposes Defendant's argument that double jeopardy bars retrial on the charge of aggravated assault with a deadly weapon, noting that reversal is not sought for lack of evidence nor is it appropriate on a lack of evidence basis. Defendant did not address either of the State's concessions. Irrespective, we address all the issues presented for review in this appeal.

DISCUSSION

{3} Defendant and his neighbor (Victim) got into an argument, and Defendant started yelling obscenities about Victim and Victim's dogs. After threatening to shoot Victim and his dogs, Defendant went into his house and came back out with a knife. Defendant approached Victim who feared that he was going to be attacked. The police arrived and Defendant threw the knife away. The police later found the knife in Defendant's yard. We discuss additional facts as they become necessary in the context of our analysis.

ANALYSIS

{4} Our independent review of this case has identified compounding errors, beginning with the State's charging documents and its trial decisions, followed by the district court's sua sponte decision during trial that ended with improper instructions to the jury. Further, the State's concession of fundamental error in the jury instruction for aggravated assault inadequately addressed the resolution of these errors. *See State v. Guerra*, 2012-NMSC-027, ¶ 9, 284 P.3d 1076 (noting that the appellate courts are not bound by the state's concession).

{5} We begin our analysis by addressing the State's concession of fundamental error in the jury instruction for aggravated assault with a deadly weapon. *See State v. Caldwell*, 2008-NMCA-049, ¶ 8, 143 N.M. 792, 182 P.3d 775 (observing that we conduct our own analysis of a conceded issue by the state). As we explain below, we accept the State's concession of fundamental error, then address the district court's improper decision to sua sponte instruct the jury on a different offense after the close of evidence because it is crucial to the State's ability to retry Defendant for the assault-based conduct that was at issue. We conclude that the compulsory rule of joinder bars further prosecution of Defendant for aggravated assault with a deadly weapon. We further conclude that Defendant's conviction for tampering with evidence is relative to an indeterminate crime and should be amended accordingly, not retried, as the State conceded.

Fundamental Error in the Jury Instructions

{6} "The rule of fundamental error applies only if there has been a miscarriage of justice, if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been done." *State v. Sutphin*, 2007-NMSC-045, ¶ 16, 142 N.M. 191, 164 P.3d 72 (internal quotation marks and citation omitted). "The general rule is that fundamental error occurs when the trial court fails to instruct the jury on an essential element." *Id.* Likening a missing element to "a partial directed verdict," our Supreme Court stated that such an action

is impermissible on the basis that "it is the fundamental right of a criminal defendant to have the jury determine whether each element of the charged offense has been proved by the state beyond a reasonable doubt." *State v. Nick R.*, 2009-NMSC-050, ¶ 37, 147 N.M. 182, 218 P.3d 868 (internal quotation marks and citation omitted). Fundamental error does not occur, however, where the jury was not instructed on an element that was not at issue in the case or where "there can be no dispute that the omitted element was established[.]" *Sutphin*, 2007-NMSC-045, ¶ 16.

{7} In the current case, the jury was instructed that it could find Defendant guilty of aggravated assault with a deadly weapon where the State proved the following elements beyond a reasonable doubt:

1. [D]efendant approached and threatened to stab [Victim];
2. [D]efendant's conduct caused [Victim] to believe [D]efendant was about to intrude on [Victim's] bodily integrity or personal safety by touching or applying force to [Victim] in a rude, insolent[,] or angry manner;
3. A reasonable person in the same circumstances as [Victim] would have had the same belief;
4. [D]efendant used a knife;
5. This happened in New Mexico on or about the 8th day of September, 2012.

The use notes for the Uniform Jury Instruction applicable to aggravated assault with a deadly weapon state that, unless the object used is specifically listed as a deadly weapon in NMSA 1978, Section 30-1-12(B) (1963), the jury should be instructed that the object used is a deadly weapon if it could cause death or great bodily harm when used as a weapon. UJI 14-305 NMRA, use note 5.

{8} The weapon at issue in this case is a three-and-one-half-inch kitchen knife. At trial, the Defendant characterized the weapon as "this little kitchen knife." The State does not dispute Defendant's description of the kitchen knife as small and concedes that it is not among the described knives specifically included within the definition of deadly weapons in Section 30-1-12(B): "daggers . . . switchblade knives, bowie knives, poniards, butcher knives, dirk knives . . . swordcanes, and any kind of sharp pointed canes[.]" We accept the State's concession that the knife at issue does not fall within the per se statutory definition for "deadly weapons," because it is not specifically designated as the type of knife considered to be a deadly weapon, *see Nick R.*, 2009-NMSC-050, ¶ 16, and because the small kitchen knife is not contemplated "in the catchall phrases" referring to "inherently dangerous items that either are carried for use or are actually used to inflict injuries on [or kill] people." *Id.* ¶ 21.

{9} We also agree with the State that this failure to properly instruct the jury amounted to fundamental error. There was no evidence at trial about this particular kitchen knife that might suggest it was inherently threatening or deadly. In addition, there was no evidence about Defendant's skill with knives or his behavior that made his possession of it inherently dangerous or deadly. Thus, nothing in the record suggests that this is a situation where the missing element was undisputedly established. *See Sutphin*, 2007-NMSC-045, ¶ 16 (stating that fundamental error is not demonstrated where there is a missing element in the instructions where "there can be no dispute that the omitted element was established"). Finally, the jury instructions gave no suggestion that the jury was required to consider whether any deadly weapon was used or whether the knife was used as a deadly weapon. *Cf. State v. Traeger*, 2001-NMSC-022, ¶¶ 22-25, 130 N.M. 618, 29 P.3d 518 (holding that there was no fundamental error in the awkward, noncompliant phraseology of a "deadly weapon" instruction, where, (1) the jury was instructed to find that the baseball bat was used as a deadly weapon; (2) the Supreme Court was persuaded that the jury considered this essential element; and (3) the evidence clearly showed that the defendant used the baseball bat as a weapon to inflict great bodily harm in an effort to threaten the victim to undress and have forced sexual intercourse).

{10} We further observe that the character of the weapon was not an issue in this case because Defendant was neither charged nor tried by the State for a crime that specifically included a "deadly weapon" as an element. *See* NMSA 1978, § 30-3-3 (1977) ("Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second[,] or third degree, robbery or burglary."); *cf. Sutphin*, 2007-NMSC-045, ¶ 16 (stating that fundamental error does not occur where the jury was not instructed on an element that is not at issue in the case). It was only after the close of evidence that the district court acted sua sponte to change the charge from assault with the intent to commit murder to aggravated assault with a deadly weapon. Thus, the State did not prosecute and Defendant did not defend against a charge that included a "deadly weapon" as an element of the crime. These facts, combined with the complete omission of the "deadly weapon" element from the instructions, constitute a miscarriage of justice that deprived Defendant of his "fundamental right . . . to have the jury determine whether each element of the charged offense has been proved by the state beyond a reasonable doubt." *Nick R.*, 2009-NMSC-050, ¶ 37 (internal quotation marks and citation omitted). For these reasons, we accept the State's concession of fundamental error and reverse Defendant's conviction for aggravated assault with a deadly weapon.

Double Jeopardy

{11} Defendant argues that he should not be retried for aggravated assault with a deadly weapon in the event that we determine that it is a lesser included offense of assault with the intent to commit murder, referring us to *State v. Slade*, 2014-NMCA-088, ¶¶ 38-41, 331 P.3d 930 (holding that a successive prosecution on an uncharged lesser included offense is barred by the Double Jeopardy Clause, where a conviction for the greater offense is reversed on appeal for insufficient evidence), *cert. quashed*, 2015-NMCERT-001, 350 P.3d 92. Defendant's alternative arguments emphasize that aggravated assault with a deadly weapon is not a lesser included offense of the originally charged offense and we agree. Because we agree that aggravated assault with a deadly weapon is not a lesser included offense of the originally charged offense, we are persuaded that *Slade* does not apply to this case.

{12} We are persuaded by Defendant's alternative theory of error, that (1) aggravated assault with a deadly weapon is a new and different offense and (2) the district court improperly amended the charges sua sponte after the close of evidence and then instructed the jury on this new offense. This new charge resulted in a violation of Defendant's constitutional right to proper notice of the charges against him. The district court's improper instruction on the uncharged offense did not operate to properly amend the original underlying charges. As such, the State may not

successively prosecute Defendant on the uncharged aggravated assault offense, because the rule of compulsory joinder, Rule 5-203(A) NMRA, required the State to properly join the two offenses if it wanted to pursue both charges. *See State v. Gonzales* (*Gonzales II*), 2013-NMSC-016, ¶ 25, 301 P.3d 380. We explain in more detail below.

1. Instructing on a New Offense After the Close of Evidence

{13} After the close of evidence, the district court directed a verdict on the charged offense of assault with the intent to commit murder. However, the court determined sua sponte that the State could proceed against Defendant on the uncharged offense of aggravated assault with a deadly weapon and approved the instruction to be submitted to the jury as a lesser included offense. We must determine the adequacy of Defendant's notice of the charges against him under these circumstances by applying the cognate approach. *See State v. Hernandez*, 1999-NMCA-105, ¶¶ 25-30, 127 N.M. 769, 987 P.2d 1156 (applying the cognate approach to the district court's conviction of the defendant for the uncharged offense of breaking and entering, where the district court sua sponte considered the charge to be a lesser included offense of aggravated burglary); *see also State v. Meadors*, 1995-NMSC-073, ¶¶ 12-13, 17, 22, 121 N.M. 38, 908 P.2d 731 (clarifying that New Mexico applies a cognate approach to determining whether a state-requested instruction on a lesser included offense of the charged offense is appropriately granted, such that the defendant was on sufficient notice of the need to defend against the argued lesser included offense). The cognate approach first incorporates a strict elements test that considers whether the statutory elements of the lesser crime are subsumed within the statutory elements of the charged crime. *See id.* ¶ 12. Then the cognate approach "focuses on the pleadings, the evidence adduced at trial, and the defendant's constitutional right to notice." *Id.* ¶ 22. In relevant part, the second part of the inquiry identifies a lesser included offense by determining if "the defendant cannot commit the greater offense in the manner described in the charging document without also committing the lesser offense." *Id.* ¶ 17; *see also State v. Montoya*, 2015-NMSC-010, ¶ 43, 345 P.3d 1056 ("When one offense is a lesser included offense of a crime named in a charging document, the defendant is put on notice that he [or she] must defend not only against the greater offense as charged but also against any lesser included offense." (alteration in original) (internal quotation marks and citation omitted)). In addition, the district court is required to "conduct an independent analysis of the notice issue" to determine if for any reason presented by the case the defendant did not receive constitutionally adequate notice of the lesser offense. *Meadors*, 1995-NMSC-073, ¶ 18. By this measure, "the defendant should be fully aware of the possible offenses for which he or she may face prosecution and should have ample opportunity to prepare a defense." *Id.* ¶ 17.

{14} Under the strict elements test, aggravated assault with a deadly weapon is not subsumed within assault with the intent to commit murder because the latter does not require the use of a deadly weapon. *See, e.g.*, *State v. Patterson*, 1977-NMCA-084, ¶ 7, 90 N.M. 735, 568 P.2d 261 ("Assault with intent to kill can be committed without use of a deadly weapon; thus, aggravated assault with a deadly weapon was not a lesser included offense[, under the strict elements test.]"); *compare* § 30-3-3 ("Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or commit any murder[.]"), *with* NMSA 1978, § 30-3-2(A) (1963) ("Aggravated assault consists of . . . unlawfully assaulting or striking at another with a deadly weapon[.]").

{15} Turning to the second part of the cognate approach, examining the charging document, this action was initiated in magistrate court by criminal complaint that originally charged Defendant with aggravated assault with a deadly weapon. The criminal complaint was amended to replace that charge with assault with the intent to commit murder. The magistrate court held a preliminary hearing on the amended charge of assault with the intent to commit murder and tampering with evidence, and Defendant was bound over to district court on this amended charge by criminal information. The criminal information and amended criminal complaint alleged that for the purposes of assault with the intent to commit murder, Defendant "did unlawfully assault or strike at [Victim], with a knife, with the intent [to] kill [Victim] in the first or second degrees of [m]urder, contrary to Section 30-3-3, . . . a third degree felony." The jury instruction for aggravated assault with a deadly weapon, as we discussed above, was required to have a finding that the knife used was a deadly weapon. Neither the statute for assault with the intent to commit murder nor the relevant charging document requires the use of a deadly weapon; and the relevant charging document did not describe the knife as a deadly weapon nor identify its significance as a deadly weapon in any way. As stated in our fundamental error analysis, the evidence was not directed at proving that the knife was a deadly weapon, consistent with the State's charging decision. Additionally, the State does not dispute that, during a pretrial hearing, defense counsel stated that aggravated assault with a deadly weapon was a more applicable charge but the State did not amend the charges. These facts suggest that Defendant was on notice that the State would *not* pursue the specific offense on which the district court sua sponte proceeded to instruct the jury. Under the circumstances, we hold that Defendant was not on notice or made fully aware of the possibility that he would need to defend against the "deadly weapon" element of the new offense, even if it were properly presented to the jury. *See Hernandez*, 1999-NMCA-105, ¶¶ 25-30 (reversing the defendant's conviction under the cognate approach on the ground that the defendant had no notice of the "breaking" element of breaking and entering when charged with aggravated burglary); *see also Meadors*, 1995-NMSC-073, ¶ 17 (requiring full awareness of the possible additional offense with ample opportunity to prepare a defense).

2. Compulsory Joinder Bars Subsequent Prosecution on Aggravated Assault With a Deadly Weapon

{16} We now address whether the State can retry Defendant for aggravated assault with a deadly weapon charge that was erroneously instructed at the first trial. The State did not address the potential joinder problem with the district court's sua sponte instruction to the jury on aggravated assault and simply presumes that it can proceed with a retrial for the aggravated assault charge. The State's concession and double jeopardy analysis treat this case as one where Defendant may be retried based on fundamental error occurring in the jury instruction for a charged offense. We are not persuaded.

{17} We have held that "Rule 5-204(A) [NMRA] allows a court to amend an information prior to sentencing but does not allow the court to amend if there is an additional or different offense charged."

State v. Roman, 1998-NMCA-132, ¶ 9, 125 N.M. 688, 964 P.2d 852. In *Roman*, we did not permit an amendment to the charging document where it was "used to impose an entirely new charge against a defendant after the close of testimony" because it prejudiced the defendant by denying him notice of, and the opportunity to defend, the charge. *Id.* ¶¶ 9, 14. The current case warrants the same result because, at trial, Defendant was not charged or tried by the State for the offense of aggravated assault with a deadly weapon. The critical question is whether a subsequent prosecution of that different offense would be permitted.

{18} In *Roman*, where the amendment to the charge was prohibited, this Court articulated no opinion on the state's ability to pursue the uncharged offense and simply reversed the conviction on that uncharged offense and remanded to the trial court for resentencing and entry of an amended judgment consistent with the Court's opinion. *See id.* ¶ 16. Recently, however, our New Mexico Supreme Court has directly addressed successive prosecutions of different charges for the same conduct under Rule 5-203(A), the rule regarding compulsory joinder. *See Gonzales II*, 2013-NMSC-016, ¶¶ 25-33. Thus, we now examine the State's ability to proceed under the rule of compulsory joinder and its application to the double jeopardy issue in this case.

{19} In *Gonzales II*, the Supreme Court raised the issue of joinder sua sponte, as we do here, on the basis that the defendant's double jeopardy concerns, like the ones Defendant raises here, "necessarily implicated" the Court's joinder rule. *Id.* ¶ 26. We also note that raising this issue sua sponte causes even less "unfair surprise" to the State in this case than it did in *Gonzales II*. *Id.* ¶¶ 27-28 (precluding a claim of unfair surprise by the state based on a case from six years earlier applying the rule of joinder in a different context based on the existing joinder rule and based on the Court's history of "distaste for piecemeal prosecutions" (internal quotation marks and citation omitted)). Here, we have the benefit of *Gonzales II*, a recent case that conveys a clear warning that our compulsory joinder rule will be enforced, even sua sponte, to bar sequential prosecutions of charges not joined in the original trial that stem from the same conduct, where the prosecution pursued an all-or-nothing trial strategy. *See id.* ¶¶ 26-33. In its answer brief, the State had an opportunity to address the application of *Gonzales II* to the facts of this case. Instead, the State simply chose to concede the fundamental error in the jury instructions and summarily assert that double jeopardy would not bar retrial, because reversal was not based on insufficient evidence. We note that the State's double jeopardy analysis relied specifically on statements made by this Court in *State v. Gonzales* (*Gonzales I*), 2011-NMCA-081, 150 P.3d 494, 263 P.3d 271, *aff'd* 2013-NMSC-016, rather than the alternative joinder grounds that our Supreme Court relied upon in *Gonzales II*. Because "[j]oinder is designed to protect a defendant's double[]jeopardy interests" in this context, there is ample existing authority for us to address this issue sua sponte without the need for further briefing. *See Gonzales II*, 2013-NMSC-016, ¶ 26 (internal quotation marks and citation omitted).

{20} In *Gonzales I*, the defendant was charged with, and convicted of, negligent child abuse, which this Court reversed for insufficient evidence on appeal. *Gonzales I*, 2011-NMCA-081, ¶¶ 31-32. The defendant argued on appeal that double jeopardy would preclude a new charge of vehicular homicide, and this Court agreed because under the cognate approach it was a lesser included offense and, given that the state chose an all-or-nothing strategy, it must suffer the consequence of being unable to bring that lesser offense in a subsequent trial. *Id.* ¶¶ 33, 35-36, 38. The Supreme Court granted certiorari on the issue of subsequent prosecution and found it unnecessary to determine whether vehicular homicide was a lesser included offense of negligent child abuse for purposes of double jeopardy. *See Gonzales II*, 2013-NMSC-016, ¶¶ 12, 24. Rather, it concluded that the state could not pursue a subsequent charge of vehicular homicide based on the principle of joinder. *See id.* ¶ 24.

{21} The compulsory joinder rule states:

> Two or more offenses shall be joined in one complaint, indictment or information with each offense stated in a separate count, if the offenses, whether felonies or misdemeanors or both:
>
> (1) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

Rule 5-203(A). Our Supreme Court construed this rule to mean that the criteria for the mandatory joinder of offenses are satisfied where under the facts of the case there are "two crimes based on the same conduct." *See Gonzales II,* 2013-NMSC-016, ¶ 25 (internal quotation marks and citation omitted). In that situation, "[t]he [s]tate had no choice but to join these two offenses in one complaint, indictment or information, if it wanted to pursue them both." *Id.* (internal quotation marks and citation omitted). Our Supreme Court explained that the purpose of the compulsory joinder rule,

> viewed as a whole, is twofold: (1) to protect a defendant from the governmental harassment of being subjected to successive trials for offenses stemming from the same criminal episode; and (2) to ensure finality without unduly burdening the judicial process by repetitious litigation.

Id. ¶ 26 (internal quotation marks and citation omitted). The Supreme Court also focused on tempering the "coercive effect" of "all-or-nothing prosecution strategies," by acknowledging that, while such a trial tactic is within the state's discretion, if such a tactic had no consequences, then "the [s]tate would have all of the benefits and none of the risks . . . , while the accused would have all the risks and none of the protections." *Id.* ¶ 33 (internal quotation marks and citations omitted). Our Supreme Court concluded that to achieve all the goals of compulsory joinder, the remedy is to bar subsequent prosecution of an offense the state failed to join in the initial trial. *See id.* ¶ 31.

{22} In an effort to limit unfairness to the state in the application of the joinder rule, it appears our Supreme Court would be inclined to excuse the state's failure to bring all joinable offenses in one charging document where (1) a charge was unknown to the state when the defendant was indicted, and (2) the state requests an instruction on a lesser included offense that satisfies the *Meadors* cognate approach. *See Gonzales II,*2013-NMSC-016, ¶ 32 (noting that the state had at least three opportunities to join the offenses, it did not ask for a vehicular homicide instruction under *Meadors*, and the state was fully aware the vehicular homicide charge was available and decided on this particular, risky trial strategy).

{23} We do not discern any material factual distinction in the current case that would shield it from the consequences imposed by *Gonzales II*. Here, the charged offense failed for insufficient evidence when the district court directed a verdict

on assault with the intent to commit murder after the close of evidence. The charging document was not amended to add aggravated assault with a deadly weapon, consistent with Rule 5-204(A), as stated above. The State was fully aware of the factual basis to pursue an aggravated assault with a deadly weapon charge and amended the original charging document to exclude such a prosecution. The State remained consistent with its all-or-nothing prosecution strategy throughout the proceedings and at trial, despite clear opportunities to amend the charges. Although the jury was ultimately instructed on the uncharged offense because of the sua sponte actions of the district court, the instructed offense did not satisfy the *Meadors* cognate approach. Thus, the new charge should never have been added by the district court and should never have gone to the jury.

{24} For these reasons, we hold that the State may not retry Defendant on the charge of aggravated assault with a deadly weapon. Such a charge arises from the same conduct it unsuccessfully prosecuted during the first trial and is barred under the rule of compulsory joinder. Next, we must decide the consequences upon Defendant's remaining conviction of tampering with evidence and whether to accept the State's further concession that retrial is warranted.

Tampering With Evidence Is Not Subject to Retrial

{25} The offense of tampering with evidence is linked to the crime to which the tampering is related, in its degree of crime and punishment.

> Whoever commits tampering with evidence shall be punished as follows:
> (1) if the highest crime for which tampering with evidence is committed is a capital or first[-]degree felony or a second[-]degree felony, the person committing tampering with evidence is guilty of a third[-]degree felony;
> (2) if the highest crime for which tampering with evidence is committed is a third[-]degree felony or a fourth[-]degree felony, the person committing tampering with evidence is guilty of a fourth[-]degree felony;
> (3) if the highest crime for which tampering with evidence is committed is a misdemeanor or a petty misdemeanor, the person committing tampering with evidence is guilty of a petty misdemeanor; and
> (4) if the highest crime for which tampering with evidence is committed is indeterminate, the person committing tampering with evidence is guilty of a fourth[-] degree felony.

NMSA 1978, § 30-22-5(B) (2003). On the other hand, tampering with evidence can be a stand-alone crime that is not tied to a separate crime. *See State v. Jackson*, 2010-NMSC-032, ¶¶ 1, 21, 27-28, 148 N.M. 452, 237 P.3d 754. Where there is no separate, identified crime, the tampering offense is linked to an indeterminate crime under Section 30-22-5(B)(4), and is punished as a fourth-degree felony. *See Jackson*, 2010-NMSC-032, ¶¶ 21, 27-28. In the current case, the record indicates that Defendant was convicted of fourth-degree felony tampering with evidence under Subsection (B)(2), relating the tampering offense to a crime that is either a third or fourth-degree felony.

{26} Defendant asserts without elaboration that, insofar as the degree of his tampering with evidence conviction is tied to his conviction for aggravated assault with a deadly weapon, he should be retried for tampering or permitted to challenge the degree of his conviction. In support of his assertion, Defendant cites to only Subsection (B)(3) of the tampering statute, stating that tampering may be a petty misdemeanor. The State concedes without elaboration that Defendant may be retried for tampering with evidence along with the charge of aggravated assault with a deadly weapon. We are not persuaded that a retrial on tampering is warranted on any theories raised by the parties on appeal.

{27} Reading between the lines of Defendant's sparse argument, we understand him to argue that (1) because his tampering conviction was tied to his erroneous conviction for aggravated assault with a deadly weapon, and (2) because his requested instruction on simple assault was wrongfully denied, he should be given the opportunity on retrial to establish that the highest crime with which he tampered was a misdemeanor assault, making his tampering conviction a misdemeanor under Subsection (B)(3). We are not persuaded by Defendant's premise that his tampering conviction was tied to the crime of aggravated assault with a deadly weapon.

{28} Recent decisions from this Court indicate that the degree and identification of the underlying crime to which the tampering offense relates, if any, are elements of tampering that should be decided by a jury. *See State v. Sanchez*, 2015-NMCA-077, ¶¶ 20-25, 355 P.3d 51 (reviewing the failure to instruct the jury on the crime to which tampering related for fundamental error), *cert. denied*, 2015-NMCERT-006, __ P.3d __ (No. 35,283 June 11, 2015); *State v. Herrera*, 2014-NMCA-007, ¶¶ 4-18, 315 P.3d 343 (same); *State v. Alvarado*, 2012-NMCA-089, ¶ 14, __ P.3d __(deciding for the first time that the Sixth Amendment requires the jury to find facts related to a specific crime that would increase a defendant's sentence for tampering). As such, the underlying crime to which tampering relates, if any, should be identified in the tampering instruction and found by the jury. *See. Sanchez*, 2015-NMCA-077, ¶¶ 20-25.

{29} In the current case, the jury instruction for tampering with evidence did not tie tampering to any identified crime. The instruction asked only whether Defendant hid or placed a knife with the intent to prevent his own apprehension, prosecution or conviction. Defendant did not object to this instruction in the district court, nor does he challenge it on appeal. This unchallenged instruction serves as the governing law of the case. *See State v. Danek*, 1994-NMSC-071, ¶ 13, 118 N.M. 8, 878 P.2d 326 (observing that unchallenged jury instructions become law of the case against the party who has not objected); *Couch v. Astec Indus., Inc.*, 2002-NMCA-084, ¶ 40, 132 N.M. 631, 53 P.3d 398 ("Jury instructions not objected to become the law of the case.").

{30} In *Alvarado*, we held that where "[t]he jury was not asked to indicate the crime, if any, to which the tampering related[,] . . . the court is limited to sentencing a defendant under the 'indeterminate crime' provision [of the statute]." 2012-NMCA-089, ¶ 14. In that case, the defendant was acquitted of the crime to which the tampering conviction was related, and the jury was not instructed to find whether the tampering conviction related to any particular crime. *Id.* ¶¶ 1, 4, 10. Under these facts, we held that the district court properly sentenced the defendant for tampering with evidence of an indeterminate crime under Section 30-22-5(B)(4). *Alvarado*, 2012-NMCA-089, ¶¶ 14, 16.

{31} Similarly, in the current case, the offense to which Defendant's tampering was related failed for insufficient evidence, and on appeal we reverse its replacement

by another offense and bar retrial on that new replacement offense. Thus, the underlying offense for which Defendant might have tampered is effectively rendered to be an unidentified, indeterminate crime. Furthermore, because the jury instructions did not require the jury to find that Defendant tampered with any particular crime or degree of crime, tampering was instructed as a stand-alone crime. *See id.* ¶ 14; *cf. Jackson*, 2010-NMSC-032, ¶ 28 (stating where an underlying crime is not identifiable, tampering is punished under the "indeterminate crime" provision in Subsection (B)(4), as a "catch-all"). Based on our opinion in *Alvarado*, Defendant would be properly sentenced for tampering with an indeterminate crime under Section 30-22-5(B)(4), punishable as a fourth-degree felony. *See Alvarado*, 2013-NMSC-089, ¶ 14.

{32} For purposes of determining whether retrial is appropriate, we hold that, because the jury instruction did not tie Defendant's tampering conviction to his conviction for aggravated assault with a deadly weapon, retrial is not warranted on that basis. Similarly, retrial is not appropriate on the ground that Defendant was wrongfully denied an instruction on misdemeanor assault because tampering with evidence was instructed without challenge as a stand-alone crime. Consistent with *Alvarado*, we hold that the district court wrongfully convicted Defendant of having tampered with evidence of a third- or fourth-degree felony in the absence of such a finding by the jury. Rather than order retrial, we order the district court to amend the judgment and sentence to reflect that Defendant was convicted for tampering with evidence of an indeterminate crime under Section 30-22-5(B)(4). Because both the indeterminate provision and the provision under which Defendant was convicted make tampering a fourth-degree felony, resentencing on this conviction is not required.

{33} Defendant's brief in chief raises one remaining argument that may affect his right to retrial on the tampering conviction. Defendant contends that it was reversible error for the district court to admit Victim's testimony that Defendant stated that he robbed the neighborhood in the course of the overall incident at issue. Defendant characterizes the statement as unfairly prejudicial bad act evidence improperly admitted under Rules 11-403 NMRA and 11-404 NMRA. The district court admitted the evidence as relevant to, and probative of, Victim's fear of Defendant, which was an element of the incorrectly charged offense of assault. *See* NMSA 1978, § 30-3-1(B) (1963) (stating that assault consists of "any unlawful act, threat[,] or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery"). We agree with the district court that Defendant's statement is part of Defendant's menacing conduct at issue, but the relevance of Victim's fear relates solely to an improperly charged—assault-based—offense.

{34} Assuming that the admission of Defendant's statement was error, Defendant must also establish that there was a reasonable probability that its admission affected the jury's tampering verdict. *See State v. Astorga*, 2015-NMSC-007, ¶ 43, 343 P.3d 1245 ("Absent a constitutional violation, we look to whether there is a reasonable probability that the error affected the verdict. Defendant bears the initial burden of demonstrating that he was prejudiced by the error." (citation omitted)). To judge the probable effect of evidentiary error, we examine the context of the error to determine the role it played, including the source of the evidence, the emphasis placed on it, and other non-objectionable evidence. *See State v. Leyba*, 2012-NMSC-037, ¶ 24, 289 P.3d 1215.

{35} In the current case, the testimony about Defendant's statement that he robbed the neighborhood was elicited from Victim, not law enforcement, and was offered in the context of other blustering comments from Defendant. Defendant makes no showing that the State placed emphasis on this comment. There is no indication that the State attempted to relate this comment to the conduct that supported Defendant's conviction for tampering, and we see no probable relationship between the comment and the tampering charge that ultimately resulted in a conviction. The State presented uncontradicted testimony that Defendant had a knife during a confrontation with Victim and tossed it into a yard when he saw that police had arrived at the scene. The police officer recovered a knife in the location where Victim said Defendant had thrown it. This evidence was all that was required for the jury to convict Defendant of tampering. The blustering and menacing behavior suggested by Defendant's comment seems to even contradict the concealing behavior that underlies his tampering conviction. Under the circumstances presented at trial, we fail to see how Defendant's comment could make the evidence of tampering more probable in a manner sufficient to establish reversible error.

{36} Finally, because Defendant makes no independent allegation of error directed solely at the tampering with evidence charge, we see no reason to accept the State's concession that Defendant should be retried on the tampering charge. The tampering with evidence conviction is affirmed.

CONCLUSION

{37} This case amply demonstrates the importance of circumspection in making charging decisions throughout the proceedings. The State chose an unsuccessful, all-or-nothing, trial strategy that resulted in a directed verdict on the original charge of assault with intent to commit murder. The district court compounded this strategic all-or-nothing prosecution error by sua sponte instructing the jury on a new uncharged offense—aggravated assault with a deadly weapon—after the close of the evidence. As a result, Defendant was deprived of proper notice of the new charge against him. This triggered a violation of the compulsory joinder requirement in Rule 5-203(A). Further error was made when the jury was improperly instructed on the aggravated assault charge.

{38} We reverse Defendant's conviction for aggravated assault with a deadly weapon and hold that the State may not retry Defendant on the aggravated assault with a deadly weapon charge that arose from the same assault-based conduct it unsuccessfully prosecuted in this case. Finally, we are not persuaded that retrial on the tampering charge is warranted and affirm Defendant's conviction for tampering with evidence. However, we remand this matter to the district court to correct the judgment and sentence consistent with our decision herein and to properly reflect that Defendant was convicted of tampering with an indeterminate crime that carries the same fourth-degree felony penalty as previously imposed by the district court.

{39} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

LINDA M. VANZI, Judge

Certiorari Granted, July 13, 2016, S-1-SC-35841

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-061

No. 33,902 (filed March 10, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
JOHNNY MAXWELL,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SOCORRO COUNTY
EDMUND H. KASE III, District Judge

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Opinion

James J. Wechsler, Judge

{1} We address in this appeal whether the provision of the Implied Consent Act that entitles a person arrested for driving under the influence to a reasonable opportunity to arrange for an independent chemical test requires the arresting officer to transport the person to obtain the test. We hold that it does not and reverse the district court's order suppressing the results of the breath tests taken by the arresting officer.

BACKGROUND

{2} The facts are not disputed. On December 22, 2012, State Police Officer Toby Lafave observed Defendant Johnny Maxwell driving without a seatbelt and without adequate tail light illumination. After stopping Defendant, Officer Lafave observed signs of intoxication that led him to conduct field sobriety tests. Observing further clues of impairment, he arrested Defendant on suspicion of driving while under the influence of liquor (DWI). Officer Lafave read Defendant the advisory under the Implied Consent Act, NMSA 1978, Section 66-8-109(B) (1993), and administered a breath alcohol test. The two samples registered .10 grams of alcohol in two hundred ten liters of breath.

{3} Officer Lafave took Defendant to the Socorro County Detention Center and while there, Defendant asked for an independent test. Officer Lafave provided Defendant with a telephone and a telephone directory. Defendant called the Socorro General Hospital and spoke with a nurse in the emergency room. He told her that he needed a blood draw for DWI testing and was told to "come on up and they would administer the test." Defendant asked Officer Lafave to transport him to the hospital, and Officer Lafave declined, saying that the test had to be performed at the detention center.

{4} Shortly thereafter, Defendant was released on bail, and his mother drove him to the hospital. Defendant arrived at the hospital approximately fifteen to twenty minutes after his telephone conversation with the nurse. At the hospital, Defendant spoke with the nurse and an emergency room doctor. The doctor told him that he would not perform the test without an order because "the situation was not life threatening."

{5} Defendant was charged in magistrate court with DWI (third offense) in violation of NMSA 1978, Section 66-8-102(C)(1) (2010). He entered a conditional plea to DWI (second offense), based on a plea and disposition agreement, reserving his right to appeal a motion to suppress. On appeal, the district court suppressed the breathalyzer test samples taken by Officer Lafave, finding that Officer Lafave's refusal to transport Defendant to the hospital to conduct the independent test was unreasonable, in violation of Defendant's rights under Section 66-8-109(B) and (E) to have an additional test performed and a reasonable opportunity to arrange for the test. The district court further found that Defendant was prejudiced by the State's statutory violation. The State appealed the district court's order. *See* NMSA 1978, § 39-3-3(B)(2) (1972) (permitting the state to appeal an order suppressing evidence under specified conditions).

THE RIGHTS PROVIDED BY THE IMPLIED CONSENT ACT

{6} Under the Implied Consent Act, "[a]ny person who operates a motor vehicle" in the state who is arrested for DWI is "deemed to have given consent" to approved breath and/or blood tests to determine the drug or alcohol content of his or her blood, as determined by a law enforcement officer. NMSA 1978, § 66-8-107(A) (1993). The test is administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person has been driving under the influence of alcohol or drugs. Section 66-8-107(B). Section 66-8-109(B) provides:

> The person tested shall be advised by the law enforcement officer of the person's right to be given an opportunity to arrange for a physician, licensed professional or practical nurse or laboratory technician or technologist who is employed by a hospital or physician of his own choosing to perform a chemical test in addition to any test performed at the direction of a law enforcement officer.

The cost of the test performed when a person has exercised the right to have an independent test described in Section 66-8-109(B) is paid by the law enforcement agency employing the law enforcement officer directing the administration of the chemical test. Section 66-8-109(D).

{7} The issue before us is whether the right of the Implied Consent Act to an independent test includes the obligation of a law enforcement officer to transport the person tested to another location for the test to be performed. As a matter of interpretation of the Implied Consent Act,

we address the issue under de novo review. *See State v. Chakerian*, 2015-NMCA-052, ¶ 10, 348 P.3d 1027 (applying de novo review to interpret the Implied Consent Act when the historical facts were not disputed), *cert. granted*, 2015-NMCERT-005, ___P.3d___ (No. 35, 121, May 11, 2015).

APPLICATION OF THE IMPLIED CONSENT ACT

{8} When engaging in statutory interpretation, we endeavor to discern the intent of the Legislature in adopting a statute. *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022. Our best indication of such intent is the language of the statute itself. *Gen. Motors Acceptance Corp. v. Anaya*, 1985-NMSC-066, ¶ 15, 103 N.M. 72, 703 P.2d 169.

{9} We recently discussed the intent of the Implied Consent Act in some detail in *Chakerian*, 2015-NMCA-052, ¶¶ 14-18. We observed that, in enacting Section 66-8-109(B), the Legislature balanced its effort to deter and prosecute DWI with the ability of an arrested driver "to reasonably preserve and test the critical and potentially exonerating evidence" surrounding the chemical tests administered under the Implied Consent Act. *Chakerian*, 2015-NMCA-052, ¶ 18.

{10} In this context, the Legislature has adopted Section 66-8-109(B) that requires a law enforcement officer directing the administration of a chemical test under the Implied Consent Act to advise the person being tested "of the person's right to be given an opportunity to arrange for" a specified medical professional chosen by the person being tested "to perform a chemical test in addition to any test performed at the direction of a law enforcement officer." Section 66-8-109(B). The language of Section 66-8-109(B) does not guarantee that an independent test will be performed, even if requested by the person being tested. *State v. Jones*, 1998-NMCA-076, ¶ 24, 125 N.M. 556, 964 P.2d 117. Rather, it requires that law enforcement personnel provide a reasonable opportunity for the person being tested to arrange for an independent test. *Id.*

{11} In *Jones*, we held that a law enforcement officer did not afford a person to be tested a reasonable opportunity under Section 66-8-109(B) when the officer denied the person's request to call his doctor and denied him access to a telephone. *Jones*, 1998-NMCA-076, ¶ 25. In *Chakerian*, we considered whether the law enforcement officer provided a reasonable opportunity to the defendant to be tested when the officer gave the defendant a telephone and a Yellow Pages telephone directory in the early hours of the morning, and the defendant did not make arrangements for an independent test. 2015-NMCA-052, ¶¶ 4, 21. We held that the officer did not comply with the statutory requirement. *Id.* ¶ 23. Specifically, we stated that the officer had only provided the defendant "with a mere possibility of being able to arrange for an independent test," requiring that compliance with Section 66-8-109(B) demanded instead a "meaningful opportunity" to arrange for an independent test. *Chakerian*, 2015-NMCA-052, ¶ 22; *but see id.* ¶¶ 39-40 (Zamora, J., dissenting) (stating that the language of Section 66-8-109(B) requiring "an opportunity to make arrangements" does not import the word "meaningful" and disagreeing that Section 66-8-109(B) requires a "meaningful opportunity" (emphasis omitted)).

{12} The statutory sufficiency of Officer Lafave providing Defendant a telephone and a telephone directory in this case is not the issue. Defendant used the opportunity afforded him to arrange for an independent test. He called the hospital and was told by a nurse to come to the hospital to receive the test.

{13} Thus, different from *Chakerian*, the issue in this case is whether, by requiring in Section 66-8-109(B) that a law enforcement officer provide "an opportunity to arrange" for an independent test, the Legislature intended the language "an opportunity to arrange" to include the requirement that the officer transport a person being tested to a hospital to receive an independent test. We decline to reach that result.

{14} Most significantly, the statutory language does not state such a requirement. *Harris v. Vasquez*, 2012-NMCA-110, ¶ 10, 288 P.3d 924 ("[Appellate courts] will not read into a statute language that is not there[.]"). In the Implied Consent Act, the Legislature created the right of a person being tested to an independent test in a limited fashion. By way of contrast, it did not adopt the broader language adopted by some other states clearly stating the right to an independent test. *See, e.g.*, N.J. Stat. Ann. § 39:4-50.2(c) (West 2008) ("In addition to the samples taken and tests made at the direction of a police officer hereunder, the person tested shall be permitted to have such samples taken and chemical tests of his breath, urine or blood made by a person or physician of his own selection."). Rather, the language of Section 66-8-109(B) states only that the directing law enforcement officer must advise a person to be tested of the "right to be given an opportunity to arrange for" an independent test.

{15} Because of this difference in statutory language, the cases from other states that Defendant cites in support of his position do not assist this Court in its determination. *See Ward v. Alaska*, 758 P.2d 87, 89-91 (Alaska 1988) (addressing an Alaska statute that stated that the person tested may have a qualified medical person "of the person's own choosing administer a chemical test in addition to the test administered at the direction of the law enforcement officer"); *State v. Hughes*, 352 S.E.2d 643, 644 (Ga. Ct. App. 1987) (interpreting a Georgia statute providing for the right to "have a . . . qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer" (omission in original) (emphasis, internal quotation marks, and citation omitted)); *People v. Underwood*, 396 N.W.2d 443, 444 (Mich. Ct. App. 1986) (considering a Michigan statute that provided, in part, that a person being tested "shall be given a reasonable opportunity to have a person of his or her choosing administer [one] of the chemical tests described in this section" (internal quotation marks and citation omitted)), *overruled on other grounds by People v. Anstey*, 719 N.W.2d 579 (Mich. 2006); *State v. Nicastro*, 527 A.2d 492, 493-96 (N.J. Super. Ct. Law Div. 1986) (per curiam) (involving a New Jersey statute that provided that "the person tested shall be permitted to have such samples taken and chemical tests of his breath, urine or blood made by a person or physician of his own selection" (emphasis omitted)), *disagreed with by State v. Ettore*, 548 A.2d 1134 (N.J. Super. Ct. App. Div. 1988).

{16} We consider the difference in statutory language from that of other states to be significant in that our Legislature selected limited language in adopting the right to an independent test. In *Jones*, we interpreted this language to require that persons to be tested be given "a reasonable opportunity to contact a qualified person of their choosing who may be able to perform the test." 1998-NMCA-076, ¶ 24. In *Chakerian*, we interpreted Section 66-8-109(B) to include an officer's duty to "meaningfully cooperate with an arrestee's

express desire to arrange for" a test. *Chakerian*, 2015-NMCA-052, ¶ 19. Regardless of the manner in which we describe the duty of the law enforcement officer, the Legislature limited that duty to relate only to the "opportunity to arrange for" an independent test. Section 66-8-109(B). In this case, Defendant did "arrange for" an independent test, and he does not argue on appeal that he did not have the opportunity to do so. Thus, at the time that Defendant requested that he be transported to the hospital, he had already been afforded the right required by Section 66-8-109(B). His request for transportation, therefore, was in addition to, and an expansion of, the Section 66-8-109(B) right to have an opportunity to arrange for the test.

{17} We acknowledge the practical difficulties a person to be tested may have in obtaining an independent test. Indeed, when Defendant arrived at the hospital approximately fifteen to twenty minutes after he had called to arrange for a test, the emergency room doctor refused to administer the test. But, Section 66-8-109(B) does not require a directing law enforcement officer to fulfill arrangements made by the person to be tested. As we stated in *Jones*, Section 66-8-109(B) "does not guarantee the arrestee an additional test will be performed, but only that the arrestee will be given a reasonable opportunity to arrange for an additional test." *Jones*, 1998-NMCA-076, ¶ 24. Nor does it guarantee that when a person to be tested contacts a person qualified to perform the test that "the test will actually be performed by the person contacted." *Id.* If we were to read such requirements into Section 66-8-109(B) in order to correct practical difficulties in the operation of the statute, we would be wrongfully assuming the responsibility of the Legislature. *Harris*, 2012-NMCA-110, ¶ 10 ("[Appellate courts] will not read into a statute language that is not there[.]").

{18} Our reading of Section 66-8-109(B) is consistent with the balance the Legislature created in enacting Section 66-8-109(B). *See Chakerian*, 2015-NMCA-052, ¶ 18 ("On the one hand, the Legislature has provided the [s]tate with strong tools for deterring and prosecuting DWI offenses, and on the other hand, the Legislature has protected the rights of citizens by requiring the [s]tate to provide an arrestee with a meaningful opportunity to reasonably preserve and test the critical and potentially exonerating evidence."). Defendant used the opportunity afforded him to arrange for an independent test as required by the statute. From its plain language, the Legislature did not intend more. We do not agree with Defendant's interpretation that would require law enforcement officers to transport arrested drivers to locations of the drivers' choosing, removing the officers from their regular law enforcement responsibilities.[1] *Montoya v. McManus*, 1961-NMSC-060, ¶ 36, 68 N.M. 381, 362 P.2d 771 ("An interpretation of a statute will never be adopted which will render the application thereof absurd or unreasonable.").

{19} Nor do we believe that Section 66-8-109(E) bears on the issue. That section provides that if a person being tested has an independent test performed, the law enforcement agency of the officer directing the test shall pay for the cost of the independent test. Indeed, that section emphasizes the importance of the right to the person being tested, *Chakerian*, 2015-NMCA-052, ¶ 18, but it does not expand upon the right stated in Section 66-8-109(B).

CONCLUSION

{20} The Implied Consent Act does not require a law enforcement officer directing chemical testing of a driver arrested on suspicion of DWI to transport the driver to another location to receive an independent test that the driver has arranged. We reverse the district court's order suppressing the breath test samples taken by Officer Lafave and remand for further proceedings.

{21} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

LINDA M. VANZI, Judge

M. MONICA ZAMORA, Judge

[1]Defendant discusses Department of Public Safety Policies and Procedures concerning chemical testing procedures that were part of the record in his brief. We do not address these policies and procedures because the issue before us relates to the requirements of the Implied Consent Act, not internal procedures.

Certiorari Granted, June1, 2016, S-1-SC-35853

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-062

No. 33,889 (filed March 15, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
GILBERT SENA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY
JAMES L. SANCHEZ, District Judge

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Opinion

Timothy L. Garcia, Judge

{1} We now consider the correct unit of prosecution for distribution of child pornography under NMSA 1978, Section 30-6A-3(B) (2007), part of the Sexual Exploitation of Children Act, NMSA 1978, §§ 30-6A-1 to -4 (1984, as amended through 2007) (the Act), as the Act is applied to the facts in this case. Defendant Gilbert Sena conditionally pled guilty to ten counts of distribution of child pornography after a police officer used peer-to-peer software on two occasions to download ten separate still images of child pornography located in a "shared" file on Defendant's computer.

{2} After considering the Supreme Court's analysis and ruling in *State v. Olsson*, 2014-NMSC-012, 324 P.3d 1230, we hold that Section 30-6A-3(B) is ambiguous. In addition, the legislative history and purpose of the statute does not provide a clear legislative intent for defining the unit of prosecution regarding the possession or distribution of child pornography and the test for distinctness, articulated in *Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624, does not apply in this case. Because we also apply the rule of lenity to the multiple charges filed in this case, we hold that Defendant may only be convicted of one count of distribution of child pornography.

BACKGROUND

A. District Court Proceedings

{3} This case arose after Defendant acquired and retained possession of several digital images of child pornography through peer-to-peer software and stored these images on the hard drive of his computer in a "shared" file, thus allowing other users of this peer-to-peer software to download the images stored in the shared file on Defendant's computer. Los Lunas Police Officer Aaron Chavez was monitoring child pornography on the internet when he discovered that Defendant possessed several images of child pornography on his computer. On October 21, 2010, Officer Chavez used peer-to-peer software to locate and download three separate still images of child pornography from the shared file on Defendant's computer. On November 4, 2010, Officer Chavez again used the peer-to-peer software to download an additional seven separate still images of child pornography from the shared file on Defendant's computer. Based upon the content of the shared file on Defendant's computer, he was indicted for twenty counts of possession of child pornography, contrary to Section 30-6A-3(A), and ten counts of distribution of child pornography, contrary to Section 30-6A-3(B).

{4} On September 6, 2013, Defendant initially pled guilty to all ten counts of distribution of child pornography. Each count was represented by a still image that Officer Chavez downloaded from the shared file on Defendant's computer and separately identified in the grand jury indictment. Sentencing on the ten counts was postponed until April 28, 2014. On April 21, 2014, the Supreme Court issued its opinion in the *Olsson* case, addressing the statutory construction of Section 30-6A-3(A) regarding the unit of prosecution for possession of child pornography, and held that the rule of lenity applies to the possession of multiple images of child pornography. *Olsson*, 2014-NMSC-012, ¶ 2, (consolidating the appeals filed by two separate defendants, James Olsson and Willard Ballard). *Olsson* did not specifically address the application of its holding to related issues involving distribution of child pornography. *Id.* The parties agreed to amend Defendant's plea agreement to make it a conditional plea, allowing Defendant to appeal the issue of whether the Supreme Court's holding in *Olsson* (specifically referring to defendant Ballard whose case was consolidated with defendant Olsson) also applied to multiple convictions for distribution of child pornography. Defendant then filed this appeal.

B. Arguments on Appeal

{5} The issue presented is whether subsequent access or transfer of Defendant's shared file images, that a third party is capable of accomplishing without Defendant's further knowledge or involvement, support separate and distinct charges for distribution of child pornography against Defendant. Defendant argues that charging for distribution of child pornography under Section 30-6A-3(B) should be controlled by *Olsson*, and, as a result, he can only be convicted on a single count based upon the one "shared" file created on his computer. By pleading guilty, Defendant stipulated that possessing child pornography images in a "shared" file accessible on peer-to-peer software that third parties can download did create a sufficient factual basis to support a charge of distribution of child

pornography. Defendant argues that the act of making this singular file available for download was a unitary act and this was his only act of distribution under the facts in this case. In addition, Defendant also argues that the act of distribution is not inherently committed one image at a time, the statutory definition utilized to determine the unit of prosecution for distribution of child pornography is ambiguous, and the rule of lenity must be applied in this case.

{6} The State asserts this case is controlled by *State v. Leeson*, 2011-NMCA-068, 149 N.M. 823, 255 P.3d 401, and that Defendant's ten convictions did not violate double jeopardy. It argues that the legislative intent behind the statute criminalizing distribution of child pornography is to protect children from continued exploitation through dissemination of the recorded images of their abuse, and the file sharing that occurred in this case is the type of dissemination the statute prohibits. The State argues that—just like in *Leeson*, where we held that the defendant could be charged separately for each image created—a separate charge is appropriate for each image of child pornography that is distributed. The State acknowledges our Supreme Court's holding in *Olsson* but argues that the *Olsson* decision should be limited solely to the unit of prosecution for possession of child pornography. Accordingly, the State requests that all of Defendant's convictions be affirmed.

DISCUSSION

A. Standard of Review

{7} Under the Act, issues regarding the unit of prosecution are addressed as a matter of law and subject to de novo review. *Olsson*, 2014-NMSC-012, ¶ 14. We now address the district court's decision de novo.

B. Units of Prosecution Under *Olsson* and *Leeson*

{8} Double jeopardy protects defendants against multiple punishments for the same offense. N.M. Const. art. II, § 15; *State v. Pierce*, 1990-NMSC-049,¶ 33, 110 N.M. 76, 792 P.2d 408; *see Benton v. Maryland*, 395 U.S. 784, 786 (1969). The number of separate acts that may be prosecuted under one criminal statute, known as a unit of prosecution case, is a scenario that can trigger a double jeopardy violation. *Leeson*, 2011-NMCA-068,¶ 13. In unit of prosecution cases, the defendant is charged with multiple violations of a single statute based upon acts that may or may not be considered a single course of conduct. *State v. Barr*, 1999-NMCA-081, ¶ 11, 127 N.M. 504, 984 P.2d 185. To determine the correct unit of prosecution, the relevant inquiry is "whether the [L]egislature intended punishment for the entire course of conduct or for each discrete act" undertaken by a defendant. *Swafford v. State*, 1991-NMSC-043, ¶ 8, 112 N.M. 3, 810 P.2d 1223.

{9} To determine the legislative intent for establishing the unit of prosecution in any particular case, the courts employ a two-part test. *State v. Gallegos*, 2011-NMSC-027, ¶ 31, 149 N.M. 704, 254 P.3d 655. First, courts look to the plain language of the statute to determine if the Legislature has defined the unit of prosecution. *State v. Swick*, 2012-NMSC-018, ¶ 33, 279 P.3d 747. If so, the inquiry is complete and proceeds no further. *Id*. If the unit of prosecution is not clearly defined in the plain language of the statute, courts usually proceed to analyze whether a defendant's acts are separated by sufficient "indicia of distinctness" to justify multiple punishments. *Gallegos*, 2011-NMSC-027, ¶ 31 (internal quotation marks and citation omitted). In determining distinctness, the district court reviews six factors that were originally articulated in *Herron*. 1991-NMSC-012, ¶ 15. As applied to the Act, the *Herron* factors are described to be: (1) time between criminal acts, (2) location of the victim during each act, (3) existence of any intervening events, (4) distinctions in the manner of committing the acts, (5) the defendant's intent, and (6) the number of victims. *See Olsson*, 2014-NMSC-012, ¶ 32. If there is not sufficient distinctness between the acts that are separately charged, the rule of lenity applies. *Herron*, 1991-NMSC-012, ¶ 14. Under the rule of lenity, doubt is resolved in a defendant's favor and against turning a single act into multiple offenses. *Id*.

{10} Two New Mexico cases have provided specific guidance regarding the unit of prosecution for charges under the Act. *See Olsson*, 2014-NMSC-012; *Leeson*, 2011-NMCA-068. In *Olsson*, our Supreme Court considered the unit of prosecution issue as applied to possession of child pornography. 2014-NMSC-012, ¶ 1. In *Leeson*, this Court considered the unit of prosecution issue as applied to manufacturing of child pornography. 2011-NMCA-068, ¶ 17. Neither court addressed the unit of prosecution issue as applied to the distribution of child pornography.

{11} In *Olsson*, our Supreme Court held that the statutory language addressing possession of child pornography was ambiguous. 2014-NMSC-012, ¶ 2. An ambiguity existed because the statutory definition for what constitutes a "visual or print medium" contains both singular types of images, such as a photograph or slide, and multiple types of images, such as a book, diskette, or film. *Id*. ¶ 20; Section 30-6A-2(B). Given this contrast, a plain meaning as to the correct unit of prosecution for possession of child pornography was not readily apparent. *Olsson*, 2014-NMSC-012, ¶ 20. Additionally, our Supreme Court found that the legislative history and purpose of Section 30-6A-3 do not define a clear unit of prosecution and that the *Herron* test of distinctness does not apply in possession cases. *Olsson,* 2014-NMSC-012, ¶¶ 31, 42. It determined that the *Herron* factors apply where a defendant has direct contact with a victim, but these factors do not translate to possession cases because many of the factors are irrelevant to possession or are inconclusive if applicable. *Olsson*, 2014-NMSC-012, ¶ 39. Because the statutory language was "insurmountably ambiguous" and the indicia of distinctness factors could not be applied in possession cases, the rule of lenity was applied in the defendant's favor. *Id*. ¶¶ 43, 45. Thus, the Court held that only one count of possession of child pornography could be imposed. *Id*. ¶ 47.

{12} In *Leeson*, this Court considered the unit of prosecution as applied to the act of manufacturing child pornography. 2011-NMCA-068, ¶ 17. This Court found that the unit of prosecution for manufacturing child pornography under Section 30-6A-3(D) was readily discernible and that a separate charge could be brought for each image created. *Leeson*, 2011-NMCA-068, ¶ 17. To manufacture is specifically defined in the Act as engaging in "the production, processing, copying by any means, printing, packaging, or repackaging of any visual or print medium" depicting child pornography. Section 30-6A-2(D). Thus, under a plain language analysis of this separate statutory wording, each photograph taken is a distinct action involving a victim and a distinct violation of the statute. *Leeson*, 2011-NMCA-068, ¶ 17. As a result, this Court determined that the prosecution of the act of manufacturing each separate photograph did not violate double jeopardy. *Id*. ¶ 20.

C. The Unit of Prosecution for Distribution of Child Pornography

{13} To determine the unit of prosecution for distribution of child pornography, we must now consider the language of Section 30-6A-3(B) and try to give effect to the legislative intent. *Leeson*, 2011-NMCA-068, ¶ 14. "If the statute does not clearly define the unit of prosecution, we must determine whether the different offenses are separated by sufficient indicia of distinctness." *Id.* (internal quotation marks and citation omitted).

{14} Section 30-6A-3(B) states:

> It is unlawful for a person to intentionally distribute any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age.
>
> "[V]isual or print medium" is defined as:
>
> (1) any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer or electronically generated imagery; or
>
> (2) any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer generated or electronically generated imagery[.]

Section 30-6A-2(B).

{15} The wording used in Section 30-6A-3(B) for distribution of child pornography is the exact same language used in Section 30-6A-3(A) regarding possession of child pornography except for one word; the word "distribute" is used in place of the word "possess." Neither "possess" nor "distribute" is defined elsewhere in the Act. Because the identical statutory language is utilized by the Legislature, we conclude that our Supreme Court's analysis in *Olsson* is the most applicable statutory construction precedent and *Olsson* should guide our analysis in the present case. We hold that the use of the word "distribute" in Section 30-6A-3(B) in place of the word "possess" under Section 30-6A-3(A) reflects an identical ambiguity with regard to the interpretation of the unit of prosecution. Therefore, consistent with *Olsson*, we agree that the statutory language in Section 30-6A-3(B) is ambiguous regarding the intended unit of prosecution for distribution of child pornography. *Olsson*, 2014-NMSC-012, ¶ 23. As recognized in *Olsson*, the same controlling definition of "visual or print medium" that is set forth in Section 30-6A-2(B) of the Act, providing for both singular and multiple types of images, also applies to factual scenarios involving acts of distribution rather than simple possession. *Olsson*, 2014-NMSC-012, ¶ 20. The history and purpose of Section 30-6A-3 discussed in *Olsson* similarly fails to provide further guidance as to a clear unit of prosecution in either scenario. 2014-NMSC-012, ¶ 29.

{16} While distribution may align with possession in certain factual scenarios, we must address how both may differ with manufacturing under *Leeson*. The language of Section 30-6A-3(D) for the manufacture of child pornography differs from the language for possession and distribution. Notably, Section 30-6A-3(D) defines manufacture somewhat differently than possession and distribution, and Section 30-6A-2(D) provides a more specific and detailed definition for the word "manufacture." This Court recognized that this more specific definition of "manufacture" provides the proper unit of prosecution as to each image manufactured. *Leeson*, 2011-NMCA-068, ¶ 17. Both distribution and possession lack this additional defined clarity. Furthermore, this Court in *Leeson* distinguished manufacturing from possession, noting having been troubled by what the Legislature intended by the word "possess" and "questioned whether [it] meant to criminalize the possession of a collection of child pornography or the possession of each individual image within a collection." *Id.* ¶ 19. Because the statutory definition of distribution is similarly ambiguous and applies the identical definition for "visual or print medium" used to define possession, our holding in *Leeson* only confirms the same concerns that were addressed and resolved by our Supreme Court in *Olsson*.

{17} With the unit of prosecution for distribution of child pornography unclear from the statute and legislative history, we must ultimately consider whether Defendant's acts have sufficient distinctness to justify multiple punishments. As concluded in *Olsson*, the *Herron* factors to determine distinctness should apply when a defendant is charged with having direct contact with the victim. Distribution of child pornography does not entail direct contact with a child victim and Defendant was not charged with any direct contact with a victim in this case.

{18} Assuming without deciding that an individual receiving a distribution of child pornography can be considered "a separate type of victim" under Section 30-6A-3(B) and the *Herron* factors should be applied, Defendant's actions in this case were not shown to be distinct with regard to any images placed in the "shared" file. No multiplicity of separate actions was alleged to have occurred. No evidence was presented to establish that Defendant personally sent any image to a third party. Even Officer Chavez established that he could download one or more of the images located in Defendant's shared file at any one time, without any indicia of distinctiveness that can be attributed to Defendant. Therefore, we determine that the *Herron* factors to establish distinctness, if applicable to separate acts of distribution of child pornography, did not exist in this case.

{19} Finally, we turn to the rule of lenity. Just as the rule of lenity was applied to the ambiguity regarding the unit of prosecution in *Olsson*, it also applies to Defendant's actions regarding the distribution of child pornography in this case. 2014-NMSC-012, ¶ 45. Defendant created one distinct computer file containing multiple images of child pornography. Defendant does not dispute that he committed an act of distribution of child pornography by making his file accessible through peer-to-peer sharing software. Defendant did not perform any other readily discernible act that would justify a separate, distinct, additional charge of distribution. The rule of lenity applies to limit the number of charges and convictions upon which Defendant may be found guilty. That number is one. The indirect actions of accessing Defendant's shared computer file by Officer Chavez do not support additional charges of distribution under the current statutory language of Section 30-6A-3(B). Accordingly, to prevent double jeopardy, Defendant's ten convictions for distribution of child pornography are now reduced to one.

{20} This Court does not address, and is specifically reserving the question of, whether multiple actions undertaken by some other defendant to affirmatively share images of child pornography with a third party may constitute separate acts of sufficient distinctiveness to warrant multiple units of prosecution for the distribution of child pornography under the Act and the current statutory language of Section 30-6A-3(B). As our Supreme Court respectfully recommended in *Olsson* , this Court also requests that the Legislature consider clarification and specificity regarding the intended unit of prosecution for possession of child pornography and the distribution of child pornography, especially in light of rapidly advancing technology and changes in society regarding the use of the internet.

CONCLUSION

{21} For the reasons set forth herein, we reverse all but one of Defendant's convictions for distribution of child pornography. We further remand this case to the district court to correct Defendant's judgment and sentence and to conduct any further proceedings that may be necessary to effectuate this Court's decision.

{22} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

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

Classified

Positions

Senior Trial Attorney/Deputy Trial Colfax County

The Eighth Judicial District Attorney's Office is accepting applications for a Senior Trial Attorney or Deputy District Attorney in the Raton Office. The position will be responsible for a felony caseload and must have at least two (2) to four (4) years as a practicing attorney in criminal law. This is a mid-level to an advanced level position. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send interest letter/resume to Suzanne Valerio, District Office Manager, 105 Albright Street, Suite L, Taos, New Mexico 87571 or svalerio@da.state.nm.us. Deadline for the submission of resumes: Open until position is filled.

Criminal Justice Advocate

The American Civil Liberties Union (ACLU) of New Mexico seeks a full-time Criminal Justice Advocate based in Albuquerque. The primary responsibility of the Criminal Justice Advocate is to develop and implement plans to change laws, regulations, policies, and procedures that impact corrections and law enforcement in New Mexico. This involves data-gathering and research; forming alliances with strategic partners; mobilizing and organizing constituent support of ACLU-NM's policy positions; lobbying government officials and legislative bodies; and representation of the ACLU-NM's positions in public forums. For the full position announcement and how to apply, please go to: https://www.aclu-nm.org/position-announcement-criminal-justice-advocate/2016/09/

13th Judicial District Attorney Assistant Trial Attorney, Senior Trial Attorney

Assistant Trial Attorney - The 13th Judicial District Attorney's Office is accepting applications for entry to mid-level attorney to fill the positions of Assistant Trial Attorney. These positions require misdemeanor and felony caseload experience. Senior Trial Attorney – We are also accepting applications for attorneys with a high level of experience prosecuting serious violent offenses. A proven track record in these major cases and experience in management/supervisory/personnel areas is also a plus. Salary for each position is commensurate with experience. Send resumes to Reyna Aragon, District Office Manager, PO Box 1750, Bernalillo, NM 87004, or via E-Mail to: RAragon@da.state.nm.us. Deadline for submission of resumes: Open until positions are filled.

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New Mexico Legal Aid seeks a staff attorney to be based in Hobbs, NM. The attorney will handle a variety of cases in Hobbs and Lea County in southeastern New Mexico. Case work will include family law, housing law, consumer issues, public benefits cases and other issues. The attorney will be active in local bar and community activities, and will participate in community education and outreach to eligible clients. The attorney also will be part of an innovative new partnership between New Mexico Legal Aid and Legal Aid of Northwest Texas to build a regional advocacy team that will include attorneys based in Roswell NM and in Odessa-Midland TX as well as in Hobbs. The project, supported with funding from the J.F. Maddox Foundation in Hobbs and the Texas Access to Justice Foundation, will focus on common issues, cases and individual clients from Hobbs and the nearby Texas communities of Andrews and Seminole. The project hopes to create a nationally replicable model for building collaborative regional capacities for litigation and community advocacy in neighboring rural communities divided by one or more state borders. We are looking for highly motivated candidates who are passionate and strongly committed to helping NMLA better serve clients in the Hobbs area, including development of effective team strategies to handle complex advocacy and extended representation cases. Requirements: Candidates must be licensed in New Mexico or eligible for admission by examination or licensed in another state and eligible for reciprocity admission or for a New Mexico legal aid providers limited license. Dual licensing in New Mexico and Texas is a plus. Candidates must possess excellent written and oral communication skills, the ability to manage multiple tasks, manage a significant caseload and build collaborative relationships within the staff and the community. Must be willing to travel. Proficiency in Spanish is a strong plus. Send a current resume and a letter of interest explaining what you would like to accomplish if you are selected for this position to: jobs@nmlegalaid.org. Salary: DOE, NMLA is an EEO Employer. Deadline: October 10, 2016.

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Pro Bono Appreciation Luncheon and CLE
October 17, 2016 from 11:30 AM – 1:30 PM
Hilton of Santa Fe
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CLE and luncheon details TBA

Free Legal Fair
October 22, 2016 from 10 AM – 1 PM
Mary Esther Gonzales Senior Center
(1121 Alto St., Santa Fe, NM 87501)

2nd JUDICIAL DISTRICT:

Law-La-Palooza Free Legal Fair
October 20, 2016 from 3 – 6 PM
Alamosa Community Center
(6900 Gonzales Rd. SW #C, Albuquerque, NM 87121)

4th JUDICIAL DISTRICT:

Free Legal Fair and Pro Bono Appreciation Luncheon
October 18, 2016 from 9 AM – 2 PM
New Mexico Highlands University
(Student Union Building; 800 National Ave., Las Vegas, NM 87701)

5th JUDICIAL DISTRICT (CHAVES):

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October 7, 2016 from 1:30 PM – 4:30 PM
Roswell Adult and Senior Center
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October 14, 2016 from 1 PM – 3 PM
Hobbs City Hall
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October 28, 2016 from 10 AM – 1 PM
Luna County District Court
(855 S. Platinum, Deming, NM 88030)

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October 21, 2016 from 3 PM – 6 PM
K-BOB's Steakhouse
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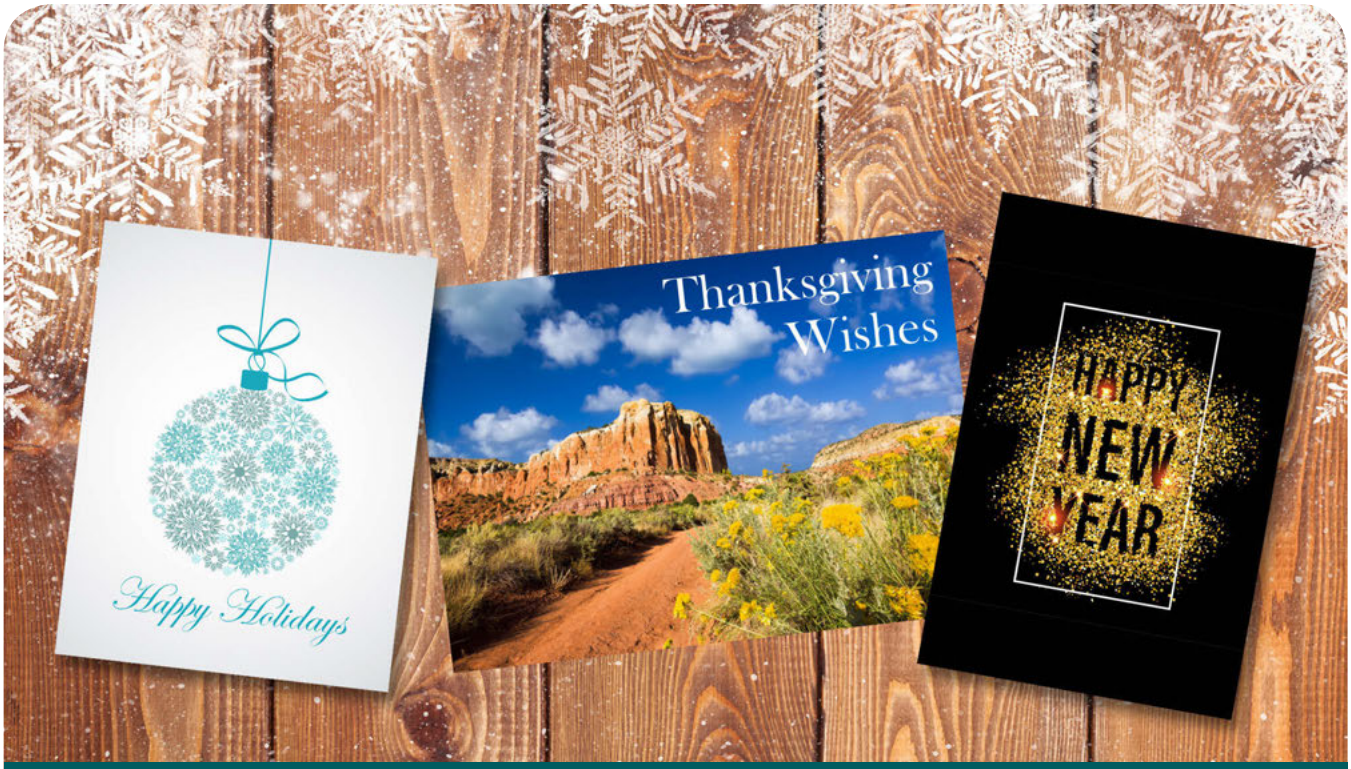

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