BAR BULLETIN

Official Publication of the State Bar of New Mexico

November 16, 2016 • Volume 55, No. 46

White Roses, by Gail Factor (see page 3) ARTWORKinternational, Inc.

Inside This Issue

NEW MEXICO Lawyer

Current Trends in Immigration Law for the Non-Immigration Lawyer

CLE Planner

Dec. 1

Drugs in the Workplace

2.0 G

Thursday, December 1, 2016 • 10 a.m. – 12:15 p.m.
State Bar Center, Albuquerque

Co-sponsor: *Employment and Labor Law Section*

This CLE will address employee marijuana and prescription drug use in the workplace and whether employers are required to accommodate employees' drug use in the workplace. The presentation will also discuss how employer's drug testing programs are impacted by the legalization of marijuana and prescription drug use.

Dec. 7

Deposition Practice in Federal Cases

2.0 G 1.0 EP

Wednesday, December 7, 2016 • 12:50 – 4:15 p.m.
State Bar Center, Albuquerque

This seminar will include panel discussion, questions and answers, and lecture concerning updates to the Federal Rules of Civil Procedure as they pertain to the scope of discovery and deposition practice, ethical considerations when deposing lay and expert witnesses in federal cases, and best practices for taking and defending depositions in federal cases.

Presented by Jason Collis Bousliman, Alfred L. Green Jr., Steven S. Scholl, and Phil Davis. Moderated by Judge Alan C. Torgerson.

Dec. 9

Immigration Law: Immigration Youth in the System: The Intersection of Immigration, Family Law and Juvenile Justice

6.0 G 1.0 EP

Friday, December 9, 2016 • 8:30 a.m. – 5 p.m.
State Bar Center, Albuquerque

Co-sponsor: *Immigration Law Section*

In New Mexico, about one in five children live in a mixed-status family, meaning that some members of the family are undocumented. This interactive CLE will provide practical tools for non-immigration attorneys who are working with mixed status families to learn how immigration law intersects with family and criminal law.

Register online at **www.nmbar.org** or call 505-797-6020.

STATE BAR of NEW MEXICO
CENTER FOR LEGAL EDUCATION

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email: address@nmbar.org • www.nmbar.org

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Business Law Section Annual Meeting
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18
Prosecutors Section BOD
Noon, State Bar Center

18
Trial Practice Section BOD
Noon, State Bar Center

22
Appellate Practice Section
Noon, teleconference

22
Intellectual Property Law Section BOD
Noon, Lewis Roca Rothgerber Christie LLP, Albuquerque

22
Senior Lawyers Division BOD
4 p.m., State Bar Center

25
Immigration Law Section BOD
Noon, teleconference

Workshops and Legal Clinics

November

16
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10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque, 1-877-266-9861

December

2
Civil Legal Clinic
10 a.m.–1 p.m., First Judicial District Court,
Santa Fe, 1-877-266-9861

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

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

7
Sandoval County Free Legal Clinic
10 a.m.–2 p.m., 13th Judicial District Court,
Bernalillo, 505-867-2376

8
Valencia County Free Legal Clinic
10 a.m.–2 p.m., 13th Judicial District Court,
Los Lunas, 505-865-4639

Cover Artist: Gail Factor (1942–2013) was committed to painting for more than five decades. An obvious artistic interest and aptitude emerged early on leading her to attend art classes at the Chicago Art Institute at the age of five. Factor pursued ongoing academic achievements with the same enthusiasm, culminating in a BFA from the University of Southern California (magna cum laude), an awarded fellowship in Fine Arts from Yale University and independent studies in art and architecture throughout Europe. Factor's work has been exhibited in galleries and museums throughout the U.S. In addition, her work is included in numerous prominent public and private collections. More of her work can be viewed at www.gailfactor.com.

Notices

Court News

New Mexico Court of Appeals

Notice of Vacancy

A vacancy on the Court of Appeals exists as of Nov. 1 due to the retirement of Hon. Michael D. Bustamante effective Oct. 31. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the Court. Alfred Mathewson, chair of the Appellate Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Download applications at http://lawschool.unm.edu/judsel/application.php or request an application by email by contacting the Judicial Selection Office at 505-277-4700. The deadline for applications is 5 p.m., Nov. 17. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Appellate Court Judicial Nominating Commission will meet beginning at 9 a.m., Dec. 1, at the Supreme Court Building, 237 Don Gaspar Ave. in Santa Fe, to interview applicants for the position. The Commission meeting is open to the public and those who have comments about the candidates will have an opportunity to be heard.

Second Judicial District Court

Notice of Exhibit Destruction

Pursuant to 1.21.2.617 Functional 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 2003–2006, 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 Nov. 16. Those 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.

Professionalism Tip

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

Within practical time limits, I will allow lawyers to present proper arguments and to make a complete and accurate record.

13th Judicial District Court

Closure Dates and New Courthouse Address

The 13th Judicial District Court in Grants will close to move to its new courthouse on Nov. 30, Dec. 1 and Dec. 2. The new courthouse will open for business on Dec. 5. The physical and mailing address of the new courthouse is 700 E. Roosevelt Ave, Suite 60, Grants, N.M. 87020. Telephone numbers will remain the same. During the three days the Court is closed, domestic violence and emergency filings will be accepted. Call Toinette Garcia, 505-240-2718, for assistance with filing. Contact Crystal Anson, 505-337-9151, with further questions.

U.S. District Court, District of New Mexico

Court Closure

The U.S. District Court for the District of New Mexico will be closed Nov. 24–25 for the Thanksgiving holiday. Court will resume on Monday, Nov. 28. After-hours access to CM/ECF will remain available as regularly scheduled. Stay current with the U.S. District Court for the District of New Mexico by visiting the Court's website at www.nmd.uscourts.gov.

Proposed Amendments to Local Rules of Civil Procedure

Proposed amendments to the Local Rules of Civil Procedure of the U.S. District Court for the District of New Mexico are being considered. The proposed amendments are to D.N.M.LR-Civ. 5, Filing and Service. 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, no later than Nov. 16.

State Bar News

Attorney Support Groups

- Nov. 21, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)
- Dec. 5, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the first Monday of the month.)
- Dec. 12, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.

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

Board of Bar Commissioners

Appointments to Boards and Commissions

The Board of Bar Commissioners will make appointments to the following boards and commissions: Client Protection Commission (one appointment, three-year term); Commission on Professionalism (one lawyer position, one non-lawyer position, two year terms); and the New Mexico Legal Aid Board (one appointment, three year term). Members who want to serve should send a letter of interest and brief résumé by Dec. 1 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to 505-828-3765; or email to jconte@nmbar.org.

Business Law Section

David Buchholtz Chosen as 2016 Business Lawyer of the Year

The Business Law Section will present the 2016 Business Lawyer of the Year Award to David Buchholtz at 4:45 p.m., Nov. 18, at the State Bar Center. The award presentation will follow the Section's annual CLE program (register at www.nmbar.org/CLE). Buchholtz practices with the Rodey Law Firm and focuses on government finance law, economic development and state tax incentive law, financial institutions law, government relations, securities law and corporate matters.

The Section invites all to attend the award ceremony. For more information, contact Breanna Henley at bhenley@nmbar.org.

Intellectual Property Law Section

AIPLA Moot Court Judges Needed

Two UNM School of Law teams will participate in the American Intellectual Property Law Association Moot Court Competition in the spring, partially sponsored by the State Bar Intellectual Property Law Section. The teams seek volunteer attorneys beginning in January to judge their training and mock trials prior to the formal competition. Contact Professor Marsha Baum at Baum@law.unm.edu or any board member of the Intellectual Property Law Section to volunteer. A board roster can be found at www.nmbar.org/IPLaw.

UNM

Law Library

Hours Through Dec. 18

Building & Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.

Reference

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

Holiday Closures

Nov. 24–25 (Thanksgiving)

Women's Law Caucus

Award Nominations

The Women's Law Caucus at the UNM School of Law seeks nominations for an outstanding woman in the New Mexico legal community to honor in the name of former Justice Mary Walters, who was the first woman appointed to the New Mexico Supreme Court. Those who want to make a nomination should submit the following information to Lindsey Goodwin at goodwili@law.unm.edu by Nov. 30: 1) nominee's name, 2) nominee's firm organization/title, 3) why the nominee should receive the award, 4) if the nominator is willing to introduce the nominee should she be chosen, and 5) any other relevant information.

Other Bars

American Bar Association

Fall State and Local Government CLE and Networking Conference

The American Bar Association Section of State and Local Government Law presents the 2016 Fall CLE and Networking Conference (10.5 G) on Nov. 17–20 in Phoenix, Ariz. Topics include cybersecurity, election dissection, energy on Indian lands, green building and sustainable development and more. Register online at http://ambar.org/2016slgfall.

First Judicial District Bar Association

November Luncheon

Join the First Judicial District Bar Association for its next luncheon event at noon, Nov. 21, at the Santa Fe Hilton. Judge Sarah M. Singleton will discuss her experience as chief judge. She will be joined by Director of Administrative Offices of the Courts Artie Pepin to discuss the judiciary budget and other matters affecting the First Judicial District Court. The cost of the luncheon is $15. R.S.V.P. to David Pumarejo at djp@santafelawgroup.com.

New Mexico Black Lawyers Association

Immigration Law CLE

The New Mexico Black Lawyers Association invites members of the legal community to attend its "Immigration and Deportation" CLE (5.0 G, 1.0 EP) from 8 a.m.–4:30 p.m., on Nov. 18, at the State Bar Center in Albuquerque. Registration is $225 and lunch is included. For more information or to register, visit www.newmexicoblacklawyersassociation.org. The deadline to request a refund is Nov. 11.

New Mexico Defense Lawyers Association

Defense Practice and Basic Skills CLE

The New Mexico Defense Lawyers Association presents a half-day "Basic Skills Academy" CLE for young lawyers (3.0 G) in the morning and a half-day CLE devoted to ethics/professionalism topics (3.0 EP) in the afternoon on Dec. 16, at the Greater Albuquerque Jewish Community Center. Morning topics include case intake, analysis and evaluation, depositions, and expert witnesses. Afternoon topics include lawyer incivility and enforcement, ethics jeopardy and JLAP. This is an excellent opportunity for all lawyers to top off their ethics professionalism CLE requirements by year-end. Registration and full program details for both seminars are available at www.nmdla.org or by calling 505-797-6021.

Featured

Member Benefit

Ethics Assistance

Contact the ethics helpline at 800-326-8155 for immediate assistance or for a written response to an ethics inquiry regarding one's own conduct. Send original questions to the Ethics Advisory Committee in care of rspinello@nmbar.org.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline

Attorneys/Law Students

505-228-1948 • 800-860-4914

Judges 888-502-1289

www.nmbar.org/JLAP

New Mexico Women's Bar Association

Seeking Nominations for Inaugural Award

The New Mexico Women's Bar Association seeks nominations for its inaugural Support for Women in the Law award. This new honor will be awarded to an individual or law firm actively engaged in promoting a culture of success for women attorneys in New Mexico. For guidance on the considerations that will be used by the selection committee, visit www.facebook.com/nmwba. Submit nominations to Christina West at cwest@indiancountrylaw.com by Nov. 18 by providing the name of the individual or law firm and 1–2 paragraphs on the reasons for the nomination.

Board of Bar Commissioners Election 2016

Vote online through Nov. 30!

Voting in the 2016 election for the State Bar of New Mexico Board of Bar Commissioners began Nov. 10 and closes at noon on Nov. 30. There are two open positions in the **Seventh Bar Commissioner District** (Catron, Dona Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties). Four candidates submitted nomination petitions for the two positions, so there will be a contested election in that district. View the candidate biographies and statements in the Nov. 9 *Bar Bulletin* (Vol. 55, No. 45).

Voting will be conducted electronically. A link to the electronic ballot and instructions was emailed to all members in the Seventh Bar Commissioner District using email addresses on file with the State Bar. To provide an email address if one is not currently on file or to request a mailed ballot, contact Pam Zimmer at pzimmer@nmbar.org.

Join a State Bar Practice Section

Benefits of Membership include:

- Practice area-targeted resources
- Networking
- Leadership experience
- Discounts on CLE programs
- Legislative advocacy
- Public service opportunities
- *And so much more!*

Up to $10-25 for one year
Choose from 20 practice sections

Sign up now, and enjoy membership through the end of next year.

Browse sections and join today at **www.nmbar.org > About Us > Sections**

STATE BAR of NEW MEXICO

From the Lawyers Professional Liability and Insurance Committee

Good Signs to Look for When Choosing a Professional Liability Insurance Company

1. No Action Has Been Taken Against the Company by the New Mexico Superintendent of Insurance in the Last Five Years

The New Mexico Office of the Superintendent of Insurance is tasked with ensuring that insurance companies, agents, adjusters, third-party administrators and other insurance industry staff operating in the state of New Mexico comply with the New Mexico Insurance Code. In addition, the OSI's Consumer Assistance Bureau accepts complaints by the insured against their insurance company regarding "policy applications, binding of policies, claim handling, and other matters involving insurance." See www.osi.state.nm.us/ConsumerAssistance/index.aspx.

Pursuant to statute, the OSI has the authority to, among other things, conduct examinations and investigations of insurance matters to determine whether a violation of the Insurance Code has occurred. See N.M.S.A. § 59A-2-8. Actions taken by the OSI against insurance companies, agents, adjusters and third-party administrators are a matter of public record.

Recent actions can be located on the OSI's website at: www.osi.state.nm.us/MiscPages/osilegal.aspx. For actions taken earlier than those listed on the OSI website, such information is available via a request pursuant to the Inspection of Public Records Act.

So, what happens if the OSI has taken action against your potential or current insurance company? That's up to you. As each attorney's insurance needs are different, how much weight is ultimately given to an action taken by the OSI is solely within the discretion of the potential insured.

Our sign to look for "No Action Taken Against the Company by the New Mexico Superintendent of Insurance in the Last Five Years" is a suggestion—not a hard-and-fast rule for evaluating and choosing an insurance company. If you have options when choosing a professional liability carrier, do your research and make sure you are comfortable with your choice.

2. No Renewal on the Bases of Potential Claims Only

The standard definition of "claim" in virtually all Lawyer's Professional Liability/Legal Malpractice insurance policies is "a demand for money or services." In other words, to constitute an actual claim against an insured lawyer under the policy, the claimant (typically a client or former client) must have actually made demand upon the lawyer to pay money to compensate for damages the client allegedly suffered as a result of alleged legal malpractice.

Once such a demand has been received by the lawyer, he or she is required under policy to report that as a claim in order to trigger coverage under the policy. Failing to report such a claim during the policy period typically constitutes a waiver of coverage for that claim. In addition, most LPL policies provide for the reporting of "potential claims." These are typically defined in the policy as situations that could potentially give rise to a "claim," but that do not meet the policy definition of an actual claim.

An example would be a communication from the client or former client accusing the lawyer of having made an error or having committed malpractice, but making no demand for the lawyer to actually pay the client's alleged "damages." LPL policies typically allow the insured lawyer to report such a "potential" claim, which triggers coverage under the current policy for that matter should an actual claim as defined in the policy ever be made. Coverage is essentially "bound" for that matter under the current policy, assuming all other required policy conditions are met, once such a notice of "potential" claim has been given.

There are obvious advantages to the lawyer to "bind" coverage in this way for potential claims. Furthermore, the renewal application for an LPL policy typically asks whether the lawyer is aware of circumstances that could potentially give rise to a claim. Failure to identify such a potential claim on the renewal application can not only result in a waiver of coverage for the claim if it should ever eventuate, but could result in revocation of the policy for misrepresentation on the renewal application.

Thus, a lawyer who fails to report a potential claim to the insurer at the time the lawyer becomes aware of it, out of concern that doing so will cause his or her premium to increase, has actually accomplished nothing because of the requirement to report it upon renewal—and has missed the opportunity to bind coverage under the current policy.

View more tips from the Lawyers Professional Liability and Insurance Committee in the Dec. 21 issue of the *Bar Bulletin*.

Legal Education

November

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 **Lawyers and Municipal Money**
5.0 G, 2.0 EP
Live Program
City of Albuquerque Legal Department
505-768-4500

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

17 **2016 Probate Institute**
6.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

17–20 **2016 Section of State and Local Government Law Fall CLE and Networking Conference**
10.5 G
Live Seminar, Phoenix, Ariz.
American Bar Association
http://ambar.org/2016slgfall

18 **2016 Business Law Institute**
5.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
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

18 **RMD Outside Counsel Seminar and Legal Updates**
4.3 G, 2.0 EP
Live Seminar, Santa Fe
New Mexico General Services Department
505-827-0402

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

22 **31st Annual Bankruptcy Year in Review Seminar (2016)**
6.0 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

30 **Building Your Civil Litigation Skills**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

December

1 **Drugs in the Workplace**
2.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

1 **Piercing the Entity Veil: Individual Liability for Business Acts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

1 **Wine, Cheese and CLEs**
1.0 G
Live Seminar, Albuquerque
New Mexico Legal Aid
kaseyd@nmlegalaid.org

1 **Celebrate Pro Bono: Ways to Give Back in New Mexico**
1.0 G
Live Seminar, Albuquerque
New Mexico Legal Aid
505-545-8543

1–4 **Case Plus: Focus Groups for Plaintiff Cases**
28.7 G
Live Seminar, Albuquerque
American Association for Justice
www.justice.org

2 **As Judges See It: Best (and Worst) Practices in Civil Litigation**
6.0 G
Live Seminar, Las Cruces
NBI Inc.
www.nbi-sems.com

December

2 **Personal Injury Evidence: Social Media, Smartphones, Experts and Medical Records**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

2 **Clients First: Understanding Your Role as an Advocate**
4.0 G, 2.5 EP
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmdla.org

2 **Civility and Professional Identity**
2.0 EP
Live Seminar, Albuquerque
New Mexico Workers Compensation Administration
www.workerscomp.state.nm.us

2 **Third Annual Wage Theft CLE**
3.0 G, 1.0 EP
Live Seminar, Gallup
New Mexico Hispanic Bar Association
www.nmhba.net

5 **Justice with Compassion—Courthouse Facility Dogs Improving the Legal System**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Boundaries and Easements**
6.5 G, 1.0 EP
Live Seminar, Albuquerque
Halfmoon Education
www.halfmoonseminars.com

5–9 **Forensic Evidence**
24.9 G, 1.2 EP
Live Seminar, Santa Fe
National District Attorneys Association
www.ndaa.org

6 **Transgender Law and Advocacy**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Medical Marijuana Law in New Mexico**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

7 **13th Century Ethical Pointers for Dealing with 21st Century Problems**
2.0 EP
Live Seminar, Albuquerque
Albuquerque Lawyers Club
575-921-1597

7 **Deposition Practice in Federal Cases**
2.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **HR Legal Compliance: Advanced Practice**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

8 **2016 Real Property Institute**
4.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Structuring Minority Interests in Businesses**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8–9 **Law and Policy for Neighborhoods Conference**
10.0 G, 2.0 EP
Live Program, Santa Fe
Santa Fe Neighborhood Law Center
www.sfnlc.com

9 **Immigrant Youth in the System: The Intersection of Immigration, Family Law and Juvenile Justice**
6.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **The Ethics of Bad Facts: The Duty to Disclose to the Tribunal**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Government Procurement and Municipal Lawsuits**
7.0 G
Live Seminar, Albuquerque
City of Albuquerque Legal Department
505-768-4500

9 **Water Rights in New Mexico**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

9 **As Judges See It: Top Mistakes Attorneys Make in Civil Litigation**
6.0 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com

9 **Medical Marijuana Law in New Mexico**
6.0 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com

9 **Essentials of Employment Law**
6.6 G
Live Seminar, Santa Fe
Sterling Education Services
www.sterlingeducation.com

12 **Ethicspalooza: The Ethics of Managing and Operating an Attorney Trust Account**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Ethicspalooza: Ethically Managing Your Law Practice**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

December

12 **Ethicspalooza: Ethical Issues of Using Social Media and Technology in the Practice of Law**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Ethicspalooza: The Disciplinary Process**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **Trials of the Century II**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **How to Get Your Social Media, Email and Text Evidence Admitted (and Keep Theirs Out)**
6.0 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com

13 **Collection Law from Start to Finish**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

14 **2016 Intellectual Property Law Institute—Copy That! Copyright Topics Across Diverse Fields**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

15 **Divorce Litigation from Start to Finish**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

15 **Business Law Bootcamp**
6.0 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com

16 **Living with Turmoil in the Oil Patch: What it Means to New Mexico**
5.8 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Lawyers and Email: Ethical Issues in Practice**
1.0 EP
Teleseminar
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Certiorari Granted, July 28, 2016, No. S-1-SC-35951

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-071

No. 33,064 (filed May 23, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
LAWRENCE BRANCH,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
WILLIAM C. BIRDSALL, District Judge

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Opinion

Linda M. Vanzi, Judge

{1} There is no question that Defendant Lawrence Branch shot and injured his adult son, Joshua Branch, with a .44 caliber revolver. Defendant confessed to the shooting and was charged with aggravated battery with a deadly weapon and negligent use of a deadly weapon. He was also charged with aggravated assault with a deadly weapon for allegedly assaulting his wife, Patricia Branch, on the theory that Defendant's conduct caused Patricia to reasonably believe that he was about to batter her as well. The key issue at trial was whether the shooting, which was the basis for all three charges, was in self defense.

{2} The jury ultimately convicted Defendant on all counts. Penalties for aggravated battery and aggravated assault were each increased by one year pursuant to the statutory firearm enhancement. NMSA 1978, § 31-18-16(A) (1993). The district court then adjudged the aggravated assault conviction to be a "serious violent offense," which limits Defendant's eligibility for good time credit for time served in a state prison. *See* NMSA 1978, § 33-2-34(A)(1) (2006, amended 2015).

{3} On appeal, Defendant argues that (1) insufficient evidence and instructional error require reversal of the aggravated assault conviction, (2) multiple punishments violate Defendant's right to be free from double jeopardy, (3) discovery and evidentiary rulings undermined Defendant's ability to present a defense and to confront the State's evidence with respect to all charges, and (4) the serious violent offense designation to the aggravated assault conviction lacks necessary findings. We affirm in part, reverse in part, and remand for the district court to document its findings related to the serious violent offense designation.

BACKGROUND

{4} By all accounts, Joshua and Defendant spent the morning of May 7, 2012, arguing in the front yard, as they often did, about how best to care for the property they occupied in separate trailers. Joshua, who was a college student in the spring of 2012, left in the middle of the argument to take an exam. The argument resumed upon his return and ended when Defendant fired a single shot, striking Joshua in the thigh. Joshua's injuries resulted in five surgeries and ongoing issues with circulation and limb function. He was on crutches when he testified for the State at trial a year later.

{5} The specific circumstances surrounding the shooting were contested below. The State's witnesses testified that Defendant was visibly upset—"aggravated, agitated"—that morning. When Joshua finished his exam and returned to his parents' trailer, Defendant, with "hatred in his voice," told him to "get . . . off the property." The two then shouted back and forth before Joshua attempted to leave. Joshua and Patricia walked toward the concrete slab that surrounded the steps to the porch. He had plans to meet his girlfriend for lunch, and Patricia, attempting to ease the tension, told him to do that. But as Joshua and Patricia talked near the front steps, Defendant walked past them into the house.

{6} At some point prior, two guns—including a .44 caliber super blackhawk (described as a "hand cannon" by one witness)—were moved from their usual spot in a closet at the back of the trailer and stashed in Defendant's recliner, which faced the trailer's front entrance. Defendant armed himself with the .44 within seconds of entering the trailer and then walked back to the front door. Steven Hickman, a family friend who was visiting the Branch home that day, testified that Defendant "went to the door and then [said] 'get . . . out of here' and then bang, just like that, that quick, the gun was fired."

{7} Patricia testified that she had her hand on Joshua's shoulder when he was shot. The two were facing one another when she looked up and saw Defendant standing in the doorway with the .44. She hollered, "No!" And Defendant fired. She saw the "fire come out" of the gun, felt something hit her leg, and saw Joshua fall. She testified that she "thought he was going to shoot all of us."

{8} While Joshua lay bleeding on the pavement, Defendant came out of the trailer and placed a set of keys on the dash of a car that was parked under the carport. He then looked over to Patricia, turned, and walked up the road, stopping only to dispose of his pocket knife in a flower pot on the way out. Patricia did not see Defendant again that day.

{9} Defendant's version of events differed in some respects. He testified that he was sitting with Patricia on a swing in the yard when Joshua returned from school. Defendant, who no longer wanted to argue, told Joshua that he would leave. When Defendant stood to do so, he saw that

Joshua was furious. As Defendant walked toward the trailer, he saw Joshua and Patricia coming toward him. He entered the house and saw Joshua outside, nearing the porch and then reaching for the rail by the door. Defendant was frightened because he knew that Joshua was a "violent kid" with post traumatic stress disorder (PTSD) who had been in several fights before, including a fight in the military. He armed himself with the .44 and shot Joshua, who then released the rail and fell to the concrete. Additional facts will be included as needed in the analysis that follows.

DISCUSSION

A. Instructional Error and Sufficiency of the Evidence

{10} 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[.]" NMSA 1978, § 30-3-1(B) (1963). The offense is aggravated when, as in this case, it is committed with a deadly weapon. NMSA 1978, § 30-3-2(A) (1963). Defendant argues that Section 30-3-1(B) required the State to prove something more than general criminal intent, which was the instruction given to the jury. Specifically, Defendant argues that the State had to prove "specific intent to frighten or put someone in fear of an imminent battery[,]" or at the very least, that one charged with violating Section 30-3-1(B) did so recklessly. Reading limiting principles of this sort into the statute would theoretically ensure some nexus between a defendant and his victim, thereby preventing what might otherwise amount to a construction of the assault statute that criminalizes the infliction of emotional distress for every bystander that is reasonably put in fear by the commission of a nearby crime.

{11} Defendant's argument is characterized as a sufficiency of the evidence challenge, as a challenge to the jury instructions themselves, and as an assertion of ineffective assistance of trial counsel in failing to request more demanding jury instructions. "Our review for sufficiency of the evidence is deferential to the jury's findings. We review direct and circumstantial evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Webb*, 2013-NMCA-027, ¶ 14, 296 P.3d 1247 (alteration, internal quotation marks, and citations omitted). With respect to jury instructions, we review for reversible error when an instruction is preserved and for fundamental error when not. *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. Whether preserved or not, however, Defendant's contention ultimately raises an issue of statutory interpretation, for which our review is de novo. *State v. Tafoya*, 2012-NMSC-030, ¶ 11, 285 P.3d 604; *see also State v. Osborne*, 1991-NMSC-032, ¶ 40, 111 N.M. 654, 808 P.2d 624 ("[I]t is the duty of the court, not the defendant, to instruct the jury on the essential elements of a crime.").

{12} Defendant's view of Section 30-3-1(B) has some merit. At common law, "[a] criminal assault was an attempt to commit a battery. A tortious assault was an act which put another in reasonable apprehension of immediate bodily harm." *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976) (per curiam) (citation omitted). The latter type—reasonable apprehension assault—has since been made a crime in many jurisdictions, which have normally adopted specific intent requirements rooted in the offense's history as an intentional tort. *Carter v. Commonwealth*, 594 S.E.2d 284, 287-88 (Va. Ct. App. 2004); *see, e.g.*, *Robinson v. United States*, 506 A.2d 572, 575 (D.C. 1986) ("An intent to frighten is sufficient[.]"); *Lamb v. State of Maryland*, 613 A.2d 402, 413 (Md. Ct. Spec. App. 1992) ("An assault of the intentional frightening variety . . . requires a specific intent to place the victim in reasonable apprehension of an imminent battery."); *Commonwealth v. Spencer*, 663 N.E.2d 268, 271 (Mass. App. Ct. 1996) ("[P]roof of an intent to cause fear is required."); *accord* Model Penal Code § 211.1(1)(c) (2015) ("A person is guilty of assault if he . . . attempts by physical menace to put another in fear of imminent serious bodily injury."). This apparent uniformity in other jurisdictions has prompted one leading treatise to categorically declare that "[t]here must be an actual intention to cause apprehension, unless there exists the morally worse intention to cause bodily harm." 2 Wayne R. LaFave & David C. Baum, *Substantive Criminal Law* § 16.3(b), at 569 (2d ed. 2003).

{13} But that is not the law of New Mexico. In *State v. Cruz*, this Court held that specific intent is not an essential element of aggravated assault. 1974-NMCA-077, ¶ 7, 86 N.M. 455, 525 P.2d 382. As a principle of construction, when a statute does not refer to intent, which is the case with Section 30-3-1(B), we normally presume that the only mens rea involved is that of conscious wrongdoing—commonly referred to as "general criminal intent." *State v. Campos*, 1996-NMSC-043, ¶ 56, 122 N.M. 148, 921 P.2d 1266 (Franchini, J., dissenting). We applied that presumption to aggravated assault in *Cruz*, and in *State v. Cutnose*, 1974-NMCA-130, ¶¶ 19-20, 87 N.M. 307, 532 P.2d 896. *Cf. State v. Mascarenas*, 1974-NMCA-100, ¶¶ 11-12, 86 N.M. 692, 526 P.2d 1285 ("[I]nstructions in the language of the statute sufficiently instruct on the required intent.").

{14} In *State v. Manus*, our Supreme Court—apparently persuaded by that reasoning—confirmed that general criminal intent is all that is required to support a conviction of aggravated assault under Section 30-3-1(B). *State v. Manus*, 1979-NMSC-035, ¶ 12, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, ¶¶ 9-10, 98 N.M. 786, 653 P.2d 162. The arguments made in *Manus*, which was also a bystander-assault case, are nearly identical to those presented here. A police officer and a bystander were filling out an accident report when the defendant approached and killed the officer with a shotgun. *Id.* ¶ 3. The defendant was charged with killing the officer and assaulting the bystander on the theory that the bystander was put in reasonable fear of receiving an immediate battery. *Id.* ¶¶ 1, 14.

{15} The defendant argued that his conviction for aggravated assault of the bystander could not stand because "there was no evidence of any intentional assault directed at [her]." *Id.* ¶ 12. Our Supreme Court rejected that argument, holding that "[t]he [s]tate was not required to prove that [the defendant] intended to assault [the bystander], but only that he did an unlawful act which caused [the bystander] to reasonably believe that she was in danger of receiving an immediate battery, that the act was done with a deadly weapon, and that it was done with general criminal intent." *Id.* ¶ 14; *see State v. Morales*, 2002-NMCA-052, ¶ 36, 132 N.M. 146, 45 P.3d 406 ("To convict [the d]efendant of aggravated assault on a peace officer, the [s]tate was not required to prove that [the d]efendant intended to injure or even frighten [the officer]."), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110; *see also United States v. Rede-Mendez*, 680 F.3d 552, 557 (6th Cir. 2012) ("The New Mexico version of aggravated assault differs from the generic version most significantly in the mens rea it attaches to the element of bodily injury or

fear of injury."); *United States v. Silva*, 608 F.3d 663, 675 (10th Cir. 2010) (Hartz, J., dissenting) ("[A] person [in New Mexico] who intentionally handles a weapon in a manner that induces a fear of battery can be guilty of assault even if he merely wants to show off his dexterity in handling the weapon, without any interest in inducing fear.").

{16} The expansive application of assault in *Manus* controls our construction of Section 30-3-1(B). In accordance with the language of the statute, the State was only required to prove that Defendant "did an unlawful act which caused [the bystander] to reasonably believe that she was in danger of receiving an immediate battery, that the act was done with a deadly weapon, and that it was done with general criminal intent." *Manus*, 1979-NMSC-035, ¶ 14. There is no nexus required between Defendant and Patricia. Liability under the statute is only limited by the requisite mental state of conscious wrongdoing and by the requirement that the victim's fear must be reasonable. *See id.*

{17} Evidence was presented that Defendant's behavior on the day of the shooting was generally threatening. He was "aggravated, agitated at something" on that day; he had "hatred in his voice." He was in the midst of an ongoing argument with Joshua that had taken a turn for the worse. He spent the morning acting erratically—driving around the yard on a backhoe, threatening to "plow Joshua's house down." He demanded that Patricia choose between him and Joshua, but she refused to do so. His demeanor prior to the shooting frightened Patricia.

{18} According to his own version of events, Defendant ascended the porch steps and saw Joshua coming toward the trailer with Patricia "behind him." Steven and Patricia testified that Defendant armed himself within "a couple of seconds" and shot Joshua while Patricia was standing right next to him. Patricia testified that she saw the muzzle flash, felt something hit her leg, and "thought he was going to shoot all of us." We view this testimony in the light most favorable to the State. *See Webb*, 2013-NMCA-027, ¶ 14. While Defendant's version of events differs in some respects, it was for the jury to weigh the credibility of the witnesses and resolve any conflicts in the testimony. *See id.* The jury could conclude that Defendant committed an unlawful act (shooting Joshua), which caused Patricia—who had witnessed the day's events and was "standing right next to" Joshua when the shooting occurred—to reasonably believe that she was also going to be shot. The jury was properly instructed on general criminal intent. Nothing more is required. *See Manus*, 1979-NMSC-035, ¶ 14.

{19} Defendant makes one additional (and related) argument with respect to the sufficiency of the evidence for the aggravated assault conviction. He contends that the evidence failed to establish that he made any threat or exhibited any menacing conduct toward Patricia, which he argues is required by the statute. Defendant misreads Section 30-3-1(B). 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[.]" *Id.* The commission of an "unlawful act" is an alternative method of committing the offense that does not rely on threatening or menacing conduct. *See Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 9, 110 N.M. 314, 795 P.2d 1006 ("[T]he word 'or' should be given its normal disjunctive meaning unless the context of a statute demands otherwise."). It was, in fact, the prong of the statute applied in *Manus*, where the state was not required to prove any threat—or any conduct at all—directed toward the bystander. 1979-NMSC-035, ¶ 14. There is abundant evidence to support a finding that Defendant acted unlawfully when he shot Joshua.

B. Double Jeopardy

{20} We next turn to the various double jeopardy issues that Defendant raises. The constitution protects against both successive prosecutions and multiple punishments for the same offense. *Swafford v. State*, 1991-NMSC-043, ¶ 6, 112 N.M. 3, 810 P.2d 1223. There are two types of multiple punishment cases: (1) unit of prosecution cases, in which an individual is convicted of multiple violations of the same criminal statute; and (2) double-description cases, in which a single act results in multiple convictions under different statutes. *Id.* ¶¶ 8-9. Defendant's arguments, involving separate statutes, raise only double-description concerns.

{21} Our courts apply a two-step inquiry to double-description claims. *Id.* ¶ 25. First, we analyze the factual question, "whether the conduct underlying the offenses is unitary, *i.e.*, whether the same conduct violates both statutes[,]" and if so, we consider the legal question, "whether the [L]egislature intended to create separately punishable offenses." *Id.* "If it reasonably can be said that the conduct is unitary, then [we] must move to the second part of the inquiry. Otherwise, if the conduct is separate and distinct, [the] inquiry is at an end." *Id.* ¶ 28.

{22} Because it is undisputed that this case involves unitary conduct (the firing of a single shot) that resulted in multiple convictions, our analysis will be limited to the question of legislative intent. "Determinations of legislative intent, like double jeopardy, present issues of law that are reviewed de novo, with the ultimate goal of such review to be facilitating and promoting the [L]egislature's accomplishment of its purpose." *State v. Montoya*, 2013-NMSC-020, ¶ 29, 306 P.3d 426 (alterations, internal quotation marks, and citation omitted). When, as here, the statutes themselves do not expressly provide for multiple punishments, we begin by applying the rule of statutory construction from *Blockburger v. United States*, 284 U.S. 299 (1932), to determine whether each provision requires proof of a fact that the other does not. *Swafford*, 1991-NMSC-043, ¶¶ 10, 30. If not, one offense is logically subsumed within the other, and "punishment cannot be had for both." *Id.* ¶ 30.

{23} In *State v. Gutierrez*, our Supreme Court modified the *Blockburger* analysis for double jeopardy claims involving statutes that are "vague and unspecific" or "written with many alternatives." 2011-NMSC-024, ¶¶ 58-59, 150 N.M. 232, 258 P.3d 1024 (emphasis, internal quotation marks, and citation omitted). Accordingly, "the application of *Blockburger* should not be so mechanical that it is enough for two statutes to have different elements." *State v. Swick*, 2012-NMSC-018, ¶ 21, 279 P.3d 747. That is, we no longer apply a strict elements test in the abstract; rather, we look to the state's trial theory to identify the specific criminal cause of action for which the defendant was convicted, filling in the case-specific meaning of generic terms in the statute when necessary. *Gutierrez*, 2011-NMSC-024, ¶¶ 58-59. We do so "independent of the particular facts of the case . . . by examining the charging documents and the jury instructions given in the case." *Swick*, 2012-NMSC-018, ¶ 21.

{24} If the statutes survive *Blockburger*, we examine "other indicia of legislative intent." *Swafford*, 1991-NMSC-043, ¶ 31. We look to "the language, history, and subject of the statutes, and we must identify the particular evil sought to be addressed by

each offense." *Montoya*, 2013-NMSC-020, ¶ 32 (internal quotation marks and citation omitted). "Statutes directed toward protecting different social norms and achieving different policies can be viewed as separate and amenable to multiple punishments." *Swafford*, 1991-NMSC-043, ¶ 32.

{25} Defendant argues that his right to be free from double jeopardy is violated by multiple punishments for (1) aggravated battery and negligent use of a firearm, (2) aggravated assault and aggravated battery, and (3) the firearm enhancements to aggravated assault and aggravated battery. The State concedes at the outset that Defendant's conviction for negligent use of a firearm must be vacated, because—as charged—it is subsumed within the aggravated battery conviction. We agree. We address Defendant's two remaining arguments in turn.

1. Aggravated Assault and Aggravated Battery

{26} The charge of aggravated assault with a deadly weapon was apparently pursued under the "unlawful act" prong of Section 30-3-1(B). The term "any unlawful act" is a generic one; there are numerous forms of conduct that could fulfill that requirement. *See Mascarenas*, 1974-NMCA-100, ¶ 14 (" 'Unlawful' may mean nothing more than 'not authorized by law.' "). In applying *Blockburger*, we identify the State's actual theory of the case to supply the case-specific meaning of generic statutory terms. *Gutierrez*, 2011-NMSC-024, ¶¶ 58-59. The "unlawful act" that was charged to the jury was that Defendant "shot Joshua Branch while Patricia Branch was standing next to him[.]"

{27} Defendant's conviction for aggravated battery, on the other hand, required the State to prove "the unlawful touching or application of force to the person of another *with intent to injure that person or another*." NMSA 1978, § 30-3-5(A) (1969) (emphasis added). Section 30-3-5(A) always includes a statutory element (intent to injure another person) that is never an element of assault under Section 30-3-1(B), even as charged in this case. That is because—as we have discussed at length in this Opinion—assault under Section 30-3-1(B) has no specific intent requirement. *Manus*, 1979-NMSC-035, ¶ 14. Similarly, assault under Section 30-3-1(B) always includes an element (the victim's reasonable belief that battery is imminent) that is never required to commit a battery. *See In re Marlon C.*, 2003-NMCA-005, ¶ 12, 133 N.M. 142, 61 P.3d 851 ("It is theoretically possible to complete a battery on a person without prior conduct causing the person to believe the person is about to be battered, for example, if the person is struck from behind."). Therefore, one offense is not subsumed within the other, and *Blockburger* alone does not foreclose punishment under both statutes.

{28} When two statutes survive *Blockburger*, we look to "the language, history, and subject of the statutes, and we must identify the particular evil sought to be addressed by each offense." *Montoya*, 2013-NMSC-020, ¶ 32 (internal quotation marks and citation omitted). "[T]he social evils proscribed by different statutes must be construed narrowly[.]" *Swafford*, 1991-NMSC-043, ¶ 32. "The aggravated battery statute protects against the social evil that occurs when one person intentionally physically attacks and injures another." *State v. Carrasco*, 1997-NMSC-047, ¶ 33, 124 N.M. 64, 946 P.2d 1075 (internal quotation marks and citation omitted). The culpable act under Section 30-3-1(B), on the other hand, is one that causes apprehension or fear. In other words, "[t]he harm related to assault is mental harm; assaults put persons in fear. The harm related to battery is physical harm; batteries actually injure persons." *State v. Cowden*, 1996-NMCA-051, ¶ 12, 121 N.M. 703, 917 P.2d 972.

{29} In *State v. Roper*, we held that double jeopardy principles are not offended when a defendant is convicted and sentenced for two counts of assault for pointing a gun at two persons at the same time. 2001-NMCA-093, ¶ 12, 131 N.M. 189, 34 P.3d 133. The analysis in *Roper* is consistent with the principle that our assault statutes are designed to protect distinct victims from mental harm caused by a single act. *Id.*; *Cowden*, 1996-NMCA-051, ¶ 12. Although this is not a unit of prosecution case, the same logic applies here, where one victim is shot and another assaulted. Defendant's convictions for offenses involving distinct social harms caused to multiple victims do not violate the right to be free from double jeopardy.

2. Firearm Enhancements

{30} Defendant next argues that firearm enhancements to his convictions for aggravated battery and aggravated assault, both committed with a deadly weapon, violate double jeopardy because use of a firearm—the only essential requirement for the increased penalty—was also charged to the jury to prove the underlying crimes. The law in this area is not clear.

{31} A sentence shall be increased by one year when a court or jury makes a separate finding of fact that a firearm was used in the commission of a noncapital felony. Section 31-18-16(A). We have previously held that the firearm enhancement can be constitutionally applied to both aggravated battery with a deadly weapon, *State v. Gonzales*, 1981-NMCA-023, ¶ 6, 95 N.M. 636, 624 P.2d 1033, *overruled on other grounds by Buzbee v. Donnelly*, 1981-NMSC-097, ¶ 46, 96 N.M. 692, 634 P.2d 1244, and aggravated assault with a deadly weapon, *State v. Charlton*, 1992-NMCA-124, ¶¶ 23, 26, 115 N.M. 35, 846 P.2d 341. In some instances, we have upheld the enhancement even when the jury instruction for the underlying offense expressly required the state to prove that the deadly weapon used was, in fact, a firearm. *See, e.g.*, *State v. Gonzales*, 2010 WL 4924986, No. 28,467, mem. op. *11 (N.M. Ct. App. Oct. 26, 2010) (non-precedential). The State cites these cases in support of its argument. Defendant counters in his reply brief that *Gonzales* and *Charlton* (and other similar cases) are no longer good law on this point.

{32} *Gonzales* relied entirely on *State v. Gabaldon*, 1978-NMCA-101, 92 N.M. 230, 585 P.2d 1352. In *Gabaldon*, we upheld a firearm enhancement applied to a conviction of robbery with a deadly weapon, where the deadly weapon used was a firearm because armed robbery could (in theory) be committed by using a knife, brass knuckles, or any other deadly weapon. *Id.* ¶¶ 1, 28, 31. Since the statutory elements for armed robbery did not always require proof that a firearm was used, there was no double jeopardy violation. *Id.* ¶ 31. *Charlton* similarly resolved the *Blockburger* portion of the double jeopardy analysis by looking strictly to the elements of the statutes. *Charlton*, 1992-NMCA-124, ¶¶ 22-23.

{33} Thus, there is a natural distinction in cases where the elements of the enhanced offense specifically refer to the use of a "firearm" as opposed to a "deadly weapon." *State v. Varela*, 1999-NMSC-045, ¶ 41, 128 N.M. 454, 993 P.2d 1280 (vacating firearm enhancements applied to a conviction for shooting into a dwelling and for felony murder predicated on that offense because the use of a firearm is an element of the crimes); *State v. Franklin*, 1993-NMCA-135, ¶ 15, 116 N.M. 565, 865 P.2d 1209 (distinguishing *Gabaldon* because the defendant in *Franklin* was specifically charged with manslaughter by

negligent use of a firearm). As we recognized in *Franklin*, the state is not required to prove any additional facts to enhance the sentence when use of a firearm—as opposed to a deadly weapon—is an express statutory element of the enhanced offense. 1993-NMCA-135, ¶¶ 13-15. In those instances, the firearm enhancement has always been subsumed under *Blockburger* (even when applied to the statutes in the abstract), and punishment cannot be had for both the enhancement and the enhanced offense. *Franklin*, 1993-NMCA-135, ¶¶ 13-15.

{34} The basis for the distinction between *Charlton* and *Gonzales*, on the one hand, and *Varela* and *Franklin*, on the other, is no longer sound. Our Supreme Court's subsequent rejection of a mechanical, strict elements test in cases involving statutes that are "vague and unspecific" or "written with many alternatives" now requires our courts to apply *Blockburger* with reference to the state's legal theory of the case. *Gutierrez*, 2011-NMSC-024, ¶¶ 58-59 (emphasis, internal quotation marks, and citation omitted).

{35} A "deadly weapon" is a generic term. As defined in the Criminal Code, it "means any firearm, whether loaded or unloaded; or any weapon which is capable of producing death or great bodily harm[.]" NMSA 1978, § 30-1-12(B) (1963). The definition then includes a nonexclusive list of various weapons, including brass knuckles, switchblade knives, etc. *Id.* Although the deadly weapon required to commit aggravated battery and aggravated assault could have technically been any of these weapons, *see Gabaldon*, 1978-NMCA-101, ¶¶ 28, 31, there is no doubt that the State sought to prove that the deadly weapon actually used in this case was a firearm.

{36} To determine the State's theory of the case, we look to the charging documents and jury instructions. *See Swick*, 2012-NMSC-018, ¶ 21. For aggravated battery with a deadly weapon, Defendant was charged by criminal information with "touch[ing] or apply[ing] force to Joshua Branch, with a .44 caliber revolver handgun, a deadly weapon." To convict him of that offense, the jury was charged to find that Defendant "touched or applied force to Joshua Branch by shooting him with a firearm[.]" For aggravated assault with a deadly weapon, Defendant was charged with "assault[ing] . . . Patricia Branch with a .44 caliber revolver[,] a deadly weapon[.]" The jury instruction on that count required a finding that Defendant "shot Joshua Branch." In light of the theory of the case charged to the jury, we can no longer examine the elements of the assault and battery statutes in the abstract to uphold the firearm enhancements as we did in *Charlton* and *Gonzales*. *See Swick*, 2012-NMSC-018, ¶ 21; *Gutierrez*, 2011-NMSC-024, ¶¶ 58-59.

{37} Our Supreme Court's most recent pronouncement on this issue was in an unpublished decision. *State v. Ferri*, 2015 WL 560798, No. 34,229, dec. ¶¶ 66-67 (N.M. Sup. Ct. Feb. 9, 2015) (non-precedential). The Court concluded that, when use of a firearm was specifically instructed as an element of the aggravated burglary offense, which similarly refers to the generic "deadly weapon" element, the inclusion of a firearm enhancement violates double jeopardy. *Id.* ¶¶ 1, 66-67. The result in *Ferri*, which is persuasive authority, *see* Rule 12-405(A) NMRA, is not consistent with *Gabaldon*'s abstract analysis of the "deadly weapon" element of armed robbery, upon which *Charlton* and *Gonzales* relied. *Gabaldon*,1978-NMCA-101, ¶¶ 1, 29-31.

{38} Because the State, according to its own theory of the case, was not required to prove any additional facts to have Defendant's sentence enhanced, the firearm enhancements in this case violate double jeopardy under the rule stated in *Varela* and *Franklin* just as they would if the statutes themselves said "firearm" instead of "deadly weapon." The enhancements must be vacated.

C. Discovery and Evidentiary Rulings

{39} Defendant next argues that discovery and evidentiary rulings undermined his right to present a defense and to confront the State's evidence. He argues that the district court erred when it (1) failed to order disclosure of Joshua's military and mental health records, (2) excluded expert testimony related to PTSD, and (3) failed to provide a remedy for the destruction of evidence material to the case. Defendant asserts that these errors, either separately or combined, deprived him of a fair trial.

{40} We review these contentions in a manner highly deferential to the court below. "The granting of discovery in a criminal case is a matter peculiarly within the discretion of the trial court. A trial judge's denial of a defendant's discovery requests will be reviewed according to an abuse of discretion standard." *State v. Bobbin*, 1985-NMCA-089, ¶ 7, 103 N.M. 375, 707 P.2d 1185 (citation omitted). The same standard applies in evaluating a trial court's decision to exclude evidence, *State v. Stills*, 1998-NMSC-009, ¶ 44, 125 N.M. 66, 957 P.2d 51, and in evaluating a trial court's ruling as to the proper remedy for evidence that has been lost or destroyed, *State v. Chouinard*, 1981-NMSC-096, ¶¶ 25-26, 96 N.M. 658, 634 P.2d 680. "An abuse of discretion arises when the evidentiary ruling is clearly contrary to logic and the facts and circumstances of the case." *State v. Downey*, 2008-NMSC-061, ¶ 24, 145 N.M. 232, 195 P.3d 1244 (internal quotation marks and citation omitted).

1. Disclosure of Military and Mental Health Records

{41} Defendant issued a subpoena duces tecum directing Joshua, who is a veteran of the Marine Corps, to provide a copy of his military discharge paperwork. Defendant also requested a court order authorizing the release of Joshua's discharge records from the National Archives in St. Louis, Missouri. *See* 5 U.S.C. § 552a(b)(11) (2014) (permitting the disclosure of agency records "pursuant to the order of a court of competent jurisdiction"). In response, the State asserted that Joshua's discharge records were inadmissible and contained sensitive personal identifying information and protected medical information. The State also asserted that Joshua's prior service as a Marine could not possibly provide a justification for Defendant shooting him in the leg.

{42} At the hearing on the issue, the district court apparently viewed Defendant's various discovery requests as a "fishing expedition."[1] The court asked Defendant to articulate his reasons for seeking Joshua's military records. Defendant asserted that Joshua had been previously involved in "violence against other members of the military." Defendant specifically referred to a fight in the military that may have resulted in Joshua's service being prematurely terminated. He argued that evidence of the fight could be admissible to show Joshua's propensity for violence. He also argued that Joshua was going to take the stand and that the discharge papers would be useful to impeach him. And finally, Defendant argued that the military records could open an avenue into Joshua's mental health history as it relates to PTSD.

[1]Defendant also subpoenaed Joshua's college academic records. That subpoena is not involved in this appeal.

{43} The district court correctly determined that, in self defense cases, evidence of specific instances of a victim's prior violent conduct cannot be admitted as propensity evidence of the victim's violent disposition. *See State v. Armendariz*, 2006-NMSC-036, ¶ 17, 140 N.M. 182, 141 P.3d 526 ("[A] victim's violent character is not an essential element of a defendant's claim of self[]defense, but rather circumstantial evidence that tends to show that the victim acted in conformity with his or her character on a particular occasion. . . . [O]nly reputation or opinion evidence should be admitted to show that the victim was the first aggressor."), *overruled on other grounds by Swick*, 2012-NMSC-018, ¶ 31. The district court also recognized that the discharge papers would not be admissible to impeach Joshua. *See* Rule 11-608(B) NMRA ("[E]xtrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness."). Because the requested records allegedly contained Joshua's "sacrosanct" medical history, and because Defendant did not justify the need for those records at the hearing, the district court quashed Defendant's subpoena and declined to issue an order authorizing production of the documents from the National Archives.

{44} Records are normally discoverable if reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 5-503(C) NMRA. While records need not be admissible to be discoverable, a proponent of discovery may still be required to provide "a reasonable basis on which to believe that it is likely the records contain material information." *State v. Garcia*, 2013-NMCA-064, ¶ 28, 302 P.3d 111. Defendant argues on appeal that the proper procedure to determine materiality of Joshua's military records would have been for the district court to order in camera review of the documents.

{45} We agree that in camera review would have been the best way to balance Joshua's privacy interests with Defendant's interests in obtaining records that were potentially relevant to his defense. *See State v. Luna*, 1996-NMCA-071, ¶ 13, 122 N.M. 143, 921 P.2d 950 ("In camera review of confidential information represents a compromise between the intrusive disclosure of irrelevant information on the one hand and the complete withholding of possibly exculpatory evidence on the other."); *State v. Gonzales*, 1996-NMCA-026, ¶ 20, 121 N.M. 421, 912 P.2d 297 (stating that the proper procedure to determine whether the material requested by the defendant is relevant is in camera review by the district court); *State v. Pohl*, 1976-NMCA-089, ¶ 5, 89 N.M. 523, 554 P.2d 984 (holding that the district court erred in not conducting an in camera review "to determine whether the files contained evidence material to the defense").

{46} But there is one problem for Defendant. Unlike the defendants in *Luna*, 1996-NMCA-071, ¶ 3, *Gonzales*, 1996-NMCA-026, ¶ 20, and *Pohl*, 1976-NMCA-089, ¶ 4, Defendant never actually requested in camera inspection of any records before the district court—even after the court asked Defendant to provide "specific knowledge . . . as to what to look for and where, or on the other hand *to request an in camera review*[.]" For that reason alone, this case better resembles *State v. Baca*, in which we stated,

> As in *Pohl*, we cannot determine whether the suppressed evidence was material to [the d]efendants' claim of self[]defense, but, unlike *Pohl*, [the d]efendants neither requested an in camera hearing nor showed as specific a need as could be expected under the circumstances. . . . Rather, our review of the argument made during the motion hearing convinces us that [the d]efendants were on a fishing expedition. [The d]efendants made no showing that their rights would be violated but for full disclosure of the master file[.]

1993-NMCA-051, ¶¶ 25-26, 115 N.M. 536, 854 P.2d 363 (internal quotation marks and citations omitted).

{47} There are compelling arguments on appeal that in camera review of Joshua's military records could have been useful to locate material information, such as the identities of character witnesses who could have testified about Joshua's reputation for violence, *see* Rule 11-405(A) NMRA, or corroborating witnesses who arguably could have testified under Rule 11-404(B) NMRA and *State v. Maples*, 2013-NMCA-052, ¶ 27, 300 P.3d 749. But we cannot say that the district court abused its discretion in rejecting the arguments that were actually presented below, where Defendant did not seek in camera review but sought full disclosure of all discharge records. *See Baca*, 1993-NMCA-051, ¶¶ 25-26; *see also State v. Ortiz*, 2009-NMCA-092, ¶ 32, 146 N.M. 873, 215 P.3d 811 ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." (internal quotation marks and citation omitted)). We affirm the district court because its ruling on the arguments before it was not "clearly contrary to logic and the facts and circumstances of the case." *Downey*, 2008-NMSC-061, ¶ 24 (internal quotation marks and citation omitted).

2. Testimony Related to PTSD

{48} Defense counsel questioned Joshua at a preliminary hearing about a diagnosis of PTSD related to prior military service. The State then filed a motion in limine to exclude evidence of Joshua's mental health history in the absence of expert testimony establishing the relevance of such evidence. The district court granted that motion, ordering that if "Defendant does not make, through expert testimony, a *prima faci*[*e*] showing that evidence of [Joshua's] mental health history is relevant, then no such evidence may be introduced." A little over a week before trial, Defendant identified Dr. Alexander Paret, a psychologist, to testify about PTSD. The State moved to exclude Dr. Paret's testimony on the ground that he had no prior contact with Joshua and would have been unable to testify about how PTSD symptoms were specifically manifested in Joshua.

{49} The district court held a hearing on the issue on the day before trial. Defendant conceded that Dr. Paret had never met or spoken with Joshua and would only testify about PTSD generally because a diagnosis of PTSD goes to the reasonableness of Defendant's assumption that he was in apparent danger when he shot Joshua. The court pointed out that "PTSD is a spectrum" that manifests itself in different people in different ways and that without ever having examined Joshua, Dr. Paret could not assist the jury in determining whether Defendant's alleged concerns about Joshua's PTSD were reasonable. The court suppressed the proposed testimony.

{50} "The very essence of discretion is that there will be reasons for the district court to rule either way on an issue, and whatever way the district court rules will not be an abuse of discretion." *State v. Layne*, 2008-NMCA-103, ¶ 7, 144 N.M. 574, 189 P.3d 707. "The trial judge's discretion is necessarily broad for he sits in the arena of litigation." *State v. Tafoya*, 1980-NMSC-099, ¶ 6, 94 N.M. 762, 617 P.2d 151 (internal quotation marks and citation omitted). It is the trial judge that is best suited to answer the determinative question: "On this subject can a jury from this person receive appreciable help?" *Id.*

(internal quotation marks and citations omitted).

{51} The defendant in *Tafoya* was prevented from calling a child psychologist to testify that children had fantasized an alleged instance of sexual assault. *Id.* ¶ 3. The psychologist's testimony "was to have been based upon statements and depositions of the children, as well as tapes of their trial testimony. She had never personally observed the demeanor of the children, nor questioned them herself." *Id.* On appeal, our Supreme Court held that it was not an abuse of discretion for the trial court to "determine that the probative value of the testimony was slight, based upon the lack of personal observation" by the psychologist. *Id.* ¶ 7.

{52} The situation is no different here. The district court in this case reasonably discounted the value of Dr. Paret's general testimony about PTSD, which would have made no reference to any observation of Joshua. "PTSD is simply not a monolithic disease with a uniform structure that does not permit of individual variation." *Brunell v. Wildwood Crest Police Dep't*, 822 A.2d 576, 588-89 (N.J. 2003). Those diagnosed with PTSD exhibit a range of reactions related to their trauma. *See* The National Institute of Mental Health: Post-Traumatic Stress Disorder, *available at* http://www.nimh.nih.gov/health/topics/post-traumatic-stress- disorder-ptsd/index.shtml (last accessed April 20, 2016). Dr. Paret's proposed testimony would not have accounted for any individual variation or meaningfully assisted the jury in determining whether Defendant's reaction to the manifestation of PTSD *in Joshua* was reasonable. "No error occurs when the judge excludes expert testimony where the probative value of that testimony is slight." *State v. Blea*, 1984-NMSC-055, ¶ 7, 101 N.M. 323, 681 P.2d 1100. The cases cited by Defendant are not to the contrary. *State v. Alberico*, 1993-NMSC-047, ¶ 44, 116 N.M. 156, 861 P.2d 192 ("[T]he relevant inquiry is on *this subject* can a jury from *this person* receive appreciable help." (alteration, internal quotation marks, and citation omitted)); *State v. Marquez*, 2009-NMSC-055, ¶ 25, 147 N.M. 386, 223 P.3d 931 (dealing with harmless error in an analysis that has been overruled), *overruled by Tollardo*, 2012-NMSC-008.

3. Destruction of Evidence

{53} At some point on the day of the shooting, Detective Danny Clugsten of the San Juan County Sheriff's Office took photographs of the crime scene that were inadvertently lost. Defendant moved on the morning of trial to dismiss all charges or to otherwise exclude several of the State's witnesses pursuant to *Scoggins v. State*, 1990-NMSC-103, ¶¶ 8-9, 111 N.M. 122, 802 P.2d 631. In the alternative, Defendant requested a last-minute continuance so that the State could review and respond to the authorities cited in the motion to dismiss. The district court denied the motion because it was not timely and because there were multiple eyewitnesses at the scene who could testify about the relevant details. Defendant subsequently requested a jury instruction that the lost photographs "may have supported the conclusion that Joshua Branch was in a position from which he could cause immediate harm to . . . [D]efendant" and that the jury could consider the loss of evidence to be "unfavorable to the [S]tate." The court gave defense counsel carte blanche to raise the issue in cross-examination of police witnesses and in closing arguments but denied the request for a limiting instruction.

{54} We apply a three-part test to determine whether deprivation of evidence by the State constitutes reversible error. *Chouinard*, 1981-NMSC-096, ¶ 16. We ask, first, whether the State breached some duty or intentionally deprived Defendant of evidence; second, whether the suppressed evidence was material; and third, whether prejudice resulted. *Id.* Because there is no allegation that the photographs were lost in bad faith, Defendant bore the burden of showing materiality and prejudice before any sanctions would have been appropriate. *See State v. Pacheco*, 2008-NMCA-131, ¶ 30, 145 N.M. 40, 193 P.3d 587. The district court is in the best position to evaluate the importance of lost evidence. *Id.*

{55} Defendant's motion was filed at the last minute and without any good reason for the late filing. The defense team had known for months that the photographs were lost. They nevertheless brought the issue to the court's attention on the morning of trial because, after a discussion the night before, they realized they "had a duty to generate a record." They faxed the motion to opposing counsel at 7:00 p.m. that night, leaving the State little opportunity to respond. It was undisputed that the motion was untimely and that there was no good excuse for the late filing.

{56} In any event, Defendant's argument is not convincing on the merits. While there is no doubt that the State breached a duty to preserve evidence, the district court could reasonably conclude that Defendant did not show materiality or prejudice. Defendant asserted at the hearing that blood spatter in the photographs might show Joshua's location when he was shot. That is speculative because Defendant did not know what was in the photographs. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *State v. Martin*, 1984-NMSC-077, ¶ 37, 101 N.M. 595, 686 P.2d 937 (internal quotation marks and citation omitted). It was, after all, Defendant's burden to establish materiality. *Pacheco*, 2008-NMCA-131, ¶ 30. And that burden might have been met had the defense team addressed the issue when the State brought it to their attention months earlier. The photos were taken and lost by an identified officer, Detective Clugston. There were likely two other witnesses, Deputy Todd Mangan, the first officer that arrived on the scene, and Detective Tim Nyce, who stated in open court that he was present when the photos were taken, that could have testified about the nature of the lost evidence. But instead of interviewing them prior to filing the motion, defense counsel speculated on the morning of trial about the contents of the photographs, asking—based on the unknown—for outright dismissal of all charges, exclusion of several of the State's witnesses, or a continuance of the trial after the jury had already been empaneled. *See State v. Aragon*, 1997-NMCA-087, ¶ 22, 123 N.M. 803, 945 P.2d 1021 ("[A]s a general rule, a motion for a continuance filed at the last minute is not favored.").

{57} Even assuming that there was discernable blood spatter in the photographs, it is unlikely that suppression prejudiced Defendant. The State's theory about Joshua's location when he was shot was not meaningfully different from Defendant's version of events. Joshua testified that he was three to four feet from the railing on the steps to the front porch. Patricia testified to the same effect. Steven saw Joshua lying on the pavement six to eight feet from the trailer after the shooting. And Defendant conceded that Joshua did not follow him onto the porch. All accounts put Joshua in the immediate vicinity of the railing surrounding the door to the trailer when the shooting occurred. The real question was not where Joshua was standing, but whether he was advancing on Defendant. No after-the-fact photograph

of blood spatter could have resolved that critical issue. *See State v. Duarte*, 2007-NMCA-012, ¶ 11, 140 N.M. 930, 149 P.3d 1027 ("[R]eversal is not mandated unless the evidence is in some way determinative of guilt." (internal quotation marks and citation omitted)). On these facts, we defer to the district court's sound discretion not to mandate sanctions of any kind.

{58} We conclude that there was no error in any of the district court's discovery and evidentiary rulings, and therefore, there was no cumulative error. *See State v. Salas*, 2010-NMSC-028, ¶ 40, 148 N.M. 313, 236 P.3d 32.

D. Aggravated Assault as a Serious Violent Offense

{59} This final issue arises, as it often does, because the district court used only boilerplate language in a sentencing document to designate a serious violent offense under Section 33-2-34(L)(4)(o) of the Earned Meritorious Deductions Act (EMDA). The EMDA provides that prisoners convicted of serious violent offenses may earn only four (as opposed to thirty) days per month of good time credit for time served in our state prisons. Section 33-2-34(A)(1), (2). The statute divides serious violent offenses into two categories: (1) an enumerated list of crimes, such as second degree murder, that are serious violent offenses as a matter of law; and (2) several "additional offenses that the district court may determine to be serious violent offenses due to the nature of the offense and the resulting harm." *State v. Scurry*, 2007-NMCA-064, ¶ 5, 141 N.M. 591, 158 P.3d 1034 (internal quotation marks and citation omitted). Aggravated assault is a discretionary offense under the second category. Section 33-2-34(L)(4)(o). In language mirroring the statute, the district court designated it to be a serious violent offense "due to the nature of the offense and the resulting harm."

{60} When, as here, an offense is discretionary under the statute, "a court's designation of a crime as a serious violent offense affects the length of time the defendant serves time in prison," and therefore "it is important that the court make specific findings both to inform the defendant being sentenced of the factual basis on which his good time credit is being substantially reduced, and to permit meaningful and effective appellate review of the court's designation." *State v. Loretto*, 2006-NMCA-142, ¶ 12, 140 N.M. 705, 147 P.3d 1138. Express findings must demonstrate that the crime was "committed in a physically violent manner either with an intent to do serious harm or with recklessness in the face of knowledge that one's acts are reasonably likely to result in serious harm." *Id.* ¶ 11 (internal quotation marks and citation omitted). Even where support exists in the record for the district court to make such a determination, it is up to the district court "in the first instance to make the required findings." *State v. Morales*, 2002-NMCA-016, ¶ 18, 131 N.M. 530, 39 P.3d 747, *abrogated on other grounds by State v. Frawley*, 2007-NMSC-057, ¶ 36, 143 N.M. 7, 172 P.3d 144.

{61} The State argues that "[t]he evidence presented at trial fully supports the trial court's finding that the aggravated assault conviction was a serious violent offense." But the standard is not whether there is sufficient evidence in the record to support the district court's unexplained conclusion. The standard is a bright line that "requires the district court to explain its conclusions." *Scurry*, 2007-NMCA-064, ¶ 6. We have held in this Opinion that, under *Manus*, Defendant may technically have been convicted of aggravated assault without directing any conduct toward Patricia, without acting recklessly, and without harboring any specific intent to cause apprehension or fear. *See* 1979-NMSC-035, ¶ 14. The district court's findings for sentencing on aggravated assault are both important and required. *Morales*, 2002-NMCA-016, ¶¶ 16, 18.

{62} The State has not pointed out any specific findings in the record. The judgment and sentence contains only the same run-of-the-mill explanation—"due to the nature of the offense and the resulting harm"—that frequently causes us to remand cases for additional factfinding. *See, e.g.*, *State v. Irvin*, 2015 WL 4276092, No. 32,643, mem. op. ¶ 37 (N.M. Ct. App. June 23, 2015) (non-precedential); *State v. Kuykendall*, 2014 WL 5782937, No. 32,612, mem. op. ¶ 37 (N.M. Ct. App. Sept. 23, 2014) (non-precedential); *State v. Ybanez*, 2013 WL 4527245, No. 31,216, mem. op. ¶¶ 18-19 (N.M. Ct. App. Mar. 27, 2013) (non-precedential); *State v. Farrell*, 2010 WL 3997938, No. 29,186, mem. op. *7 (N.M. Ct. App. Feb. 3, 2010) (non-precedential); *State v. Salles*, 2009 WL 6677933, No. 29,222, mem. op. *2-3 (N.M. Ct. App. May 1, 2009) (non-precedential).

{63} We once again remand for findings consistent with the standard described in *Morales*, 2002-NMCA-016, ¶¶ 16, 18, and the cases that have followed it.

CONCLUSION

{64} Defendant's convictions for aggravated assault and aggravated battery, both with a deadly weapon, are affirmed. The firearm enhancements to those convictions are reversed and vacated. Defendant's conviction for negligent use of a deadly weapon is also reversed and vacated. Finally, we remand the serious violent offense designation related to Defendant's aggravated assault conviction back to the district court for specific findings to identify and explain the evidence supporting the designation.

{65} IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:
TIMOTHY L. GARCIA, Judge
STEPHEN G. FRENCH, Judge

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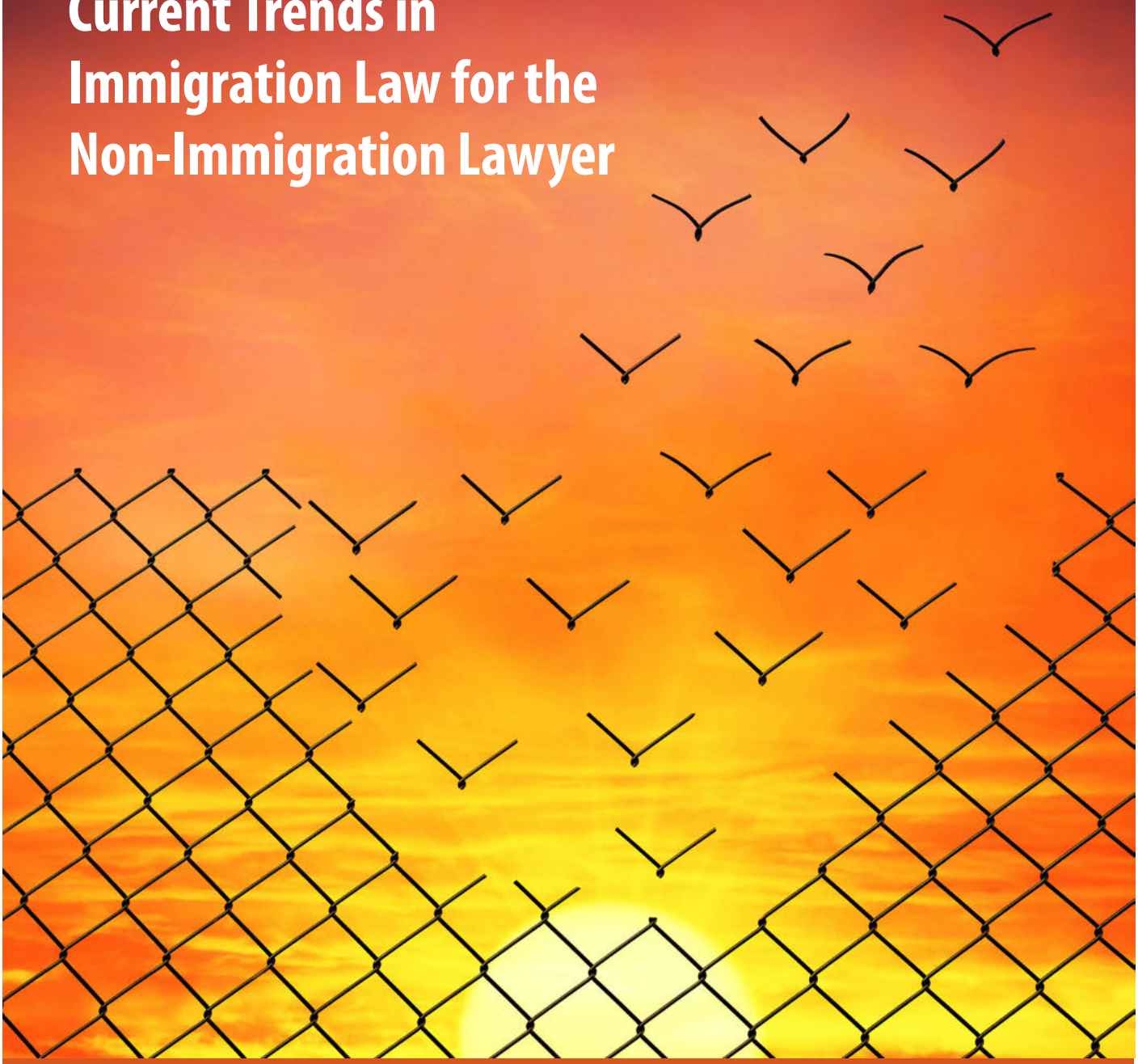
Current Trends in Immigration Law for the Non-Immigration Lawyer



Immigration Law Section

Introduction

By Jessica K. Miles

It has become more common to think about and talk about immigrants as a homogenous group. Yet, the people who make up the group we call "immigrants" are just as varied and complex as those who are U.S. citizens. Some have families; others are alone or have families they have chosen. Many work long, hard hours; some stay at home with children or are unemployed. Some have never broken a law—not even an immigration law—and others have been arrested. "Immigrants" are just as good and moral, and just as flawed as the rest of society because they are *part* of our society.

Accordingly, attorneys, judges and politicians encounter immigrants both as part of our vocation as well as in our daily lives. In that regard, we should be mindful of the history of our immigration policies, as laws meant to exclude people based on their national origin and race[1], and take that into account in the way that the issue is framed politically and socially, as well as how we talk about immigrants in our communities, homes and offices.

With this publication, the State Bar Immigration Law Section hopes that attorneys, judges, politicians and community members will not only benefit from the wealth of knowledge regarding immigration law and policy that is presented by notable immigration law practitioners in New Mexico, but that readers will also take to heart that what we do as a society—the laws we pass (or fail to pass), enforce, and apply to immigrants—has real and lasting impacts on *people* within our community. ■

Endnotes

[1] *E.g.* Chinese Exclusion Act, Sess. I, Chap. 126; 22 Stat. 58. 47th Congress (Approved May 6, 1882); 1917 Immigration Act, H.R. 10384; Pub.L. 301; 39 Stat. 874; 64th Congress (February 5th, 1917) (prohibiting the immigration of the disabled and further restricting immigration of people from Asian countries); 1924 Immigration Act, H.R. 7995; Pub.L. 68-139; 43 Stat. 153; 68th Congress (May 26, 1924) (imposing immigration quotas that favored European countries and expanding same prohibitions on Chinese immigration to include Japanese immigrants); *see also* Presidential Proclamation 2525, Franklin Delano Roosevelt (December 7, 1941) (prohibiting naturalization of Italian, German, and Japanese immigrants, and severely curtailing their rights under the U.S. Constitution).

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Challenges in Business Immigration: E-Verify and H1-B Visas

By Tania S. Silva

There are many regulations governing immigration that apply only to the business community. Little to no media coverage is given to this topic because business immigration lacks the emotional component that family petitions or individual permits possess. Nonetheless, as American companies compete with their foreign counterparts daily, access to foreign employees with superior expertise and knowledge is a must if we are to maintain our place in the global economy. Likewise, it is only a benefit to the country to allow decent individuals who are bright and talented the opportunity to enter and strengthen the American workforce.

This article briefly looks at two particular business immigration policies, the E-Verify program and the H-1B visas, and their effect on both U.S. employees and the immigrant population.

Business immigration laws are often associated with investor visas and national treaty workers. However, they also cover procedures for verification of employment within the country. In theory, anyone in the U.S. receiving compensation for their goods or services should be authorized to work in the country. This, of course, is not the case at all. Millions of individuals who either entered the U.S. without inspection or who overstayed their visas currently work and contribute to the American economy. However, they do so in an underground manner that lends itself to multiple abuses by employers who overlook the illegality of their own actions (i.e., hiring individuals not authorized to work in the U.S.) in order to obtain cheap workers who often remains silent about their rights.

In theory, anyone in the U.S. receiving compensation for their goods or services should be authorized to work in the country.

The Department of Homeland Security developed an internet-based system called E-Verify, which compares information from an employee's Form I-9, employment eligibility verification, to data from DHS and the Social Security Administration to confirm that an individual is authorized to work in the U.S. To-date, E-Verify is mostly a voluntary program. However, legislation introduced by members of the U.S. House of Representatives Judiciary Committee seeks to make the program mandatory for all employers, including those in the agricultural industry.

The main complaint about E-Verify from employers who do use the program is the dreaded tentative nonconfirmations, indicating that an employee may not be authorized to work in the U.S. An evaluation of the program by the research firm Westat indicated that at least one percent of legal workers were originally given an erroneous TNC by E-Verify.[1] Should the program become mandatory in the whole country, this one percent represents at least a million American citizens who will have to deal with a system that takes a "guilty until proven innocent" approach, requiring the employee to challenge any TNC.

The program is not very popular, in spite of U.S. Citizenship and Immigration Service's assertions. It has been established for almost 20 years, and still only three percent of all employers in the U.S. participate in E-Verify.[2] The E-Verify program is very intrusive for employers, businesses and particularly for employees because the government places the burden of proof on the employee, even if the system itself made the mistake. Therefore, those individuals who may lack the documents, knowledge or the time to follow through with an appeal may end up losing a job opportunity due to the system's error. If the system became mandatory nationwide, an American citizen who never appealed a TNC may be permanently labeled unemployable. In addition, E-Verify may also encourage discriminatory practices against employees and other individuals who receive a TNC of their employment eligibility. According to the DOJ's Office of Special Counsel for Immigration-Related Unfair Employment Practices, some employers have demanded that Hispanic candidates and others who "look foreign" provide evidence of their eligibility to work prior to being hired. Some employers failed to notify employees of a TNC and their right to contest the finding. These are unacceptable practices of E-verify, but USCIS is yet to come up with penalties for employers who misuse the system. The 20 states that mandate use of the system (New Mexico is not one of them) do provide for sanctions and loss of licenses. Yet, businesses are not signing up for the program, and states lack funding to enforce it. Ultimately, the system fails to accomplish its goal of detecting unauthorized workers.

Another example of this problem is the H1-B visa. Established in 1990, this non-immigrant visa allows an American business to temporarily employ a foreigner in a "specialty" occupation.[3] Many argue against this type of visa based on fear that jobs Americans can do are given to foreigners. However, this visa is often a last resort for U.S. employers.[4] The process to apply for the H1-B visa is rather complex, expensive, and subject to a cap of 65,000 visas[5] each fiscal year. Since the number of submitted applications often surpasses the number of visas available, applicants enter a lottery just to get a chance to have their applications reviewed. Thousands of applications are turned down or don't make the lottery.

There are misconceptions surrounding both E-Verify and the H1-B visa. Now that both systems have been in effect for almost two decades, an overhaul seems in order. There must be serious repercussions against those who abuse or misuse these programs. Further research is warranted to come up with solutions that keep the interests of the American worker first, while addressing the hiring needs of American employers. ■

Endnotes

[1] *Source*: Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications

[2] *Source*: The Practices and Opinions of Employers who do not Participate in E-verify

[3] The term "specialty occupation" means an occupation that requires (a) theoretical and practical application of a body of highly specialized knowledge, and (b) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the U.S.. 8 U.S. Code §1184 (i)(1)

[4] Source: The Charlotte Observer

[5] An additional 20,000 slots are set aside for beneficiaries with a U.S. master's degree or higher, which are exempt from the cap. Also, H-1B workers who are petitioned for or employed at an institution of higher education or its affiliated or related nonprofit entities or a nonprofit research organization, or a government research organization are not subject to the numerical cap. (Source: USCIS)

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Special Immigrant Juvenile Status:
Children at the Crossroads of Family and Immigration Law

By Lauren L. Armstrong and Eva E. Eitzen

> ***"I can't remember the last time I saw my dad. It's hard to get ahead in life when you don't know who your parents are and you don't have status."***
>
> -Alejandro, a 16-year old client who was raised by his aunt after his father abandoned the family and his mother passed away

> ***"While other kids in high school were worried about going to prom or going to college, I was worried about getting picked up by immigration and trying to figure out how to take care of my little brothers."***
>
> -Daniela, a 17-year old client who fled to the U.S. with her younger siblings due to poverty, gang violence and parental neglect in her home country

Immigrant youth who lack support from parents are some of the most vulnerable individuals encountered in an immigration practice. Fortunately, the Immigration and Nationality Act provides a humanitarian protection for these children known as Special Immigrant Juvenile Status, which includes a pathway to lawful permanent resident status, or a "green card." *See* INA §§ 203(b)(4), 101(a)(27)(J). LPRs may work with permission in the U.S., travel to other countries and return, and, in most cases, apply to become a U.S. citizen after five years with LPR status.

SIJS is a unique part of the INA that requires obtaining an order from state court before applying for a visa from U.S. Citizenship and Immigration Service, the primary federal agency which provides immigration benefits to immigrants. Because SIJS protections require an understanding of both family *and* immigration law, many eligible children in New Mexico are not screened for this form of relief. Those who *are* identified as eligible may face challenges in securing legal representation because of limited resources.

In order to apply for SIJS, a child must first obtain an order from a state court having jurisdiction over the care and custody of juveniles—this includes district courts, family courts and juvenile courts across New Mexico. *See* 8 C.F.R. § 204.11. The state court order must include a dependency component which can be established one of three ways: 1) by finding that the juvenile is dependent upon the court; 2) by committing the child to a state agency; or 3) by placing the child under the custody of an individual or entity. The state court order also must find that reunification with *one or both* of the child's parents is not viable due to abandonment, neglect, or abuse as defined by state law.[1] *See, e.g.*, NMSA 1978, §§ 32A-4-2, 40-10A-102. The court must further find that it is not in the child's best interest to be returned to their country of origin.

New Mexico state law provides a number of different processes that can be used to obtain a predicate order. The most common vehicles for obtaining the SIJS findings are abuse and neglect proceedings, kinship guardianship, divorce, sole custody and dependency proceedings. However, attorneys have successfully brought cases using emancipation, juvenile delinquency, orders of protection and declaratory judgments as well. A practitioner who wishes to obtain a predicate order should follow the normal procedures for the type of proceeding that is appropriate for the situation, and add the specific SIJS findings which are set out by INA § 101(1)(27)(J).

To qualify for SIJS, the child must be unmarried and under the age of 21. *See* 8 C.F.R. § 204.11. As a practical matter, though, it is ideal to secure the state court order before age 18. Children between the ages of 18 and 20 may face challenges in obtaining the requisite court order in states such as New Mexico where the age of emancipation is 18. Additionally, USCIS has not maintained a uniform policy on how to

adjudicate cases for those over 18, and as such, it is critical to screen children for eligibility and connect them with legal services as early as possible.

The most common vehicles for obtaining the SIJS findings are abuse and neglect proceedings, kinship guardianship, divorce, sole custody and dependency proceedings.

After obtaining the predicate state court order, the child may file a self-petition for SIJS classification with USCIS using the Form I-360. If the self-petition is approved, the child is eligible to apply for permanent residence using the Form I-485. That application may be filed with an immigration court or with USCIS, depending upon which agency has jurisdiction over the application. In some cases, the I-360 and I-485 may be filed concurrently, and the child may become a permanent resident in four to six months. However, because there is a cap on the number of visas that may be issued through this process each year, the juvenile may not be able to file concurrent applications, or may have to wait some period of time before obtaining lawful permanent residence. The Department of State issues a monthly Visa Bulletin which indicates whether visas are available for SIJS children based on their country of origin and the date the I-360 was filed.[2]

Securing legal status is a life changing event for immigrant children who have often faced years of trauma, instability and hopelessness. In all cases it allows immigrant children to focus on their future rather than the risk of deportation. ■

Endnotes

[1] Because only one parent must have abandoned, neglected or abused the child, this can include a wide variety of situations. Practitioners should engage in an analysis to determine if SIJS is possible each time they encounter an immigrant child who is not living with both parents.

[2] Practitioners must follow the priority dates listed under the EB-4 category of the Visa Bulletin. The Visa Bulletin can be accessed online at https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html.

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The Sunset of 245(i) *and the Rise of New Hope* in Immigration Waivers

By Alfredo J. Bonilla

It is often said that immigrants come to the U.S. in search of a better life. Images of suburban sprawl, a white picket fence and a family dog spring to mind—it's the American Dream. For many immigrants, however, their focus is more on obtaining a rectangular plastic card that reads, "Permanent Resident."

Adjusting status to become a lawful permanent resident in the U.S. is the goal for the overwhelming majority of immigrants.

Procedurally, there are two ways for an immigrant to obtain a green card: *adjustment of status* in the U.S. or *consular processing* outside of the U.S. An immigrant may be in a position to choose between adjustment of status and consular processing, but that is rare. Obtaining a green card through consular processing applies to immigrants who are physically outside of the U.S. and have an approved visa petition. A visa is either immediately available or the immigrant is placed in a preference category until his or her priority date becomes current and a visa becomes available. If the immigrant is eligible for an immediate visa or his or her priority date becomes current, the immigrant submits a green card application and attends an interview at the U.S. consulate in his or her home country for final adjudication. Unlike consular processing, adjustment of status may be available when the immigrant is physically in the U.S. In that case once the visa petition is approved, the immigrant applies for a green card through an office of U.S. Citizenship and Immigration Services, and the adjudication takes place entirely in the U.S. Generally, processing times for adjusting status in the U.S. are faster than consular processing abroad.

Adjusting status to become a lawful permanent resident in the U.S. is the goal for the overwhelming majority of immigrants. Ideally, an immigrant can obtain a green card if they entered the U.S. legally, are admissible to the U.S. and are eligible for an immigrant visa at the time of their application. Unfortunately, for millions of immigrants who entered the U.S. illegally, this is not an option. These individuals must find an alternative route to obtaining a green card. The Immigration and Nationality Act of 2011 is the body of law that provides these alternative routes.

INA 245(i)[1] is designed to help people who are in the U.S. illegally. This includes those who entered illegally and those who entered legally but remained in the U.S. after their visa expired. INA 245(i) allows an immigrant to become a permanent resident if an employer or close family relative petitioned them by April 30, 2001, and the immigrant was physically present in the U.S. on Dec. 21, 2000.

INA 245(i) allows immigrants to adjust their status in the U.S., without having to travel to a U.S. Consulate in their country to apply for a green card. This is a good thing because consular processing is often a roulette wheel for immigrants, who risk remaining outside of the U.S. and separated from loved ones in the U.S. if things do not go well at the U.S. Consulate. Unfortunately, the sun is setting on the INA 245(i) option because it only applies to a select demographic and excludes millions of undocumented immigrants living in the U.S.

In 1996, the Illegal Immigration Reform and Responsibility Act created the three and 10 year bars to admission to the U.S. for immigrants who violated immigration laws. The three year bar is triggered when an immigrant has been unlawfully present in the U.S. for a continuous period of more than 180 days (six months), but less than one year, leaves the U.S. The bar prevents the immigrant from lawfully entering the U.S. for a period of three years. The 10 year bar is triggered when an immigrant has been unlawfully present in the U.S. for a continuous period of more than 365 days (one year) leaves the U.S. These bars have a devastating effect on immigrants seeking to obtain a green card when INA 245(i) is not an option because they have to leave the U.S. to consular process and the mere act of leaving the U.S. is what triggers these bars. Thus, these immigrants are often stuck and can only rely on an immigration waiver of the three and 10 year bars.

When an immigrant is married to a U.S. citizen or lawful permanent resident or has a U.S. citizen or lawful permanent resident parent, a waiver may be available for the three and 10 year bars. To qualify

for this waiver, the immigrant must prove that his or her U.S. citizen or lawful permanent resident spouse or parent will suffer extreme hardship if the waiver is not approved. This is a tough standard to meet and the processing time can take more than a year. If approved, the immigrant can lawfully re-enter the U.S. with a green card and does not have to wait outside the U.S. for three or 10 years. For years, immigrants applying for waivers still had to play the roulette wheel that is consular processing. This all changed in March 2013 with the introduction of the provisional waiver process.

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The provisional waiver only applies to those immigrants seeking waivers for unlawful presence (whether 3 or 10-year bars) who are married to U.S. citizens. It allows the immigrant to apply for the waiver in the U.S. prior to the consulate interview in their country. The immigrant stays in the U.S. with their spouse during the adjudication of the waiver and only leaves for the consulate interview itself at the tail end of the case. This cut the time immigrants have to remain abroad drastically. Now immigrants who qualify for the provisional waiver only have to wait in their home country for weeks rather than months. Recently, in August 2016, the provisional waiver was expanded to include those being sponsored by permanent residents, those over the age of 21 sponsored by U.S. citizens, diversity lottery winners[2], and employers. These are positive trends that undoubtedly provide hope to millions of immigrants in the U.S. hoping to become legal one day. ■

Endnotes

[1] 8 U.S.C. §1255 (i).

[2] A class of immigrants from countries with historically low rates of immigration to the U.S.. A limited number of visas are available each fiscal year. Visas are distributed among six geographic regions and no single country may receive more than seven percent of the available visas in any one year.

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Simple Possession, Dire Consequences:
The Story Behind *Ramirez v. State*[*]

By Rebecca Kitson

Martin Ramirez, a citizen of Mexico, entered the U.S. as a teenager in the 1980s. He dreamt of a better future for himself and eventually found it in the form of a family. In 1993, he married a U.S. citizen and became a stepfather to four U.S. citizen stepchildren, ages 5, 6, 7 and 8 years old. He loved his wife dearly and took his role as father to the stepchildren seriously.

On Jan. 4, 1997, Martin was arrested at a local park for smoking marijuana. He was charged with three misdemeanors: possession of marijuana under 1 oz., possession of drug paraphernalia and concealing identity, in violation of NMSA 1978, §§ 30-31-23(B)(1)(1190, amended 2011), 30-31-25.1 (1981, amended 2001), and 30-22-3 (1963). He was arrested and booked. Martin first met with his public defender right before his arraignment, who conveyed an offer of time served in return for a guilty plea to all three charges. Martin accepted the offer. What Martin did not know—and was not told—was information concerning the immigration consequences of his guilty plea. This was despite the fact that Form 9-406(1990) was required to be completed by the judge, the defendant, and the defendant's counsel, certifying that the defendant had been advised as to the effect upon the defendant's immigration status.

In April of 2001, Martin's wife started the process to obtain Legal Permanent Residency, or LPR status (colloquially known as a "green card"), for him. Unfortunately, Martin's wife passed away less than five months later from an accidental drug overdose. In addition to the emotional upheaval of her death, the petition on Martin's behalf for LPR status died with her[1].

Immigration Law Regarding Simple Possession of Marijuana

In 2008, Martin applied for LPR status through his 21-year-old U.S. citizen stepdaughter, who qualified as an "immediate relative" parent pursuant to INA §201(b)(2)(A)(i); 8 USC §1151(b)(2)(A)(i), because his marriage to her biological mother took place prior to the date his stepdaughter turned 18. However, the requisite relationship is only the first step—he still needed to demonstrate "admissibility" in order to qualify. It was his burden to show that he did not have any legal violations or conditions that barred LPR status.

Most noncitizens in New Mexico face dire immigration consequences of apparently minor criminal offenses.

Generally, those who have not been "admitted" to the U.S. are subject to the grounds of inadmissibility under Immigration and Nationality Act §212, 8 USC §1182. "Admission" is "the lawful entry of the alien into the U.S. after inspection and authorization by an immigration officer." INA §101(a)(13). Those who have been admitted are generally subject to the grounds of deportability under INA §237; 8 USC §1227. The statute contains a laundry list of grounds related to health, immigration violations and crime, among others. Some are of limited duration, and some are permanent. Some are waivable under certain conditions, some are not. In Martin's case, the primary barrier to his residency was his misdemeanor marijuana convictions.

Martin's convictions from 1997 made him inadmissible because they were offenses related to a controlled substance as defined in 21 USC §802, under INA §212(a)(2)(A)(i)(II); 8 USC §1182(a)(2)(A)(i)(II). Convictions (or even, in some circumstances, admissions of the essential elements of a crime without a technical "conviction") for controlled substances are nearly always permanent and are not waivable grounds of inadmissibility for purposes of permanent residency[2]. The law regarding inadmissibility for controlled substances, while allowing for some argument (see *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015)), is relatively strict and "bright line"—there exists a sole waiver, given that the offense relates to a single possession offense of marijuana for personal use, under 30 grams. See INA 212(a)(2)(A)(i)(ii); 8 USC §1182(a)(2)(A)(i)(ii), which is available only for a single offense of single possession of 30 grams or less of marijuana and under limited circumstances. While a single paraphernalia conviction may also qualify for the waiver, the burden is on the applicant to demonstrate that the paraphernalia related to 30 grams or less of marijuana for personal use. See *Escobar Barraza v. Mukasey*, 519 F.3d 388 (7th Cir. 2008), but see *Mellouli v. Lynch*, *supra*. If an INA §212(h) waiver is available to a person convicted of drug paraphernalia the immigration court should use a "circumstance-specific" approach and the applicant must demonstrate his eligibility by a preponderance of the evidence. *Matter of Martinez Espinosa*, 25 I&N Dec. 118, 120-22 (BIA 2009), overruled on other grounds by *Mellouli v. Lynch*.

INA §212(h) (8 USC §1128(h)) contains the waiver for a single conviction related to marijuana for personal use (under 30 grams). There are two forms of the waiver: 1) that the conviction occurred 15 years prior to the date of application for the benefit, that that the admission would not be contrary to the welfare and security of the U.S, that the person has been rehabilitated, the applicant meets all other qualifications and is deserving of the exercise of discretion; and 2) if he or she is the spouse, parent, son or daughter of a U.S.

citizen or LPR who would suffer extreme hardship if the person is removed from the U.S., and is deserving of the exercise of discretion. INA §212(h)(1)(A),(B); 8 USC §1182(h)(1)(A),(B).

In Martin's case, the fact that he pled guilty to possession of under 30 grams of marijuana *and* paraphernalia precluded him from qualifying for the waiver because that meant he had *two* convictions related to marijuana[3]. The agency considering Martin's application for residency, the U.S. Citizenship and Immigration Service also did not find a sufficiently "extreme hardship" to his family members to warrant a waiver.

Once denied LPR status, Martin faced imminent removal proceedings in front of the Immigration Court in El Paso, Texas (the court having jurisdiction over those in New Mexico). At that point, he moved to vacate his guilty plea for the marijuana convictions under a claim of ineffective assistance of counsel.

Law Regarding Post-Conviction Relief and Immigration Consequences

The law in New Mexico regarding ineffective assistance of counsel in advising as to the immigration consequences of a guilty plea had been established in 2004 by *State v. Paredez*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799, which held that a "[d]efendant's attorney had an affirmative duty to determine his immigration status and provide him specific advice regarding the impact a guilty plea would have on his immigration status." The duty stems from the waiver of constitutional rights, including the right to a jury trial, and the waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 7, citing *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). The U.S. Supreme Court followed suit in 2010 in *Padilla v. Kentucky*, 559 U.S. 356, 373, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284 (2010), holding that both misadvice and non-advice regarding the immigration consequences of a guilty plea could amount to ineffective assistance of counsel and thus undermine the voluntary nature, and by extension the constitutionality, of a guilty plea.

However, Martin's writ of error *coram nobis* requesting that his guilty plea be withdrawn was denied by the district court on the basis that both *Paredez* and *Padilla* were not retroactive. In 2011, Martin was arrested and placed in federal immigration detention in Otero County, New Mexico. He was formally placed in removal (deportation) proceedings in front of the Immigration Court. Immigration and Customs Enforcement exercised their discretion and released Martin on a $5,000 cash-only bond.

Meanwhile, the New Mexico Court of Appeals overturned the district court's ruling, holding that *Padilla* and *Paredez* did not establish new rules and thus could be applied retroactively, and that counsel's failure to advise Martin of the immigration consequences of his guilty plea prejudiced him. *State v. Ramirez*, 2012-NMCA-057, 278 P.3d 569, aff'd, 2014-NMSC-023, 333 P.3d 240. However, in 2013 the U.S. Supreme Court took up the issue of federal retroactivity of the *Padilla* in *Chaidez v. United States,* 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013). The Court concluded that *Padilla* was not retroactive. With that, Martin's future in the U.S. swung between state and federal case law.

Martin's case was reviewed by the New Mexico Supreme Court, which held that as matter of first impression that *State v. Paredez* (the state decision which required attorneys to advise noncitizen clients of the immigration consequences of guilty pleas), applied retroactively to people like Martin. *Ramirez v. State*, 2014-NMSC-023, 333 P.3d 240. The NMSC held that the responsibility of criminal defense counsel to affirmatively advise as to the immigration consequences of a guilty plea was retroactive to 1990 in the state of New Mexico. *Id.* As a result, Martin's guilty pleas for the 1997 misdemeanor marijuana convictions were vacated.

The Final Court Frontier: Immigration Proceedings in Martin's Case

Martin's legal battle, however, was not over. He still had to face the Immigration Court and convince the Immigration Judge that he was deserving of discretionary relief from removal in the form of an adjustment of status to LPR[4]. During the two days of testimony before the Immigration Court, the judge heard his entire life story: his role as a stepfather, step-grandfather, and caregiver for his quadriplegic stepson. He was grilled, both by the ICE counsel as well as by the immigration judge, as to his fitness as a parent and to his fitness as a potential LPR of the U.S. Martin was required to explain in minute detail the day he was arrested, and take responsibility for the now vacated convictions[5].

In June, 2016, Martin was granted LPR status. This closed a near 20 year battle that traversed the New Mexico judiciary and the federal immigration system, due principally to a single incident of marijuana possession. Martin's case is only unique in that it reached the NMSC. Most noncitizens in New Mexico face dire immigration consequences of apparently minor criminal offenses.

This is a complex area of the law. It is incumbent upon the criminal defense bar to understand these consequences in order to advise their clients appropriately. Through the joint efforts of the immigration and criminal defense bars, counsel can work together to secure the best future for their clients, assuring both their liberty and their freedom to remain in the U.S. ■

Endnotes

[1] The law regarding widows and widowers has changed significantly, and now allows for greater forgiveness for surviving beneficiaries. *Please see* INA §204(l); 8 USC §1154(l).

[2] There is a limited waiver for non-immigrant visas found at INA §212(d)(3); 8 USC §1182(d)(3). However, these waivers are highly discretionary and difficult to obtain. *See Matter of Hranka,* 16 I&N Dec. 491 (BIA 1978); *See also* Department of State guidance at 9 FAM 40.301 N3.

[3] The U.S. Citizenship and Immigration Service (USCIS) office did not recognize the holding of *Escobar Barraza v. Mukasey, supra*, because it was in the 7th Circuit, and thus did not consider the waivability of the paraphernalia conviction.

[4] Applicants for relief or protection from removal have the burden of establishing: 1) satisfaction of the applicable eligibility requirements; and 2) that a favorable exercise of discretion (where relevant) is warranted. INA §240(c)(4)(A); 8 USC §1229a(c)(4)(A).

[5] *See Schroeck v. Gonzales,* 429 F.3d 947 (10th Cir. 2005) [the immigration judge's consideration of a dismissed criminal case did not violate respondent's constitutional rights against double jeopardy or by requiring him to prove his innocence.]

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**Explicit client permission was obtained to share details regarding his life and case.*

Deferred Action:
A Tool for Community Development

By Allegra S. Love

In 2012, in the absence of action from Congress to reform the American immigration system, President Barack Obama signed the executive order creating Deferred Action for Childhood Arrivals. DACA identifies certain young immigrants, known as Dreamers, who were brought to the U.S. as children and are studying or earning degrees. It provides them with access to work authorization, a Social Security number and a reprieve from deportation. It is an imperfect remedy. It is a temporary designation and not a path to citizenship or legal residency and, as an executive order, and therefore, subject to the support of the President of the U.S. Yet suddenly, undocumented immigrants were offered sincere economic and educational tools with which to plan their futures. DACA, in theory, provides a pathway for some individuals away from the economic and social margins that make progress so difficult.

DACA, in theory, provides a pathway for some individuals away from the economic and social margins that make progress so difficult.

Community members in Santa Fe saw these challenges as an opportunity and formed the Santa Fe Dreamers Project—a non-profit organization that provides free legal representation to immigrant youth and their family members. The foundations of the Project, were to explore whether we could use DACA as a tool to improve conditions for young immigrants in Santa Fe and support their economic and educational success.

With that goal in mind and in collaboration with community partners from the schools, churches, the City of Santa Fe and local immigrant organizers, the Santa Fe Dreamers Project has held a weekly free legal clinic for the last three years to offer young immigrants free representation in their Deferred Action cases. The clinic is not a place to find pro-se help but is instead a place where immigrants can seek high quality representation in a comfortable setting using a model that is designed around that barriers they experience to accessing lawyers. Through this model the Project has filed almost 900 cases free of charge. They are funded by grants, foundations and private donations. Attorney fees can be very expensive for a Deferred Action case and in the immigrant community that money often simply doesn't exist. If it does, it often comes out of monthly expenses used to keep families afloat—rent, diapers, milk, car repairs, dentist appointments, etc. Yet with creativity and the generosity of the community The Project has been able to develop a model that costs the organization $200 per client to file a Deferred Action case. For an investment of $200 they can help young people in our community make an authentic transformation that supports their personal educational and economic success.

The Santa Fe Dreamers Project is seeing extraordinary success. Dreamer clients are significantly outpacing Santa Fe's general population in their high school graduation rate. Clients are enrolling in community college and graduate school. Families are seeing huge income bumps as a result of receiving Deferred Action. They are finding jobs that come with health care, sick days and are free from exploitation. Many immigrants are opting to address pressing social problems in our town whether they are bilingual pre-school teachers, dental aides in community clinics or community organizers. In Santa Fe, for the first time ever, English language learners showed more improvement on standardized tests than their English speaking peers. That is due to excellent teaching and better bilingual pedagogy and extraordinary efforts from students but I'd like to think our services played a at least a very small part. Many families are even buying their first homes. Administrators of the Project have seen clients from 15 counties in New Mexico and three surrounding states. The small investment in creating a ladder out of poverty is making families all over New Mexico more capable and healthier but also making our whole community stronger as well. At a time where New Mexico is consistently ranked one of the worst places to be a child, we are in desperate need of models that make our state a healthier place to be for everyone.

What is coming into focus through our work in Santa Fe is a model of community supported legal services where we ask for financial investment from our leaders and neighbors to support an extraordinary social impact from the immigrant community. This is particularly relevant as study after study points out that immigrants indeed make our economy stronger whether propping up money making industries in our state, starting businesses, or getting trained in the STEM or medical fields where we have extreme shortages in this state.

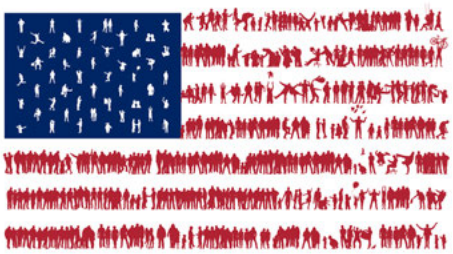
In 2014, President Obama tried to expand the scope and impact of Deferred Action by creating DAPA, a similar program for the parents of U.S. Citizens. DAPA would have offered the same benefits as DACA and affected 5 million undocumented people living in the U.S. Immigrant families. Immigration advocates and leadership in progressive cities were looking forward to the community and economic development opportunities that would accompany the expansion. But the State of Texas successfully sued for an injunction which was upheld by the fifth circuit court of appeals. In June 2016 a split Supreme Court declined to rule on the injunction and DAPA was effectively dead in the water.

Now the fate of DACA and any future DAPA program depends on November's election.*

Now the fate of DACA and any future DAPA program depends on November's election.* Hillary Clinton has vowed to continue DACA and fight to actualize DAPA and Donald Trump has vowed to end DACA and deport undocumented immigrants. This difference is critical. When individuals choose to see the capabilities and contributions of immigrants in communities as a resource, supporting immigrants becomes a smart economic and community development strategy instead of simply an exercise in compassion and humanity, as it is so often viewed. This is an important argument not only as administrations change in the White House, but also as Congress reconfigures and the potential for real immigration reform is a possibility. When that reform comes, it will be important to come together as a community to support and invest in excellent legal services to our immigrant families in New Mexico and afar so that economic and social impacts can be maximized to make everyone stronger. ■

* This issue of the *New Mexico Lawyer* went to press prior to the announcement of the 2016 Presidential Election results.

Allegra Love is an attorney and director of the Santa Fe Dreamers Project. She attended the University of New Mexico School of Law. She is a board member of the State Bar Immigration Law Section.



Some Thoughts About American Immigration Law Policy

By L. John Russo

(The views expressed in this article are solely those of the author and do not necessarily reflect the views of the State Bar Immigration Law Section.)

I. The Power of Capitalism, Materialism, and the Status Quo

There has been a robust national debate about immigration policy throughout the recent presidential primary and general election campaigns. Sometimes, on all sides of the debate, people come to the debate with a pre-formed assumption that illegal immigration is a problem, without actually having analyzed the issue. Is all illegal immigration really a problem for everyone? If it is, why is it a problem? For whom is it a problem?

The magnet of American small businesses and large corporations that use "contractors" offering to pay American wages is a strong attracting force to workers from Mexico, and many other foreign countries, where their wages, working conditions, and legal rights are often significantly worse than in the U.S.. The economic differential between wages and working conditions in a wealthy country (like the the U.S.) and a somewhat poor country (such as Mexico) attracts millions of Mexican laborers to the U.S..

Recognition of economic and political reality is a prerequisite to an accurate analysis of transnational migration. The power of capitalism and materialism will always trump federal statutory law. The insatiable desire to acquire property and to live a "better life" is probably the single most active motivator for people all over the world. As an example, the desire to shop helped bring down the Berlin Wall.

Human rights conditions in Mexico have also driven people to leave the country. Human rights-related problems in Mexico include "law enforcement and military involvement in serious abuses, such as unlawful killings, torture, and disappearances." U.S. Bureau of Democracy, Human Rights, and Labor, "Mexico 2015 Human Rights Report," available at http://www.state.gov/documents/organization/253239.pdf. The report also pointed to "[i]mpunity and corruption in the law enforcement and justice system" and pointed out that "[o]rganized criminal groups killed, kidnapped, and intimidated citizens, migrants, journalists, and human rights defenders."

Many American small businesses, for decades, have eagerly welcomed undocumented immigrants. They can and almost always do pay lower wages to undocumented workers than they pay to documented immigrants and to workers who are U.S. citizens. They frequently pay cash, either under the table or over the table, and do not pay federal payroll taxes. Undocumented workers, as a practical matter, do not benefit from federal labor laws designed to protect the workforce, including basic safety rules enacted to protect human life. Most of the American business community has a strong vested interest in preserving the status quo. At the same time, American micro and small businesses that seek to recognize and obey the federal labor and taxation laws are frequently at a significant competitive disadvantage when attempting to compete against companies that hire unlawfully present undocumented foreign workers.

One other cog in the status quo is the relatively porous border between Mexico and the U.S., coupled with the demonstrably ineffective U.S. Border Patrol. Low wages, high profit margins, and the status quo depend on an uninterrupted, if modest, stream of undocumented foreign labor into the U.S.. If illegal immigration were ever completely ended, would small businesses, and even large American corporations, maintain their profit margins?

Low-wage, relatively unskilled workers are necessary to keep the economy functioning. In the absence of undocumented workers who are not lawfully authorized to work in the U.S., who would pick the fruit? Who would do the housekeeping work at the hotels? Who would work in the kitchens of many restaurants, including fast-food restaurants? Who would do the office janitorial work? Who would do the roofing work? Who would do the concrete work? Who would shovel the cow manure at our dairy farms?

These are some of many occupations that require very hard physical labor but do not pay well. Many, but not all, citizens and documented foreign workers do not want to do this kind of work. If approximately 11 million unlawfully present foreign workers and their mixed-citizenship families were to be deported, it would cause an economic disaster.

II. "They All Must Leave Now"

As with every issue, there are competing policy proposals aimed at addressing immigration. Generally, an immigrant visa is a prerequisite to lawfully immigrating to the U.S.. The policy of "they all must leave now" entails the enforcement of the visa requirement. *See* Immigration Act of May 26, 1924, 43 Stat.153, as amended, § 211(a) Immigration and Nationality Act of 1952, P.L. 82-414, 66 Stat. 163, as amended, 8 U.S.C. § 1181(a).

It may come as a surprise to some, but most undocumented Mexican immigrants would voluntarily return to Mexico if they knew beforehand that they would be eligible to receive the immigrant visa upon returning. *See, e.g.*, Alex Nowrasteh, "Removing the 3/10 Year Bars Is Not Amnesty," *Cato Institute* (April 23, 2014). Those immigrants would have to "get in line" for re-entry through a process called Consular Processing, meaning they would apply for a visa at a U.S. consulate or embassy in their home country. While the visa does not entitle the applicant to be admitted into the U.S., it does provide an opportunity to "knock on the door" and request permission to enter as a lawful immigrant.

The visa holder is almost always permitted to lawfully enter the U.S.. However, this traditional procedural mechanism that has been used for decades is no longer a realistic option for millions of people who have overstayed their temporary visas or who have entered illegally. President Bill Clinton signed a law that virtually destroyed traditional American immigration. *See* Section 212(a)(9)(C), INA, added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 , P.L. 104-208, 110 Stat. 3009, 8 U.S.C. § 1182(a)(9)(C) ("Section 9C").

Section 9C requires a 10-year mandatory non-waivable absence from the U.S. for most people who are unlawfully present in the U.S. for a year or more, depart the U.S. for any reason, and then re-enter or attempt to re-enter unlawfully. This is a common fatal impediment to legal status for most Mexican immigrants because of geography, history, economics, and family.

Consequently, Section 9C has "trapped" most of the 11 million people living in the U.S. without documentation. At a minimum, to accomplish a goal of removing all of the undocumented immigrants currently living in the country, Congress would have to tweak just a few sections of the 1996 Bill Clinton-era law such that millions of Mexican and other unlawfully present immigrants would be incentivized to leave the country at their own expense and then apply for immigrant visas. There would be no need to hire and train thousands of additional highly compensated U.S Immigration and Customs Enforcement ("ICE") Enforcement and Removal Officers.

III. "Let Them Stay and Pay a Fine"

Another competing policy—my proposal—would permit the approximately 11 million people to stay in the country and regularize their immigration status without being compelled to travel abroad for a visa. This could be called The Uncomprehensive Immigration Reform Act of 2017. It need not be 1,198 pages long like the Senate "Gang of Eight" drafted and passed in 2013. No more than 20 pages, double-spaced, are all that would be required to un-comprehensively but effectively address the presence of 11 million unauthorized workers.

Suggested revisions to our lawmakers could include:

1) Amending Section 249 Registry INA, 8 U.S.C. § 1259, to record permanent resident status for certain immigrants who entered the U.S. before Jan. 1, 2012, coupled with payment of a $1,000 fine, or more accurately, an "additional sum", per person;
2) Extending the sunset date of Section 245(i) INA, 8 U.S.C. § 1255(i) adjustment of status to immigrants who are physically present in the U.S. with respect to family-based or labor certification applications that have been filed on or before April 30, 2018;
3) Repealing the bars to adjustment of status at Section 245(c) INA, 8 USC § 1255(c), regarding prior unauthorized employment and failure to maintain a continuous lawful status in the U.S. before filing an application for adjustment of status, USCIS form 1-485;
4) Repealing Section 212(a)(9)(C) INA, 8 U.S.C. § 1182(9)(C), (which presently requires a 10-year non-waivable absence bar to receiving an immigrant visa) before, on, and after the effective date of the Uncomprehensive Immigration Reform Act of 2017;
5) Repealing Section 212(a)(9)(B) INA, 8 U.S.C. § 1182(9)(B), (generally a 10-year absence bar for more than one year of "unlawful presence") before, on, and after the effective date of the uncomprehensive Immigration Reform Act of 2017;
6) Limiting the Section 212(a)(6)(C)(i) INA, 8 U.S.C. § 1182(6)(C)(i) dishonesty bar to immigration to a one-year absence from the U.S. plus payment of a $1,000.00 "additional sum";
7) Limiting the Section 212(a)(6)(C)(ii) INA, 8 U.S.C. 1182(6)(C)(ii) false claim to U.S. citizenship bar to a one-year absence from the U.S. plus payment of a $1,000.00 "additional sum";
8) Deleting the words "extreme hardship" as a requirement for waivers of inadmissibility, and replacing them with the word "hardship";
9) Expanding the scope of qualifying family relatives required to request a waiver of a ground of inadmissibility, to include U.S. citizen children and adult sons and daughters and the applicant himself/herself;
10) Codifying President Obama's Deferred Action for Childhood Arrivals program ("DACA") into statutory law; and
11) Reducing by 50 percent all U.S. government filing fees, sometimes referred to as "customer service fees", from their present levels. (The filing fee for a family of four to adjust status to lawful immigrant in the U.S. is presently set at $5,960.)

Does this proposed legislation in an Uncomprehensive Immigration Reform Act of 2017 amount to "amnesty"? No. These recommended changes are some reasonable, practical and sensible amendments to the Immigration and National Act of 1952, as amended. ■

John Russo practices with the Law Offices of L. John Russo in Albuquerque and specializes in immigration, citizenship and deportation law. He has practiced law for more than 33 years and is a member of the State Bar Immigration Law Section. Russo graduated from the UNM School of Law.

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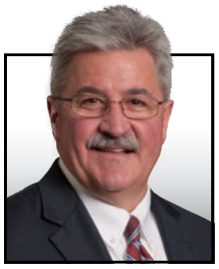

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Certiorari Denied, July 20, 2016, No. S-1-SC-35949

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-072

No. 34,303 (filed May 25, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JAMES JOSEPH RAMIREZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
JERRY H. RITTER JR., District Judge

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Santa Fe, New Mexico
JANE A. BERNSTEIN
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

BENNETT J. BAUR
Chief Public Defender
J.K. THEODOSIA JOHNSON
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Linda M. Vanzi, Judge

{1} A jury found Defendant James Joseph Ramirez guilty of several crimes arising from a home invasion where a child victim was home alone. Defendant asserts on appeal that (1) multiple punishments violate his right to be free from double jeopardy, (2) there was insufficient evidence to support his conviction for child endangerment, and (3) the restraint used to convict him of kidnapping was incidental to the commission of another crime. We affirm in all respects.

BACKGROUND

{2} The facts are not in dispute. Victim was a child—fifteen at the time of the incident—who was home alone one night while his older brothers worked and his parents attended a Christmas party. He heard a knock at the door and answered to find a man wearing a hooded sweatshirt with the hood pulled low over his eyes. The identity of the hooded man would later be the only real concern at trial, but for our purposes on appeal, it is uncontested that he was Defendant.

{3} Defendant asked if Victim's parents were home. Victim, who was naturally suspicious, lied and responded that they were. Defendant then attempted to force his way inside, and the Victim attempted to block the doorway until Defendant pulled a revolver from his waist, prompting Victim to retreat into the house.

{4} Victim ran to the living room, realized his mother had blocked the back door with laundry, so he stopped and got on his knees. Defendant, who had followed Victim inside, picked him up by his shirt and pointed the gun up and down his body. He ordered Victim to lock the door and then asked if "Alyssa" was home. Victim responded that he did not know anyone by that name. Defendant then followed Victim from room to room, forcing him at gunpoint to open each door so Defendant could look inside. Having apparently concluded that there was, in fact, no "Alyssa" at the residence, Defendant remarked, "shit, wrong house," and left.

DISCUSSION

Sufficiency of the Evidence

{5} This is a double jeopardy case at its core, but we will begin by disposing of two cursory arguments that (1) there is insufficient evidence of child endangerment because the State did not prove Defendant knew Victim was a child, and (2) the restraint used to kidnap Victim was incidental to Defendant's conviction for child endangerment. When the sufficiency of the evidence is challenged, "we must view the evidence in the light most favorable to the conviction." *State v. Wade*, 1983-NMCA-084, ¶ 11, 100 N.M. 152, 667 P.2d 459.

{6} To be convicted of child endangerment under NMSA 1978, Section 30-6-1(D)(1) (2009), a defendant must act "with reckless disregard in relation to the safety or health of [a child] specifically." *State v. Gonzales*, 2011-NMCA-081, ¶ 25, 150 N.M. 494, 263 P.3d 271. The standard is not entirely clear; but even assuming—for the purposes of this argument—that the State was required to prove that Defendant was subjectively aware that Victim was a child, the evidence is still sufficient to support the conviction.

{7} Victim was fifteen years old when Defendant knocked at his door and seventeen when he testified before the jury. He testified that Defendant's immediate question when the two met face-to-face was "are your parents home?" That alone is sufficient evidence for the jury to infer Defendant's awareness that the person he would later hold at gunpoint was a child. *See State v. Graham*, 2005-NMSC-004, ¶ 13, 137 N.M. 197, 109 P.3d 285 (stating that the appellate courts "view the evidence as a whole and indulge all reasonable inferences in favor of the jury's verdict"); *State v. Montoya*, 1966-NMSC-224, ¶ 10, 77 N.M. 129, 419 P.2d 970 ("Knowledge, like intent, is personal in its nature and may not be susceptible of proof by direct evidence. It may, however, be inferred from occurrences and circumstances.").

{8} Defendant next admits—somewhat paradoxically—that he committed child endangerment but asserts that we must vacate his conviction for kidnapping because the Legislature did not intend kidnapping to be predicated on restraint incidental to the offense he committed. Defendant characterizes this as an issue of statutory interpretation, for which our review is de novo. *See State v. Trujillo*, 2012-NMCA-112, ¶ 7, 289 P.3d 238 ("Whether the Legislature intended restraint during an aggravated battery to be charged as kidnapping is a question of statutory interpretation."), *cert. quashed*, 2015-NMCERT-003, 346 P.3d 1163. But even assuming that Defendant's interpretation of the statutes at issue is correct and that the limitations on kidnapping in *Trujillo* (which was an aggravated battery case) similarly apply in a child abuse case, the testimony, as a matter of fact, does not support the notion that Victim's restraint was incidental to child endangerment. *See id.* ¶ 6 (viewing the facts "in the

light most favorable to the conviction"); *see also State v. Sotelo*, 2013-NMCA-028, ¶¶ 29-30, 296 P.3d 1232 (applying a sufficiency of the evidence standard to the question of whether restraint is incidental to a separate crime).

{9} In *Trujillo*, we held that the restraint needed to effect a minutes-long battery—"a momentary grab in the middle of a fight"—was not conduct that was contemplated by the kidnapping statute because it was "merely incidental" to the battery. 2012-NMCA-112, ¶¶ 6, 8. In *Trujillo*, we identified three tests employed in other jurisdictions to determine whether restraint is incidental to another offense but ultimately concluded that "the overarching question . . . is whether the restraint or movement increases the culpability of the defendant over and above his culpability for the other crime." *Id.* ¶ 6.

{10} Victim testified that he ran to the living room and stopped and got on his knees before Defendant entered, and that Defendant picked him up by his shirt and pointed the gun up and down his body. The State argued to the jury that this particular conduct was the basis for the child endangerment charge. Defendant then, according to Victim's testimony, ordered Victim to lock the door and forced him at gunpoint to assist in a futile room-to-room search for an individual not present in the home. This search, "with [the] gun pressed to the back of [Victim's] head," was the factual basis in the State's closing argument for the kidnapping charge.

{11} We conclude that the prolonged search for "Alyssa," in which Victim was held to service to open each door in the home, turn on each light, and allow Defendant to explore each empty room, increased Defendant's culpability over and above his culpability in endangering Victim by pointing the gun at him in the first instance. Thus, the restraint in this case is not incidental to child endangerment under the standards enunciated in *Trujillo*. We affirm Defendant's conviction for kidnapping.

Double Jeopardy

{12} Defendant argues that his convictions for aggravated burglary and aggravated assault (both with a deadly weapon) are subsumed into his conviction for child endangerment. In the event his other arguments are unsuccessful, Defendant argues that burglary was improperly aggravated because the same firearm was used to support his conviction for aggravated assault. These contentions all invoke constitutional protections against double jeopardy.

{13} The right to be free from double jeopardy protects against both successive prosecutions and multiple punishments for the same offense. *Swafford v. State*, 1991-NMSC-043, ¶ 6, 112 N.M. 3, 810 P.2d 1223. There are two types of multiple punishment cases: (1) unit of prosecution cases, in which an individual is convicted of multiple violations of the same criminal statute; and (2) double-description cases, in which a single act results in multiple convictions under different statutes. *Id.* ¶¶ 8-9. Defendant's arguments, involving separate statutes, raise only double-description concerns.

{14} Our courts apply a two-step inquiry to double-description claims. *Id.* ¶ 25. First, we analyze the factual question, "whether the conduct underlying the offenses is unitary, *i.e.*, whether the same conduct violates both statutes[,]" and if so, we consider the legal question, "whether the [L]egislature intended to create separately punishable offenses." *Id.* "If it reasonably can be said that the conduct is unitary, then [the appellate courts] must move to the second part of the inquiry. Otherwise, if the conduct is separate and distinct, [the] inquiry is at an end." *Id.* ¶ 28.

A. Aggravated Burglary and Child Endangerment

{15} Defendant first argues that he cannot be punished for both aggravated burglary (with a deadly weapon) and child endangerment. That argument fails the unitary conduct portion of the analysis. "[W]e will find that conduct is not unitary when the illegal acts are separated by sufficient indicia of distinctness." *State v. Mora*, 2003-NMCA-072, ¶ 18, 133 N.M. 746, 69 P.3d 256 (internal quotation marks and citation omitted). Relevant considerations include the quality and nature of the individual acts, their objectives and results, and their separation in time or physical distance. *Id.* As a general rule, conduct is not unitary when there is "an identifiable point at which one of the charged crimes ha[s] been completed and the other not yet committed." *State v. DeGraff*, 2006-NMSC-011, ¶ 27, 139 N.M. 211, 131 P.3d 61.

{16} The jury was instructed to convict Defendant of aggravated burglary if it found that he "entered a dwelling without authorization" and "with the intent to commit an aggravated assault once inside" while "armed with a handgun." The offense of burglary is complete upon unauthorized entry with the requisite intent. *State v. Office of Pub. Def. ex rel. Muqqddin*, 2012-NMSC-029, ¶ 41, 285 P.3d 622. "Accordingly, the crime of aggravated burglary was completed as soon as Defendant, with the requisite intent, gained entry to Victim's [home] while armed with a [handgun]." *State v. Montoya*, 2011-NMCA-074, ¶ 34, 150 N.M. 415, 259 P.3d 820.

{17} The State's theory for child endangerment, evident in its closing argument, was that Defendant "forc[ed his] way into a child's home" and "plac[ed] a gun to [his] head, showing . . . active disregard for that child's health." Because the crime of aggravated burglary was complete upon entry and before Defendant endangered Victim by pointing the gun to his head, the conduct is not unitary, and multiple punishments are authorized. *See, e.g.*, *State v. Bernal*, 2006-NMSC-050, ¶ 11, 140 N.M. 644, 146 P.3d 289; *DeGraff*, 2006-NMSC-011, ¶ 27; *see also Swafford*, 1991-NMSC-043, ¶ 28 ("[I]f the conduct is separate and distinct, [the] inquiry is at an end.").

B. Aggravated Assault and Child Endangerment

{18} Defendant next argues that his conviction for aggravated assault is subsumed into his child endangerment conviction. Since the parties do not dispute that the conduct underlying these offenses is unitary, we limit our analysis to legislative intent. "Determinations of legislative intent, like double jeopardy, present issues of law that are reviewed de novo, with the ultimate goal of such review to be facilitating and promoting the [L]egislature's accomplishment of its purpose." *State v. Montoya*, 2013-NMSC-020, ¶ 29, 306 P.3d 426 (alterations, internal quotation marks, and citation omitted). When, as here, the statutes themselves do not expressly provide for multiple punishments, we begin by applying the rule of statutory construction from *Blockburger v. United States*, 284 U.S. 299 (1932), to ensure that each provision requires proof of a fact that the other does not. *Swafford*, 1991-NMSC-043, ¶¶ 10, 30. When applying *Blockburger* to statutes that are vague and unspecific or written with many alternatives, we look to the charging documents and jury instructions to identify the specific criminal causes of action for which the defendant was convicted. *State v. Gutierrez*, 2011-NMSC-024, ¶¶ 53, 58, 150 N.M. 232, 258 P.3d 1024.

{19} Aggravated assault is committed when one "assault[s] . . . another with a deadly weapon[.]" NMSA 1978, § 30-3-2(A) (1963). Assault, as charged in this case, is defined in NMSA 1978, Section 30-3-1(B) (1963), as "any unlawful act, threat or menacing conduct which causes

another person to reasonably believe that he is in danger of receiving an immediate battery[.]" The specific menacing conduct charged in the jury instruction was that Defendant "pointed a gun at [Victim.]"

{20} Section 30-6-1(D)(1) makes it a crime to recklessly cause or permit a child to be "placed in a situation that may endanger the child's life or health[.]" *State v. Consaul*, 2014-NMSC-030, ¶¶ 29, 37-38, 332 P.3d 850. Neither the indictment nor the jury instructions shed any light on the State's trial theory for the child endangerment charge, but in its closing argument, the State made it clear that Victim was endangered by the gun: "We know what firearms do," the State told the jury. "We know what they're intended to do. They're intended to wound and kill. Clearly, this places [Victim] in danger of that."

{21} Defendant contends that since the State's theory was that child endangerment and aggravated assault were both committed when Defendant pointed a gun at Victim, he is twice being punished for "one act of threatening a child in violation of double jeopardy" according to the modified *Blockburger* analysis that our Supreme Court adopted in *Gutierrez*, 2011-NMSC-024, ¶¶ 58-59. *Gutierrez* all but overruled *State v. McGruder*, 1997-NMSC-023, 123 N.M. 302, 940 P.2d 150, *abrogated on other grounds by State v. Chavez*, 2009-NMSC-035, ¶ 16, 146 N.M. 434, 211 P.3d 891, to hold that the only essential element of an offense prohibiting the unlawful taking of a motor vehicle was logically subsumed within the "anything of value" element of the robbery statute because the jury in that case was charged to find that the taking of a 1996 Oldsmobile satisfied both offenses. *Gutierrez*, 2011-NMSC-024, ¶¶ 53, 58-59. Specifically, the Court refused to apply *Blockburger* to the statutes in the abstract, opting instead to look to the jury instructions to identify the case-specific meaning of robbery's generic statutory term, "anything of value." *Gutierrez*, 2011-NMSC-024, ¶ 59. Because the jury instruction for robbery in *Gutierrez* expressly required proof that a 1996 Oldsmobile was taken, the unlawful taking of a motor vehicle was a lesser included offense of robbery and punishment could not be had for both the greater and lesser offense. *Id.* ¶¶ 58-60.

{22} We do not believe that *Gutierrez* stands for a return to the fact-based, ad hoc double jeopardy adjudications that were rejected in *Swafford*. *See Gutierrez*, 2011-NMSC-024, ¶ 78 (Bosson, J., specially concurring) (cautioning against looking beyond the indictment and jury instructions in a *Blockburger* analysis). Nor do we consider it an invitation to carelessly overturn convictions for offenses that involve some overlapping conduct or share a single element. *See State v. Swick*, 2012-NMSC-018, ¶ 21, 279 P.3d 747 (stating that we "evaluate legislative intent by considering the [s]tate's legal theory independent of the particular facts of the case"). The modified *Blockburger* approach is nothing more than a test to determine whether the state's theory for one crime, as charged to the jury, is logically subsumed (i.e., a lesser included offense) within the state's theory for a separate crime. *Gutierrez*, 2011-NMSC-024, ¶¶ 58-60. To say, as Defendant does, that he is being twice punished for the same act of pointing a gun at Victim is to merely restate the test for unitary conduct, which has already been established before any analysis of the statutes under *Blockburger* can begin. *See Swafford*, 1991-NMSC-043, ¶ 25.

{23} Although the act of pointing the gun at Victim is a shared element of both offenses as charged, it does not follow that one offense is subsumed within the other. Assault, under Section 30-3-1(B), which requires only general criminal intent, can always be committed whether or not one acts with the reckless disregard required to commit child endangerment. *See State v. Manus*, 1979-NMSC-035, ¶¶ 12, 14, 93 N.M. 95, 597 P.2d 280 (stating that "general criminal intent is required to support a conviction for aggravated assault"), *overruled on other grounds by Sells v. State*, 1982-NMSC-125, ¶¶ 9-10, 98 N.M. 786, 653 P.2d 162. And one can always offend Section 30-6-1(D)(1) without causing reasonable apprehension of an immediate battery. Thus, the jury in this case could have concluded that Defendant did not act recklessly and yet still convicted him of aggravated assault; or the jury could have found that Victim's fear was not reasonable and still convicted Defendant of child endangerment. Because, unlike the situation in *Gutierrez*, it was possible to convict Defendant of either offense without convicting him of the other, neither offense, as a matter of law and a matter of logic, is a lesser offense subsumed within the other, and the modified *Blockburger* test will not foreclose multiple punishments.

{24} When two statutes survive *Blockburger*, we examine "other indicia of legislative intent." *Swafford*, 1991-NMSC-043, ¶ 31. We look to "the language, history, and subject of the statutes, and [the appellate courts] must identify the particular evil sought to be addressed by each offense." *Montoya*, 2013-NMSC-020, ¶ 32 (internal quotation marks and citation omitted).

> Statutes directed toward protecting different social norms and achieving different policies can be viewed as separate and amenable to multiple punishments. . . . If several statutes are not only usually violated together, but also seem designed to protect the same social interest, the inference becomes strong that the function of the multiple statutes is only to allow alternative means of prosecution.

Swafford, 1991-NMSC-043, ¶ 32.

{25} We begin with the observation that children are often placed in danger by conduct that also happens to violate a separate criminal statute. *See, e.g.*, *Graham*, 2005-NMSC-004, ¶ 12 (involving the possession of marijuana, accessible to a child); *State v. Orquiz*, 2012-NMCA-080, ¶ 1, 284 P.3d 418 (involving driving while intoxicated with a child in the vehicle); *State v. Clemonts*, 2006-NMCA-031, ¶¶ 11-12, 139 N.M. 147, 130 P.3d 208 (involving the commission of various traffic offenses with a child in the vehicle). Violation of a separate statute is actually a factor that we consider in determining whether the gravity and likelihood of potential harm is sufficient to support a conviction for child endangerment. *Chavez*, 2009-NMSC-035, ¶ 25 ("[S]uch legislative declaration of harm may be useful, though not dispositive, to an endangerment analysis when the Legislature has defined the act as a threat to public health, safety, and welfare.").

{26} The defendant in *Graham* was convicted of child endangerment *based on* the possession of illegal drugs when police found crack cocaine in the defendant's home and a marijuana bud in a child's crib in the master bedroom. 2005-NMSC-004, ¶ 2; *see id.* ¶ 32 (Bosson, J., dissenting). The Legislature's designation of marijuana as a Schedule I controlled substance was critical in upholding the endangerment conviction. *Id.* ¶ 12. Similarly, the defendant in *Orquiz* was "properly convicted" of both driving while intoxicated and child endangerment "based upon the presence of a child in the moving vehicle that [the d]efendant drove." 2012-NMCA-080, ¶¶ 1, 11-12 (relying on a line of prior driving while intoxicated/child abuse cases). In *Orquiz*, we implicitly recognized that two interests were being infringed by the

defendant's conduct: "[N]ot only [did] the intoxicated driver threaten the safety of the general public, but the driver also pose[d] an immediate, substantial, and foreseeable threat to a specific member of the general public[,] . . . a child." *Id.* ¶ 15.

{27} There is a common sense principle supporting multiple punishments under these circumstances. Society recognizes that those who endanger children in the process of committing certain crimes are simply more culpable than those who commit the same crimes without putting a child at risk. The Legislature has expressed this interest by providing for expanded protection of children in Section 30-6-1(D)(1) and throughout the Criminal Code. For example, the crime of child abuse resulting in death is a first degree felony, Section 30-6-1(F), authorizing a basic sentence of life imprisonment, *see* NMSA 1978, § 31-18-15(A)(1) (2007, amended 2016), while the crime of causing death to an adult with a similar mental state is a fourth degree felony, NMSA 1978, § 30-2-3(B) (1994) (involuntary manslaughter), providing for a penalty of only eighteen months imprisonment, *see* § 31-18-15(A)(10). And child endangerment (not resulting in death) is a third degree felony, *see* § 30-6-1(D)(1), (E), subject to a penalty of three years imprisonment, *see* § 31-18-15(A)(9), while there is no comparable crime for endangering an adult. By enacting these offenses and establishing enhanced penalties for their commission, the Legislature has expressed a "compelling public interest in protecting defenseless children." *Graham*, 2005-NMSC-004, ¶ 9 (internal quotation marks and citation omitted). This is all to say that the social evil addressed by the child endangerment statute is the inchoate but "truly significant risk of serious harm to children[,]" *Chavez*, 2009-NMSC-035, ¶ 22, which is an interest that has sometimes justified a greater degree of punishment than that imposed for identical criminal conduct that does not create such a risk. *See, e.g.*, *Graham*, 2005-NMSC-004, ¶ 12; *Orquiz*, 2012-NMCA-080, ¶ 1.

{28} On the other hand, "[t]he aggravated assault statute is aimed at deterring aggression against other people in which the use of deadly weapons is involved." *State v. Rodriguez*, 1992-NMCA-035, ¶ 17, 113 N.M. 767, 833 P.2d 244. The aggression specifically criminalized in Section 30-3-1(B) is conduct that causes mental harm to the victim—i.e., puts the victim in fear, even when that fear is not accompanied by actual physical harm, *see State v. Roper*, 2001-NMCA-093, ¶ 12, 131 N.M. 189, 34 P.3d 133, or even any risk of physical harm. *See* § 30-3-1(B) (requiring only a reasonable belief that a battery is imminent).

{29} We conclude that there is little overlap between the social policies addressed by the child abuse and assault statutes. *See Swafford*, 1991-NMSC-043, ¶ 32 ("Statutes directed toward protecting different social norms and achieving different policies can be viewed as separate and amenable to multiple punishments."). We also conclude that the two statutes are not ordinarily violated together. *See Swick*, 2012-NMSC-018, ¶ 13 ("Legislative intent may be gleaned [by] . . . determining whether the statutes are usually violated together[.]" (internal quotation marks and citation omitted)). Reasonable fear can be imposed by threat to a child victim when there is no risk of actual, physical harm to a child. And the life and health of that child can be recklessly put at substantial risk whether or not the defendant makes a fear-inducing threat. But in unusual cases where a defendant acts in a manner that infringes on both of those social interests, multiple punishments for aggravated assault and child endangerment do not violate the right to be free from double jeopardy.

{30} This case is a good example of the policies at issue. This was a life-threatening and harrowing experience for Victim—a child. He testified that he thought he was going to be shot from the moment he saw the gun. His mother later found him at the neighbors' house, crying and scared, and the family ultimately moved out of their home because they no longer felt comfortable there. Because the law separately punishes the distinct evils evident here, we affirm Defendant's convictions for both offenses.

C. Aggravated Burglary and Aggravated Assault

{31} Defendant's final argument is that the same firearm was used to aggravate both burglary and assault, thereby offending principles of double jeopardy. This argument is unpersuasive for a number of reasons, the most obvious being that we have already held that the aggravated burglary was complete before the gun was pointed at Victim in the living room, which was the basis for the child endangerment and aggravated assault convictions. Therefore, the conduct underlying the two offenses is not unitary, *Bernal*, 2006-NMSC-050, ¶ 11; *DeGraff*, 2006-NMSC-011, ¶ 27, and our double jeopardy inquiry "is at an end." *Swafford*, 1991-NMSC-043, ¶ 28.

CONCLUSION

{32} Defendant's convictions are affirmed.

{33} IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
M. MONICA ZAMORA, Judge

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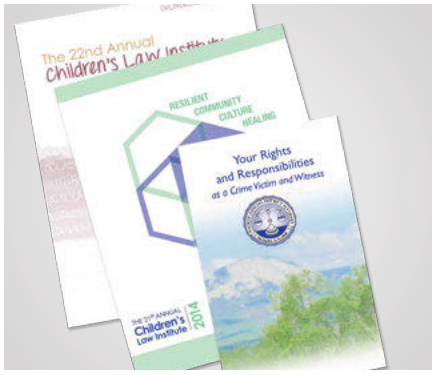

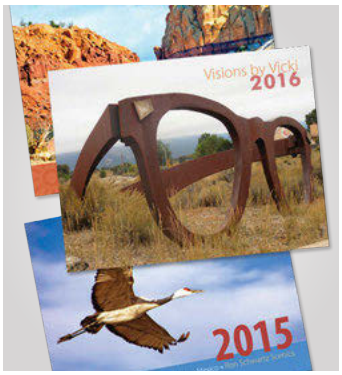

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