Official Publication of the State Bar of New Mexico

Bar Bulletin

November 23, 2016 • Volume 55, No. 47

Winter in Pilar, by Michelle Chrisman (see page 3)

www.michellechrisman.com

Inside This Issue

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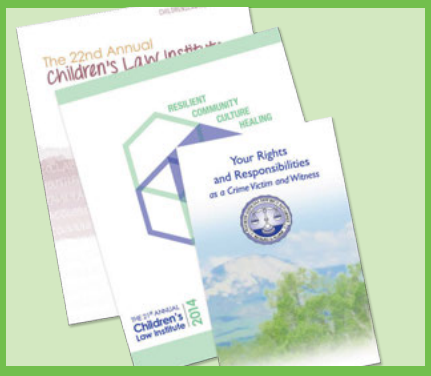

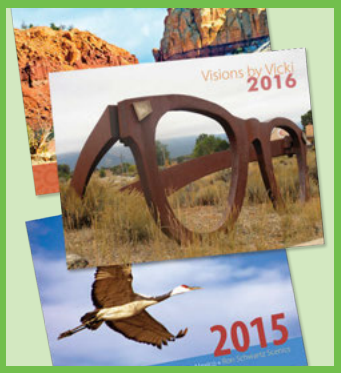

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7
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14
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20
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Cover Artist: Michelle Chrisman's landscapes are painted "en plein air." She considers herself a contemporary colorist and modernist, but most of all a visual poet. She is drawn to the visual beauty of New Mexico and the West, the desert, and the variety of three cultures. She paints alla prima in direct response to the landscape. Chrisman teaches annual painting workshops for Ghost Ranch in Abiquiu and for the New Mexico Art League and Harwood Art Center in Albuquerque. She can be reached via email at MichelleChrisman78@gmail.com and her website is www.MichelleChrisman.com.

Notices

Court News

New Mexico Supreme Court Board of Legal Specialization

Comments Solicited

The following attorneys are applying for certification as a specialist in the areas of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, attorneys and others are encouraged to comment upon any of the applicant's qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Appellate Practice Law
Randolph Barnhouse

Environmental Law
Thomas Hnasko

Federal Indian Law
James E. Fitting

New Mexico Court of Appeals

Announcement Judicial Vacancy

A vacancy will occur on Dec. 1 due to the retirement of Judge Roderick T. Kennedy. The deadline for application is 5 p.m., Dec. 8. The Appellant Nominating Commission will meet Dec. 22 in Santa Fe to interview applicants for this vacancy. Alfred Mathewson, chair of the Appellate Court Judicial Nominating Commission, invites applications for these positions from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications can be found at lawschool.unm.edu/judsel/application.php.

Second Judicial District Court

Hours Change

Effective Nov. 21, the Second Judicial District Children's Court Clerk's Office, located at 5100 2nd Street, Albuquerque, hours will be 8 a.m. to 4 p.m. The office will remain open through the lunch hour.

Sixth Judicial District Court

Notice of Right to Excuse Judge

Gov. Susana Martinez appointed Jarod K. Hofacket to fill the vacant judicial position and to take office on Nov. 4 in Division IV of the Sixth Judicial District Court. Judge Hofacket will be assigned all pending and reopened cases previously assigned to Judge Daniel Viramontes, District Judge, Division IV. All pending and reopened cases involving Amy DeLaney-Hernandez shall be assigned to Judge Hofacket. All pending and reopened cases involving Tyler Benting shall be assigned to Judge Jennifer E. DeLaney, District Judge, Division II. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days to excuse Judge Hofacket.

Professionalism Tip

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

I will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

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.

Exhibit Destruction

The 13th Judicial District Court in Cibola County will destroy exhibits from the following cases listed below on Dec. 15. Parties involved in the cases listed below may retrieve the exhibits before the destruction date by appearing in person at the district court clerk's office in Grants. Call Court Manager Kathy Gallegos at 505-287-8831 ext. 3110 for more information. Below are the cases that will have exhibits destroyed: CR-1333-1985-00053 through CR-1333-2015-00233; JR-1333-1993-00021 through JR-1333-2015-00034; AP-1333-1991-00005 through AP-1333-2002-10; LR-1333-2003-1 through LR-1333-2015-00010; CV-1333-1982-00276 through CV-1333-2014-00228; DM-1333-1984-00150 through DM-1333-2015-00240; DV-1333-1999-00088 through DV-1333-2015-00128; PB-1333-1996-00022 through PB-1333-2015-00011; JQ-1333-1996-00015 through JQ-1333-2015-00001; PQ-1333-2004-00006 though PQ-1333-2015-00003; SA-1333-2004-00003 through SA-1333-015-00008; SQ-1333-1987-00006 through SQ-1333-2015-00011.

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.

Announcement of Judicial Vacancy

The Judicial Conference of the U.S. has authorized the appointment of a full-time U.S. magistrate judge for the District of New Mexico at Albuquerque. The current annual salary of the position is $186,852. The term of office is eight years. A full public notice and application forms for the U.S. magistrate judge position are posted in the Clerk's Office of the U.S. District Court at all federal courthouses in New Mexico, and on the Court's website at www.nmd.uscourts.gov. Application forms may also be obtained from the Intake Counter at all federal courthouses in New Mexico, or by calling 575-528-1439. Applications must be received by Dec. 23. All applications will be kept confidential unless the applicant consents to disclose.

State Bar News

Attorney Support Groups

- 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#.

- Dec. 19, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)

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

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.

Board of Editors

Seeking Applications for Open Positions

The State Bar Board of Editors has open positions beginning Jan. 1, 2017. Both lawyer and non-lawyer positions are open. The Board of Editors meet at least four times a year (in person and by teleconference), reviewing articles submitted to the B*ar Bulletin* and the quarterly *New Mexico Lawyer*. This volunteer board reviews submissions for suitability, edits for legal content and works with authors as needed to develop the topics or address other concerns. The Board's primary responsibility is for the *New Mexico Lawyer*, which is generally written by members of a State Bar committee, section or division about a specific area of the law. The Board of Editors should represent a diversity of backgrounds, ages, geographic regions of the state, ethnicity, gender, and areas of legal practice, and preferably have some experience in journalism or legal publications. Applicants outside of Albuquerque are especially needed. The State Bar president, with the approval of the Board of Bar Commissioners, appoints members of the Board of Editors, often on the recommendation of the current Board. Those interested in being considered for a two-year term should send a letter of interest and résumé to Communications and Member Services Program Manager Evann Kleinschmidt at ekleinschmidt@nmbar.org. Apply by Dec. 1.

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	10a.m.–6p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed
Holiday Closures	
Nov. 24–25 (Thanksgiving)	

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

Albuquerque Lawyers Club

December Luncheon and CLE

Join the Albuquerque Lawyers Club for "Are There 13th Century Ethical Pointers for Dealing with 21st Century Problems?" (2.0 EP) at 11:30 a.m., Dec. 7, at Seasons Rotisserie and Grill in Albuquerque. Jack Clark Robinson, OFM, the Minister Provincial of Our Lady of Guadalupe Province of the Franciscans will present insights from his more than 30 years as a Franciscan friar and ministering across the Southwest. Judge James O. Browning of the U.S. District Court will introduce Father Robinson. For more information and to R.S.V.P., visit www.albuquerquelawyersclub.com.

Featured
Member Benefit

Fee Arbitration Program

This program helps to resolve fee disputes between attorneys and their clients or between attorneys. Call 505-797-6054 or 1-800-876-6227.

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Judges 888-502-1289
www.nmbar.org/JLAP

New Mexico Criminal Defense Lawyers Association

Two CLEs to Fulfill Ethics Requirements

The New Mexico Criminal Defense Lawyers Association presents two CLEs to help attorneys fill their ethics credits requirements. On Dec. 2, attend "Clients First: Understanding Your Role as an Advocate" in Albuquerque (4.0 G, 2.5 EP) and and "Latest Techniques in Trial Skills & Sentencing" on Dec. 16 in Las Cruces (3.5 G, 2.0 EP). Civil attorneys are welcome. Visit www.nmcdla.org to register and renew membership dues for 2017 today.

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Legal Education

November

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

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 **2016 Annual Civil Rights Seminar**
6.0 G
Live Seminar, Albuquerque
New Mexico 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 **Lawyers' Duties of Fairness and Honesty (Fair or Foul: 2016)**
2.0 E
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Keynote Address with Justice Ruth Bader Ginsburg (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Avoiding Retirement Pitfalls**
3.0 G
Live Replay, 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

December

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

7 **Gender and Justice (2016 Annual Meeting)**
1.0 E
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

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

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

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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.

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.

Opinions

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

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

Effective November 11, 2016

Unpublished Opinions

No. 35551	2nd Jud Dist Bernalillo CR-15-870, STATE v R TRUJILLO (reverse and remand)	11/07/2016
No. 34308	8th Jud Dist Colfax CV-13-182, J BLUMENSHINE v P KASTLER (affirm in part and remand)	11/08/2016
No. 34398	8th Jud Dist Colfax CV-13-182, J BLUMENSHINE v P KASTLER (affirm in part and remand)	11/08/2016
No. 35032	8th Jud Dist Colfax CV-13-182, J BLUMENSHINE v P KASTLER (affirm in part and remand)	11/08/2016
No. 35176	2nd Jud Dist Bernalillo CR-14-5908, STATE v J BROWN (affirm)	11/10/2016

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

Clerk's Certificate of Admission

On November 4, 2016:
Ian W. Bearden
313 Manzano Street NE
Albuquerque, NM 87108
575-779-6585
iwbearden@gmail.com

On November 4, 2016:
Blake J. Dugger
Law Office of Blake J. Dugger
6300 Riverside Plaza Lane
NW, Suite 100
Albuquerque, NM 87120
866-488-9998
blake@
lawofficeofblakejdugger.com

On November 8, 2016:
Linda S. Gross
N.M. Children, Youth
& Families Department
1720 E. Aztec Avenue
Gallup, NM 87301
505-863-9556 Ext. 1117
505-722-6976 (fax)
linda.gross@state.nm.us

On November 8, 2016:
John Parker Moon
Ritsema & Lyon, PC
999 18th Street, Suite 3100
Denver, CO 80202
303-675-4410
303-297-2337 (fax)
john.moon@ritsema-lyon.com

Clerk's Certificate of Reinstatement to Active Status

As of November 8, 2016:
Paul Cattrell Collins
Crowley Law Firm
490 N. 31st Street, Suite 500,
Transwestern II
Billings, MT 59103
406-252-3441
406-259-4159 (fax)
pcollins@crowleyfleck.com

In Memoriam

As of July 13, 2016:
Jesse R. Cosby
610 N. Virginia Avenue
Roswell, NM 88201

As of October 17, 2016:
Douglas Gene Schneebeck
4520 Aspen Avenue NE
Albuquerque, NM 87110

Clerk's Certificate of Change to Inactive Status

Effective October 24, 2016:
Andrea W. Hattan
Office of the U.S. Attorney -
District of Alaska
222 W. Seventh Avenue, #9
Room 253
Anchorage, AK 99513

Effective October 24, 2016:
Sharon L. Fjordbak
The Fjordbak Law Firm
8623 Royalbrook Court
Dallas, TX 75243

Effective November 1, 2016:
Dick Kisluk
PO Box 13583
Albuquerque, NM 87192

Sheila Mahdavi
15785 Laguna Canyon Road,
Suite 270
Irvine, CA 92618

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective November 23, 2016

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2016 NMRA:

Effective Date
(except where noted differently: 12/31/2016)

Rules of Civil Procedure for the District Courts

1 007.2	Time limit for filing motion to compel arbitration	
1 009	Pleading special matters	07/01/2017
1 017	Parties plaintiff and defendant; capacity	07/01/2017
1 023	Class actions	
1 054	Judgments; costs	
1 055	Default	07/01/2017
1 060	Relief from judgment or order	07/01/2017
1 079	Public inspection and sealing of court records	05/18/2016
1 083	Local rules	
1 093	Criminal contempt	
1 096	Challenge of nominating petition	
1 104	Courtroom closure	
1 120	Domestic relations actions; scope; mandatory use of court-approved forms by self-represented litigants	
1 128	Uniform collaborative law rules; short title; definitions; applicability	
1 131	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
1 128.1	Collaborative law participation agreement; requirements	
1 128.2	Initiation of collaborative law process; voluntary participation; conclusion; termination; notice of discharge or withdrawal of collaborative lawyer; continuation with successor collaborative lawyer	
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Rules of Civil Procedure for the Magistrate Courts

2 110	Criminal contempt	
2 114	Courtroom closure	
2 305	Dismissal of actions	
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3 114	Courtroom closure	
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4 306	Order dismissing action for failure to prosecute	
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4 702	Motion for default judgment	
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4 703	Default judgment; judgment on the pleadings	
4 909	Judgment for restitution	
4 909A	Judgment for restitution	
4 940	Notice of federal restriction on right to possess or receive a	05/18/2016
4 982	Withdrawn	
4 986	Withdrawn	
4 989	Withdrawn	
4 990	Withdrawn	

Rules of Criminal Procedure for the District Courts

5 102	Rules and forms	
5 104	Time	
5 112	Criminal contempt	
5 123	Public inspection and sealing of court records	05/18/2016
5 124	Courtroom closure	
5 304	Pleas	
5 511	Subpoena	
5 511.1	Service of subpoenas and notices of statement	
5 614	Motion for new trial	
5 615	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/2016
5 801	Reduction of sentence	

Rules of Criminal Procedure for the Magistrate Courts

6 102	Conduct of court proceedings	
6 109	Presence of the defendant	
6 111	Criminal contempt	
6 116	Courtroom closure	
6 201	Commencement of action	
6 209	Service and filing of pleadings and other papers	
6 506	Time of commencement of trial	05/24/2016
6 601	Conduct of trials	

Rules of Criminal Procedure for the Metropolitan Courts

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7 111	Criminal contempt	
7 115	Courtroom closure	
7 201	Commencement of action	
7 209	Service and filing of pleadings and other papers	
7 304	Motions	
7 506	Time of commencement of trial	05/24/2016
7 606	Subpoena	

Rules of Procedure for the Municipal Courts

8 102	Conduct of court proceedings	
8 108	Presence of the defendant	
8 110	Criminal contempt	
8 114	Courtroom closure	
8 201	Commencement of action	
8 208	Service and filing of pleadings and other papers	
8 506	Time of commencement of trial	05/24/2016
8 601	Conduct of trials	

Criminal Forms

9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
9 611	Withdrawn	
9 612	Order on direct criminal contempt	
9 613	Withdrawn	

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10 163	Special masters	
10 166	Public inspection and sealing of court records	05/18/2016
10 168	Rules and forms	
10 171	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/2016
10 322	Defenses and objections; when and how presented; by pleading or motion	
10 325	Notice of child's advisement of right to attend hearing	
10 340	Testimony of a child in an abuse or neglect proceeding	
10 408A	Withdrawn	
10 413	Withdrawn	
10 414	Withdrawn	
10 417	Withdrawn	
10 502	Summons	
10 560	Subpoena	
10 570	Notice of child's advisement of right to attend hearing	
10 571	Motion to permit testimony by alternative method	
10 604	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
10 701	Statement of probable cause	
10 702	Probable cause determination	
10 703	Petition	
10 704	Summons to child Delinquency Proceeding	
10 705	Summons to parent or custodian or guardian – Delinquency Proceeding	
10 706	Order of appointment of attorney for child and notice and order to parent(s), guardian(s), or custodian(s)	
10 707	Eligibility determination for indigent defense services	
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10 716	Judgment and Disposition	
10 717	Petition to revoke probation	
10 718	Sealing order	
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10 722	Affidavit for arrest warrant	
10 723	Arrest warrant	
10 724	Affidavit for search warrant	
10 725	Search warrant	
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10 727	Waiver of right to have a children's court judge preside over hearing	
10 731	Waiver of arraignment in youthful offender proceedings	
10 732	Waiver of preliminary examination and grand jury proceeding	
10 741	Order for evaluation of competency to stand trial	
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10 743	Order for diagnostic evaluation	
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Rules of Evidence

11-803	Exceptions to the rule against hearsay – regardless of whether the declarant is available as a witness	

Rules of Appellate Procedure

12 101	Scope and title of rules	
12 201	Appeal as of right; when taken	
12 202	Appeal as of right; how taken	
12 203	Interlocutory appeals	
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12 204	Appeals from orders regarding release entered prior to a judgment of conviction	
12 206	Stay pending appeal in children's court matters	
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12 208	Docketing the appeal	
12 209	The record proper (the court file)	

12 302	Appearance, withdrawal, or substitution of attorneys; changes of address or telephone number
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12 402	Issuance and stay of mandate
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12 501	Certiorari from the Supreme Court to the district court regarding denial of habeas corpus
12 503	Writs of error
12 504	Other extraordinary writs from the Supreme Court
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12 601	Direct appeals from administrative decisions where the right to appeal is provided by statute
12 602	Appeals from a judgment of criminal contempt of the Court of Appeals
12 604	Proceedings for removal of public officials within the jurisdiction of the Supreme Court
12 606	Certification and transfer from the Court of Appeals to the Supreme Court
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14 303	Assault; attempted battery; threat or menacing conduct; essential elements
14 304	Aggravated assault; attempted battery with a deadly weapon; essential elements
14 306	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; essential elements
14 308	Aggravated assault; attempted battery with intent to commit a felony; essential elements
14 310	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
14 311	Aggravated assault; attempted battery with intent to commit a violent felony; essential elements
14 313	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14 351	Assault upon a [school employee] [health care worker]; attempted battery; essential elements
14 353	Assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct; essential elements
14 354	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery with a deadly weapon; essential elements
14 356	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct with a deadly weapon; essential elements
14 358	Aggravated assault on a [school employee] [health care worker]; attempted battery with intent to commit a felony; essential elements
14 360	Aggravated assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
14 361	Assault on a [school employee] [health care worker]; attempted battery with intent to commit a violent felony; essential elements
14 363	Assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14 371	Assault; attempted battery; "household member"; essential elements
14 373	Assault; attempted battery; threat or menacing conduct; "household member"; essential elements
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14 376	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; "household member"; essential elements
14 378	Aggravated assault; attempted battery with intent to commit a felony; "household member"; essential elements
14 380	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; "household member"; essential elements
14 381	Assault; attempted battery with intent to commit a violent felony; "household member"; essential elements
14 383	Assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; "household member"; essential elements
14 990	Chart
14 991	Failure to register as a sex offender; 1999 and 2000 versions of SORNA; essential elements
14 992	Failure to register as a sex offender; 2005, 2007, and 2013 versions of SORNA; essential elements
14 993	Providing false information when registering as a sex offender; essential elements
14 994	Failure to notify county sheriff of intent to move from New Mexico to another state, essential elements
14 2200	Assault on a peace officer; attempted battery; essential elements
14 2200A	Assault on a peace officer; threat or menacing conduct; essential elements
14 2200B	Assault on a peace officer; attempted battery; threat or menacing conduct; essential elements
14 2201	Aggravated assault on a peace officer; attempted battery with a deadly weapon; essential elements
14 2203	Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with a deadly

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14 2204 Aggravated assault on a peace officer; attempted battery with intent to commit a felony; essential elements
14 2206 Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with intent to commit a felony; essential elements
14 2207 Aggravated assault on a peace officer; attempted battery with intent to commit a violent felony; essential elements
14 2209 Aggravated assault on a peace officer; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14 3106 Possession of a dangerous drug
14 4503 Driving with a blood or breath alcohol concentration of eight one hundredths (.08) or more; essential elements
14 4506 Aggravated driving with alcohol concentration of (.16) or more; essential elements
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Rules Governing Admission to the Bar

15 104 Application
15 205 Grading and Scoring
15 302 Admission to practice

Rules of Professional Conduct

16-108 Conflict of interest; current clients; specific rules

Rules Governing Discipline

17 202 Registration of attorneys
17 204 Trust accounting
17 208 Incompetency or incapacity
17 214 Reinstatement

Rules Governing the Client Protection Fund

17A-005 Composition and officers of the commission

Rules Governing the Unauthorized Practice of Law

17B 005 Civil injunction proceedings
17B 006 Determination by the Supreme Court

Rules Governing the Recording of Judicial Proceedings

22 101 Scope; definitions; title
22 204.1 Temporary Certification for Court Reporters

Supreme Court General Rules

23 107 Broadcasting, televising, photographing, and recording of court proceedings; guidelines

Rules Governing the New Mexico Bar

24 101 Board of Bar Commissioners
24 102 Annual license fee
24 110 "Bridge the Gap: Transitioning into the Profession" program
24 111 Emeritus attorney

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I. Rules Applicable to All Cases

LR1-101 Title and citation
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LR1-103 Failure to comply
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LR1-107 Assigned judge
LR1-108 Assignment of consolidated cases
LR1-109 Certificates of service
LR1-110 Informing the court of contact information
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LR1-112 Corporations and other business entities as parties
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II. Rules Applicable to Civil Cases

LR1-201 Motion practice
LR1-202 Interrogatories, requests for production, and requests for admission
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III. Rules Applicable to Criminal Cases

LR1-301 Search warrants
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LR1-303 Grand jury
LR1-304 Indictment and summons
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IV. Rules Applicable to Domestic Relations Cases

LR1-401 Modification of Rule 1-016 scheduling dates
LR1-402 Tolling of procedural deadlines
LR1-403 Contempt

V. Rules Applicable to Children's Court Cases

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VI. Rules Applicable to Court Alternative Dispute Resolution Programs

LR1-601 Alternative dispute resolution

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Local Rules for the Second Judicial District Court

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LR2-104 Assignment of cases

LR2-105 Consolidating cases
LR2-106 Priorities for resolving scheduling conflicts
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LR2-108 Court security
LR2-109 Decorum
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LR2-111 Transportation of incarcerated and in-custody persons for hearings and trial; dress
LR2-112 Tendering money to and disbursing money from the court; insufficient funds checks; refunds; daily jury receipt
LR2-113 Pro se appearance and filings; corporations as parties
LR2-114 Counsel of record; appearance; withdrawal
LR2-115 Attachments
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LR2-202 Rule 1-054 NMRA, attorney fees
LR2-203 Electronic filing authorized

Rules Applicable To Criminal Cases

LR2-301 Grand jury proceedings.
LR2-302 Bond procedures
LR2-303 Waivers of arraignment
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LR2-305 esignation of proceedings for transcript conference
LR2-306 Appeals from driver's license revocation hearings
LR2-307 Technical violation program
LR2-308 Case management pilot program for criminal cases

Rules Applicable To Domestic Relations Cases

LR2-401 Court clinic mediation program and other services for child-related disputes.
LR2-402 Exemption from Rule 1-016 NMRA

Rules Applicable To Court Cases

LR2-501 Adoption; new birth certificate
LR2-502 Exemption from Rule 1-016 NMRA

Rules Applicable Court Alternative Resolution Programs

LR2-601 Court-annexed alternative resolution generally
LR2-602 Settlement facilitation program
LR2-603 Court-annexed arbitration

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LR2-Form 701 Motion to withdraw
LR2-Form 702 Entry of appearance by substitute counsel or party pro se
LR2-Form 703 Request for hearing
LR2-Form 704 Notice of hearing
LR2-Form 705 Praecipe
LR2-Form 706 Rule 1-099 NMRA, certificate
LR2-Form 707 Final pretrial order
LR2-Form 708 Notice and Order STEPS
LR2-Form 709 Court clinic referral order
LR2-400 Case management pilot program for criminal cases 02/02/2016

Local Rules for the Third Judicial District Court

I. Rules Applicable To All Cases

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LR3-102 Disciplinary action for failure to comply
LR3-103 Court appointments and application for fees
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LR3-105 Court security
LR3-106 Pleadings and filed papers
LR3-107 Pro se filings (parties who wish to represent themselves without an attorney)
LR3-108 Appearances, withdrawals, and substitution of counsel
LR3-109 Change of address or telephone number
LR3-110 Service of notices and the mailing of other pleadings
LR3-111 Hearings and scheduling conflicts
LR3-112 Telephone conferences and hearings
LR3-113 Orders and judgments
LR3-114 Depositing of wills

II. Rules Applicable To Civil Cases

LR3-201 Default judgments
LR3-202 Disposition of civil exhibits
LR3-203 Civil case control
LR3-204 Consolidation of cases
LR3-205 Findings of fact and conclusions of law
LR3-206 Jury matters
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LR3-208 Attorney fees
LR3-209 Electronic filing authorized

III. Rules Applicable To Criminal Cases

LR3-301 Transport of persons in custody
LR3-302 Bond procedures

IV. Rules Applicable To Domestic Relations Cases

LR3-401 Domestic relations mediation program
LR3-402 Safe exchange and supervised visitation program
LR3-403 Child support payments
LR3-404 Parenting classes

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

LR3-601 Settlement facilitation program

VII. Forms

[Reserved]

Local Rules for the Fourth Judicial District Court

I. Rules Applicable To All Cases

LR4-101 Title
LR4-102 Failure to comply
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LR4-104 Mode of attire
LR4-105 Removal of court files
LR4-106 Payments to district court clerk
LR4-107 Prohibition against forum shopping
LR4-108 Telephonic hearings
LR4-109 Submission of orders, judgments, and decrees
LR4-110 Request for hearings
LR4-111 Vacating settings
LR4-112 Jury instructions
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II. Rules Applicable To Civil Cases

LR4-201 Filing fees
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III. Rules Applicable To Criminal Cases

LR4-301 Technical violation program for adult probationers

IV. Rules Applicable To Domestic Relations Cases

LR4-401 Domestic relations mediation program

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

[Reserved]

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LR4-Form 702 Request for setting

Local Rules for the Fifth Judicial District Court

I. Rules Applicable To All Cases

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LR5 102 Chief judge
LR5 103 Disqualification; designation of judges
LR5 104 Dress requirements
LR5-105 Local rules advisory committee
LR5 106 Orders, decrees and judgments
LR5 107 Motions; settings
LR5-108 Motions to vacate and continue trial settings
LR5-109 Mailing of pleadings
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LR5-112 Audio recording free process; civil cases
LR5-113 Interviewing, examining and questioning jurors
LR5-114 Violation of local rules
LR5-115 Death certificates
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LR5-117 District court clerk trust account; court registry

II. Rules Applicable To Civil Cases

LR5 201 Local rule exemption to Rule 1 016(B) of the Rules of Civil Procedure for the District Courts; pretrial scheduling
LR5 202 Action by more than one judge
LR5-203 Requested findings of fact and conclusions of law
LR5-204 Judgment based on written instrument
LR5-205 Certificates as to the state of the record
LR5-206 Settlement conference
LR5-207 Motions and exhibits
LR5-208 Written interrogatories
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LR5-301 Technical violation program for adult probationers
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IV. Rules Applicable To Domestic Relations Cases

LR5-401 Domestic relations; mediation

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

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VII. Forms

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Local Rules for the Sixth Judicial District Court

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LR6-102 Disciplinary action for failure to comply
LR6-103 Control of court files
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LR6-105 Court schedules; itinerary; settings
LR6-106 Civil process; issuance
LR6-107 District court clerk's trust and litigant accounts
LR6-108 Court appointments
LR6-109 Court security
LR6-110 Attorney's attire
LR6-111 Legal research materials

II. Rules Applicable To Civil Cases

LR6-201 Withdrawals and substitution of counsel
LR6-202 Service of notices and mailing of other papers
LR6-203 Consolidation of cases
LR6-204 Orders and judgments
LR6-205 Orders to show cause

LR6-206 Default judgments
LR6-207 Attorney fees
LR6-208 Settings
LR6-209 Audio or audio-video conferences and hearings
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LR6-211 Continuances and conflicts
LR6-212 Excusal of judges
LR6-213 Electronic filing authorized

III. Rules Applicable To Criminal Cases

LR6-301 Orders and judgments in criminal matters
LR6-302 Arrest warrants and affidavits
LR6-303 Docket call
LR6-304 Pretrial conference
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IV. Rules Applicable To Domestic Relations Cases

LR6-401 Domestic relations mediation and supervised visitation programs; fees
LR6-402 Parent education workshop
LR6-403 Parenting plans
LR6-404 Supervised visitation sliding fee scale

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

[Reserved]

VII. Forms

LR6-Form 701 Request for setting
LR6-Form 702 Local Rule 6 202 consent to service
LR6-Form 703 Certificate as to the state of the record and nonappearance
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Local Rules for the Seventh Judicial District Court

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LR7 102 Delivery of papers to judge
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LR7-106 Library
LR7 107 Arrival prior to trial or hearing time
LR7 108 Attire

II. Rules Applicable To Civil Cases

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LR7-203 Electronic filing authorized

III. Rules Applicable To Criminal Cases

LR7 301 Technical violation program

IV. Rules Applicable To Domestic Relations Cases

[Reserved]

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

[Reserved]

VII. Forms

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Local Rules for the Eighth Judicial District Court

I. Rules Applicable To All Cases

LR8 101 Title
LR8 102 Assignment of cases; consolidation
LR8 103 Page limitations
LR8 104 Forum shopping
LR8 105 Control of court files
LR8-106 Requests for hearing; telephonic appearances
LR8 107 Submission of orders, decrees, and judgments
LR8 108 Exhibits and exhibit lists
LR8-109 Failure to comply

II. Rules Applicable To Civil Cases

LR8 201 Electronic filing authorized

III. Rules Applicable To Criminal Cases

[Reserved]

IV. Rules Applicable To Domestic Relations Cases

[Reserved]

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

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VII. Forms

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Local Rules for the Ninth Judicial District Court

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LR9-109 Conflicts and priorities
LR9-110 Disbursement of trust monies
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LR9-113 Motion practice
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LR9-115 Settings

LR9-116 Vacating trials or settings
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LR9-201 Interrogatories, requests for production, and requests for admission
LR9-202 Appointments of counsel
LR9-203 Default judgments; setting aside
LR9-204 Consolidated cases
LR9-205 Orders and judgments
LR9-206 Application of payment for attorney fees
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III. Rules Applicable To Criminal Cases

LR9-301 Transportation of prisoners
LR9-302 Time for presentation of plea and disposition agreements
LR9-303 Order setting defendant's bond
LR9-304 Jointly charged defendants; case caption; effect
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IV. Rules Applicable To Domestic Relations Cases

LR9-401 Contempt
LR9-402 Presence of parties before court
LR9-403 Telephonic appearance; time for filing and emergency relief
LR9-404 Custody education workshop for child-related proceedings

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

LR9-601 Court ordered mediation in civil cases

VII. Forms

[Reserved]

Local Rules for the Tenth Judicial District Court

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II. Rules Applicable To Civil Cases

LR10 201 Dismissals; civil cases
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III. Rules Applicable To Criminal Cases

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IV. Rules Applicable To Domestic Relations Cases

LR10-401 Divorce actions

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

[Reserved]

VII. Forms

[Reserved]

Local Rules for the Eleventh Judicial District Court

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LR11-103 Submission of orders following decision or settlement
LR11-104 Motions; proposed orders; briefs
LR11-105 Continuances
LR11-106 Jury trials; instructions
LR11-107 Voir dire at trial
LR11-108 Withdrawal of court files
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LR11-110 Place of filing; forum shopping; docket number
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LR11-113 Filing fees and forms of payment
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LR11-115 Fax filing; copies; return envelopes; changes to documents
LR11-116 Juror questionnaires
LR11-117 Exhibits
LR11-118 Cell phones and other electronic devices
LR11-119 Decorum in the courtroom
LR11-120 Attire in the courtroom
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LR11-201 Interrogatories
LR11-202 Request for trial setting
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LR11-204 Exemptions from filing fee
LR11-205 Consolidation of cases
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III. Rules Applicable To Criminal Cases

LR11-301 Entry of appearance, withdrawal in a criminal case
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IV. Rules Applicable To Domestic Relations Cases

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LR11-402 Domestic relations mediation; safe exchange and supervised visitation

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

[Reserved]

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[Reserved]

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

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-030

No. S-1-SC-34826 (filed August 4, 2016)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
LUCAS TRAMMELL,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
DENISE BARELA-SHEPHERD, District Judge

HECTOR H. BALDERAS
Attorney General
YVONNE MARIE CHICOINE
Assistant Attorney General
Santa Fe, New Mexico
for Petitioner

BENNETT J. BAUR
Chief Public Defender
MARY BARKET
Assistant Appellate Defender
Santa Fe, New Mexico
for Respondent

Opinion

Barbara J. Vigil, Justice

{1} In 2004 Lucas Trammell (Defendant) pled guilty, in part, to false imprisonment of a minor victim. At the time, a conviction of false imprisonment of a minor victim required that Defendant register as a sex offender under the New Mexico Sex Offender Registration and Notification Act (SORNA), NMSA 1978, §§ 29-11A-1 to -10 (1995, as amended through 2000). Defendant's attorney failed to realize that Defendant's plea included a sex offense requiring SORNA registration. Defendant moved to withdraw his plea six years later, after he was arrested and found to have violated the terms of his probation. We conclude that although counsel's failure to advise Defendant of the SORNA registration requirement in his plea agreement was per se deficient performance under the first prong of the *Strickland* test for ineffective assistance of counsel, Defendant failed to show that under *Strickland*'s second prong he had been prejudiced by that deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

I. BACKGROUND

{2} On March 31, 2004, pursuant to a plea agreement, Defendant was convicted of several crimes, including false imprisonment of a minor. Defendant's conviction followed a March 15, 2002, incident whereby Defendant stole a truck, unaware that there was a twelve-year-old boy in the back seat. Upon realizing that the child was in the vehicle, Defendant returned the child unharmed to the vehicle's original location.

{3} On July 1, 2004, the district court sentenced Defendant to a total of eleven years and six months in prison and suspended two of those years, resulting in a prison term of nine years and six months. Defendant's prison term was to be followed by two years of probation and parole. The district court issued its judgment, sentence, and partial suspension order by standard court form, filling in the blanks in accordance with the facts and circumstances of Defendant's case. Notably, on the page listing potential probation conditions, the district court did not check the box next to the language "Defendant Shall Register as a Sex Offender pursuant to section NMSA 1978, § 29-11A-1, *et seq*., as amended." Further, the order provided that "upon release from D.O.C. . . . Defendant must successfully complete [a] residential substance abuse program including either Fort Stanton or Delancey Street. This will be followed by standard supervised probation. Complete STEPS program."

{4} Defendant completed his prison sentence on May 26, 2008, and was released to complete his probation and parole. Prior to his release, though, Defendant had met with a case worker to discuss his probation conditions and was informed that as a result of his conviction for false imprisonment of a minor victim he would be subject to sex offender probation requiring SORNA registration. *See* NMSA 1978, § 29-11A-3(B)(7) (2000) (providing that " 'sex offense' means: . . . (7) false imprisonment . . . when the victim is less than eighteen years of age and the offender is not a parent of the victim"). Although he was surprised to learn that he was subject to sex offender probation, Defendant complied with the registration requirement because he was eager to be released. As a sex offender, one condition of his release was that he could "not date or marry anyone who has custody of minor children without *prior permission* from [his] Probation/Parole Officer."

{5} After his release, on November 6, 2009, Defendant was arrested on child abuse charges for the battery of his girlfriend's fourteen-year-old son. Because Defendant failed to seek permission from his probation officer prior to dating the victim's mother, he had violated the terms of his supervision—so the State filed a motion to revoke probation. Additionally, now that Defendant had violated the terms of his supervision, the State sought to impose the four years of habitual offender time it had agreed not to pursue under the original plea agreement.

{6} Defendant, by new counsel, then filed a motion for modification of his probation terms and conditions requesting that the district court issue an order "immediately suspending his supervision by the Sex Offender Probation Unit (SUP) and placing him on standard probation with all the standard terms and conditions as ordered at initial sentencing." Defendant contended that he "was not ordered onto sex offender probation by [the district] court as part of his sentence," but rather "was specifically ordered . . . to be supervised under the standard terms of probation." Further, Defendant argued that pursuant to NMSA 1978, Section 31-20-5.2(A) (2003), "*prior to* placing a sex offender on probation, the court must conduct a hearing to determine the terms and conditions of probation," and no such hearing was conducted in his case. *See id*.

{7} Defendant then filed a motion to withdraw his plea on April 9, 2010. Defendant argued that because "he was

not advised . . . that he was pleading guilty to a sex offense . . ., his guilty plea was . . . not entered knowingly and voluntarily." Defendant thus argued that his plea counsel was ineffective by failing to advise him that SORNA registration was a collateral consequence of his plea, relying heavily on the Court of Appeals' opinion in *State v. Edwards*, 2007-NMCA-043, 141 N.M. 491, 157 P.3d 56, *cert. quashed*, 2007-NMCERT-008 (Aug. 3, 2007). In *Edwards*, the Court of Appeals held that a defense attorney's failure to advise a client in a criminal case of the SORNA registration consequences of a guilty plea amounted to deficient performance under the first prong of the *Strickland* test for ineffective assistance of counsel. *Edwards*, 2007-NMCA-043, ¶ 32. Defendant further argued that he was prejudiced by his attorney's deficient performance because "had he been adequately advised, he would have rejected the plea and disposition agreement as it was," and instead would have negotiated a plea that did not subject him to sex offender registration. Both Defendant's original plea attorney and his attorney in the probation revocation proceedings believed that if defense counsel and the prosecutor had realized this plea included a sex offense there likely would have been a different plea agreement.

{8} The district court held a hearing on the motion to withdraw the plea on April 16, 2010. Then, on May 19, 2010, the district court found that Defendant was a habitual offender and ordered him to serve an additional four years of imprisonment. The district court did not rule on the motion to withdraw Defendant's original plea until October 29, 2010, when it denied the motion, concluding that there had not been ineffective assistance of counsel because the Court of Appeals opinion upon which Defendant relied was not retroactively applicable to Defendant's case and Defendant had not met his burden of showing he had been prejudiced by his counsel's conduct.

{9} Defendant appealed the denial of his motion to withdraw his plea to the Court of Appeals. *See State v. Trammell*, 2014-NMCA-107, ¶ 5, 336 P.3d 977. The Court of Appeals reversed the district court, holding that its opinion in *Edwards* did not announce a new rule, so it applied retroactively. *Trammell*, 2014-NMCA-107, ¶ 2. Therefore, Defendant's attorney's failure to advise him that he would be subject to SORNA registration as a result of his plea constituted deficient performance by counsel. *Id.*

{10} The Court of Appeals' determination that *Edwards* did not announce a new rule was "based partly on the fact that a line on Defendant's judgment and sentence paperwork called into question possible SORNA registration." *Trammell*, 2014-NMCA-107, ¶¶ 12, 14. The Court of Appeals went on to conclude that "[t]he affirmative obligation of defense counsel to be aware of collateral consequences of a plea is well established." *Id.* ¶ 15. Additionally, case law at the time Defendant entered his plea provided that " 'there is little question that adequate pre-plea knowledge of the SORNA registration and notification consequences of a plea ought to be a part of criminal procedure.' " *Id.* (quoting *State v. Moore*, 2004-NMCA-035, ¶ 26, 135 N.M. 210, 86 P.3d 635). Combined with testimony by Defendant's attorney that it was "standard practice to advise a client that he was pleading guilty to a sex offense and that he had failed to realize that Defendant's offense was considered a sex offense," the Court of Appeals determined that these factors demonstrated that Defendant's attorney had failed to meet his obligation under *Edwards*, which applied retroactively to Defendant's case. *Trammell*, 2014-NMCA-107, ¶ 15.

{11} The Court of Appeals then considered whether Defendant had been prejudiced by his attorney's failure to advise him of the SORNA registration requirements under *Strickland*'s second prong. *See Trammell*, 2014-NMCA-107, ¶¶ 16-18. The Court of Appeals noted that in order to show prejudice, Defendant would have been required to "show that there was a reasonable probability that he would have rejected the plea and proceeded to trial if he had been informed of the SORNA consequences." *Id.* ¶ 16. "However," the Court of Appeals added, "these rules are not mechanical, and we may consider other factors, so long as the focus is on whether there has been such a breakdown in the adversarial process as to undermine the fundamental fairness of the proceeding whose result is being challenged." *Id.* (internal quotation marks and citation omitted). The Court of Appeals concluded that (1) "we consider SORNA registration, like immigration consequences, a harsh result of Defendant's plea," *id.* ¶ 17; (2) Defendant testified that he would not have accepted the plea had he known it was considered a sex offense, *id.* ¶ 18; and (3) Defendant's plea counsel testified that he did not believe that either he or the prosecutor recognized that the plea included a sex offense, *id.* Thus, the Court of Appeals concluded that SORNA registration "prejudiced Defendant to the extent that it constituted a breakdown in the fundamental fairness of the proceedings." *Id.*

{12} Accordingly, the Court of Appeals remanded the case to the district court with instructions to allow Defendant to withdraw his plea. *Id.* ¶ 19. The State filed a petition for a writ of certiorari from this Court, which we granted. 2014-NMCERT-010. While we agree with the Court of Appeals' conclusion that the rule from *Edwards* retroactively applied to Defendant's situation because *Edwards* did not announce a new rule, we disagree with the Court of Appeals' conclusion that Defendant was prejudiced by his counsel's failure to advise him of the plea agreement's SORNA registration requirement. We thus reverse the Court of Appeals and remand to the district court for reentry of its order denying Defendant's motion to withdraw his guilty plea as premised on ineffective assistance of counsel in accordance with this opinion.[1]

II. STANDARD OF REVIEW

{13} "A motion to withdraw a guilty plea is addressed to the sound discretion of the [district] court, and we review the [district] court's denial of such motion only for abuse of discretion." *State v. Paredez*, 2004-NMSC-036, ¶ 5, 136 N.M. 533, 101 P.3d 799 (internal quotation marks and citation omitted). "We review the retroactive application of a judicial opinion de novo." *Ramirez v. State* (*Ramirez II*), 2014-NMSC-023, ¶ 9, 333 P.3d 240 (citing *Kersey v. Hatch*, 2010-NMSC-020, ¶ 14, 148 N.M. 381, 237 P.3d 683).

III. DISCUSSION

{14} Before challenging Defendant's claim that he received ineffective assistance of counsel, the State first argues that both the district court and the Court of Appeals lacked jurisdiction to consider and review Defendant's case. We address this issue at the outset, and determine that this controversy is properly before our Court. The State then argues that the Court of Appeals erred in allowing Defendant to withdraw his plea because there was no ineffective assistance of counsel. The State contends that *Edwards* does not apply retroactively,

[1]Defendant served all four years of his habitual offender sentence and was released on December 17, 2012.

and, therefore, Defendant's plea counsel's performance was not deficient under the law at that time. Further, the State argues that Defendant did not demonstrate prejudice, as required under *Strickland*. We disagree with the State, in part, and hold that the logic of *Edwards* applies retroactively because it did not announce a new rule of law. Yet, we also conclude that Defendant did not adequately show that he had been prejudiced by his counsel's deficient advice in the course of accepting the instant plea agreement.

A. Jurisdiction

{15} The State argues that both the district court and the Court of Appeals lacked jurisdiction with respect to Defendant's motion to withdraw his guilty plea. Yet, the State also concedes that Defendant's motion to withdraw his plea might have been properly treated by the district court as a petition for habeas corpus relief under Rule 5-802 NMRA. Thus, when the district court denied Defendant's motion, his appeal from the disposition should have been to the Supreme Court in accordance with Rule 5-802. *See Cummings v. State*, 2007-NMSC-048, ¶ 9, 142 N.M. 656, 168 P.3d 1080. Still, the error is of no moment to our review of the underlying issues in this case as the proper remedy for the error is transfer to the Supreme Court from the Court of Appeals. *See Martinez v. Chavez*, 2008-NMSC-021, ¶ 14, 144 N.M. 1, 183 P.3d 145 (per curiam) (considering a case that was transferred in error to the Supreme Court because it was not incorrectly considered to be an appeal from a habeas corpus proceeding, and providing that "we recognize the difficult task that the Court of Appeals often faces when confronted with a case filed as a direct appeal from post-conviction proceedings that may or may not be properly construed as a habeas corpus proceeding"). Accordingly, we now consider whether Defendant's Sixth Amendment right to effective assistance of counsel was violated by entry of the instant plea agreement.

B. Ineffective Assistance of Counsel

{16} "The Sixth Amendment to the United States Constitution . . . guarantees not only the right to counsel but the right to the effective assistance of counsel." *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 16, 130 N.M. 179, 21 P.3d 1032 (internal quotation marks and citation omitted). In order to be entitled to relief on the basis of ineffective assistance of counsel, a defendant must show that (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. In *Edwards*, 2007-NMCA-043, ¶¶ 31-32, the Court of Appeals held that defense counsel's failure to advise a defendant that pleading guilty or no contest to a sex offense would require that the defendant register as a sex offender under SORNA amounted to deficient performance under the first prong of the *Strickland* ineffective assistance of counsel test. Although the *Edwards* Court was unable to make a determination on the issue of prejudice in that case, it recognized that the standard for assessing prejudice required a defendant to show that "but for counsel's errors, [the defendant] would not have pleaded guilty and instead gone to trial." 2007-NMCA-043, ¶ 34 (alteration in original) (quoting *Patterson*, 2001-NMSC-013, ¶ 18). Thus, under *Edwards*, defense counsel's failure to advise Defendant of the instant plea agreement's SORNA registration requirement was per se deficient performance of counsel under *Strickland*'s first prong. Yet, *Edwards* predated Defendant's plea agreement, so we must first determine whether *Edwards* embodied a novel pronouncement or instead relied on preexisting law.

i. Defense Counsel's Failure to Advise Defendant of Sex Offender Registration Requirements Pursuant to Plea Agreement Was Per Se Deficient Performance Under *Strickland*'s First Prong

{17} The State's primary argument in this case arises from what it claims was a novel pronouncement in 2007 by the Court of Appeals in *Edwards* holding that defense counsel's failure to advise a defendant entering into a plea agreement of said agreement's SORNA registration requirement constitutes deficient performance of counsel. Accordingly, the State argues that *Edwards* should not apply retroactively to Defendant's 2004 plea agreement. We analyze the retroactivity of novel criminal laws in accordance with *Teague v. Lane*, 489 U.S. 288, 310 (1989). " 'If it is an old rule, it applies both on direct and collateral review. If it is a new rule, it generally applies only to cases that are still on direct review.' " *State v. Ramirez* (*Ramirez I*), 2012-NMCA-057, ¶ 6, 278 P.3d 569 (quoting *State v. Frawley*, 2007-NMSC-057, ¶ 34, 143 N.M. 7, 172 P.3d 144), *aff'd Ramirez II*, 2014-NMSC-023. New rules "break[] new ground or impos[e] a new obligation on the [s]tates," meaning that "the result [of the case] was not dictated by precedent existing at the time the defendant's conviction became final." *Ramirez I*, 2012-NMCA-057, ¶¶ 7 (third alteration in original) (internal quotation marks and citation omitted). We conclude that *Edwards* did not make a novel pronouncement of law and that the duty to advise clients of SORNA registration requirements was a prerequisite to effective performance of counsel that existed prior to that case's publication.

{18} *Edwards* relied heavily on this Court's opinion in *Paredez*, 2004-NMSC-036. *See generally Edwards*, 2007-NMCA-043, ¶¶ 16-32. *Paredez* held that under the first prong of *Strickland* a criminal defense attorney's failure to ascertain and advise a client of the collateral immigration consequences of entering a guilty plea was per se deficient performance. *See Paredez*, 2004-NMSC-036, ¶ 19 ("An attorney's failure to provide the required advice regarding immigration consequences will be ineffective assistance of counsel if the defendant suffers prejudice by the attorney's omission."). *Edwards* analogized the harsh immigration consequences of a criminal conviction to the comparably harsh collateral consequences of SORNA registration. *See* 2007-NMCA-043, ¶¶ 25-27. After considering the two types of collateral consequences in *Edwards*, the Court of Appeals concluded that "[w]e see no reason why the similarly harsh consequences of sex offender registration should not also necessitate specific advice from counsel so that defendants can make informed decisions regarding their pleas." *Id*. ¶ 26.

{19} This Court recently issued an opinion that built on our holding in *Paredez* and is persuasive to our analysis regarding *Edwards*' retroactive effect. In *Ramirez II* this Court held that although *Paredez* was issued in 2004, it would be given retroactive effect to cases dating back to 1990 because it did not rely on a novel pronouncement of law. *Ramirez II*, 2014-NMSC-023, ¶ 2. *Ramirez II* recognized that "New Mexico does not give retroactive effect to a new criminal procedure rule." *Id*. ¶ 11. However, the Court determined that *Paredez* did not announce a new rule in 2004 because courts in New Mexico were already prohibited from accepting guilty pleas from defendants who had not been properly advised of the immigration consequences of their pleas under rules that had been in place since 1990. *Ramirez II*, 2014-NMSC-023, ¶ 6. The Court looked specifically to Forms 9-406 NMRA and 9-406A NMRA (1990), which were "used in New Mexico courts

in the course of accepting a guilty plea," and Rules 5-303(E)(5) NMRA (1990), 6-502(D)(2) NMRA (1990), 7-502(E)(2) NMRA (1990), and 8-502(D)(2) NMRA (1990), which "predicate[ed] acceptance of a guilty plea . . . on th[e] court's colloquy with the defendant directly, assuring the defendant's understanding of the immigration consequences of the plea." *Ramirez II*, 2014-NMSC-023, ¶¶ 7, 13. Form 9-406 specifically required a court, when accepting a plea, to verify " '[t]hat the defendant understands that a conviction may have an effect upon the defendant's immigration or naturalization status.' " *Ramirez II*, 2014-NMSC-023, ¶ 3 (quoting Form 9-406 (1990)). It also required the defendant to verify that the warning had been administered by the judge and required defense counsel to certify that he or she explained the contents of the forms to the client. *Id*. Additionally, the Court surveyed professional norms, which supported the conclusion that the obligation to advise a client of the immigration consequences of a guilty plea predated *Paredez*, and possibly even the 1990 form and rules. *Ramirez II*, 2014-NMSC-023, ¶ 15.

{20} The plea rules and forms on which the *Ramirez II* Court relied were silent concerning advisement of SORNA consequences until *Edwards* was decided in 2007. *See* Form 9-406 (2007). Thus, courts at the time of Defendant's conviction were not formally required to ensure that defendants pleading to sex offenses had been advised of SORNA consequences when they entered their pleas. However, since the original 1995 enactment of SORNA, courts have been required to "provide a sex offender adjudicated guilty in that court with written notice of his [or her] duty to register pursuant to [SORNA] . . . *in judgment and sentence forms* provided to the sex offender." NMSA 1978, Section 29-11A-7 (A) (1995) (emphasis added). We conclude that this requirement of notice as part of the judgment and sentence documentation in a criminal case supports the notion that judges and lawyers in criminal cases should have been aware of the requirements and thereby had a duty to incorporate considerations of such requirements into their handling of relevant criminal cases. Indeed, in Defendant's case, the judgment and sentence form used by the district court had a space to denote whether Defendant would be subject to sex offender registration. Regrettably, though, the district court failed to make the correct demarcation, and that mistake went further unchecked by the attorneys in the case.

{21} In the instant case the Court of Appeals analogized to this Court's rationale from *Ramirez II* to conclude that *Edwards* applied retroactively because it did not announce a new rule of law. *See Trammell*, 2014-NMCA-107, ¶¶ 11-15. Although the guilty plea forms, Forms 9-406 and 9-406A, that were discussed in *Ramirez II* were not amended to include warnings about SORNA consequences until after *Edwards* was decided by the Court of Appeals—three years after Defendant had entered his plea—the judgment and sentence order issued by the district court in Defendant's case did in fact have an option to check a box relating to sex offender probation. *See Trammell*, 2014-NMCA-107, ¶ 15; *compare* Form 9-406 (1998) *with* Form 9-406 (2007). The Court of Appeals below thus determined that the presence of this item on the judgment and sentence form was evidence that SORNA requirements should have been considered at the time by both the district court and counsel. *See Trammell*, 2014-NMCA-107, ¶¶ 12, 15. Further, *Ramirez II* established that defense counsel has an obligation to be aware of the collateral consequences of a plea, and defense counsel in the instant case testified that it was in fact his usual practice to advise clients about such matters if they were pleading to a sex offense. *Trammell*, 2014-NMCA-107, ¶ 15. And, there was established case law pre-dating *Edwards* which indicated that "there is little question that adequate pre-plea knowledge of the SORNA registration and notification consequences of a plea ought to be a part of criminal procedure." *Trammell*, 2014-NMCA-107, ¶ 15 (internal quotation marks and citation omitted); *see Moore*, 2004-NMCA-035, ¶ 26 ("[W]e think there is little question that adequate pre-plea knowledge of the SORNA registration and notification consequences of a plea ought to be a part of criminal procedure."). Thus, the Court of Appeals concluded that *Edwards* did not announce a new rule and, like *Paredez*, should be applied retroactively. *Trammell*, 2014-NMCA-107, ¶ 15. We agree with the Court of Appeals' retroactivity analysis, and conclude that the case law, professional norms, notice requirements, and forms in use following the enactment of SORNA in 1995 provide ample evidence that advisement of a plea agreement's SORNA registration requirement by defense counsel is, and long has been, a prerequisite to effective assistance of counsel.

{22} We favorably compare the instant scenario with those at issue in *Ramirez II* and *Paredez*, and hold that the failure to advise a defendant of collateral SORNA registration requirements, like the failure to advise of immigration consequences, has been a well-established prerequisite to the effective assistance of counsel when arranging a plea agreement. Further, defense counsel testified that it was the professional norm at the time of Defendant's plea to advise clients of SORNA requirements under such a plea agreement. *Cf. Ramirez II*, 2014-NMSC-023, ¶ 15. As such, *Edwards*—like *Paredez*—did not announce a new rule, and should have been applied retroactively by the district court. A defense attorney's failure to advise a defendant entering into a plea which requires SORNA registration of that consequence is per se deficient performance under *Strickland*'s first prong. We thus next turn to the second prong under *Strickland* to determine whether Defendant was prejudiced by his defense counsel's failure to advise him of his plea agreement's SORNA registration requirement.

ii. Defendant Failed to Show that He Suffered Prejudice Under *Strickland* as a Result of Defense Counsel's Deficient Performance

{23} Under *Strickland*, in order to show prejudice, "[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. Cases involving plea agreements are different:

> [I]n the plea bargain context a defendant must establish that . . . but for counsel's errors, he would not have pleaded guilty and instead gone to trial. A defendant who was convicted on a plea is not required to prove that a trial would have resulted in acquittal. The question is whether there is a reasonable probability that the defendant would have gone to trial instead of pleading guilty or no contest had counsel not acted unreasonably.

Patterson, 2001-NMSC-013, ¶ 18 (internal quotation marks and citations omitted).

{24} "There is no formulaic test for determining whether a defendant has demonstrated prejudice. Such a determination is made on a case-by-case basis, in light of the

facts of that particular case." *State v. Favela*, 2015-NMSC-005, ¶ 19, 343 P.3d 178. Yet, when assessing whether a defendant has been prejudiced by an attorney's deficient performance, "courts are reluctant to rely solely on the self-serving statements of defendants." *Patterson*, 2001-NMSC-013, ¶ 29. Thus, a defendant must provide additional evidence of prejudice. *Id.* We typically consider the strength of the State's evidence against the defendant and the defendant's pre-conviction statements and actions, such as assertions of innocence or statements of intent to go to trial. *Id.* ¶¶ 30-31.

{25} Defendant has only presented evidence that he would have tried to negotiate a different plea agreement had he known about the SORNA requirement. The only evidence Defendant proffers to show that he would have rejected the instant plea agreement in favor of the alternative result of a trial, had his counsel properly advised him of the SORNA requirements, is (1) his testimony that had he been advised that he was pleading to a sex offense, he would not have accepted that plea and would have fought for a different agreement; (2) his plea counsel's testimony that, had he realized that Defendant was pleading to a sex offense, he would have tried to work out a different plea agreement with the prosecutor; and (3) because there was nothing sexual about the factual allegations in Defendant's case, it was likely that the prosecutor would have agreed to a different plea agreement that did not require SORNA registration. Yet, Defendant did not introduce any evidence to support his argument in the form of relevant testimony from the prosecution. And, Defendant did receive some benefits—in the form of numerous dropped charges—by accepting the plea, a salient fact considering his defense counsel's testimony that the State had a "very strong case against" him. Thus, this evidence amounts to no more than the "self-serving" offer of evidence we rejected in *Patterson*. 2001-NMSC-013, ¶ 29. Defendant has not demonstrated in a tangible way that in the absence of the mistake made by his attorney he would have rejected the instant plea agreement in favor of taking his arguments to trial. That is, the evidence falls short of demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," particularly where "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome," that outcome being the decision not to go to trial. *See Strickland*, 466 U.S. at 694.

{26} Further, Defendant was made aware of his plea's SORNA registration requirement over two years prior to this eventual challenge, bolstering our conclusion that his claim that he would not have accepted his plea is self-serving. First, instead of immediately soliciting the advice of a lawyer following his apprisal of the SORNA registration requirement six months prior to his release, Defendant merely acquiesced. *Trammell*, 2014-NMCA-107, ¶ 3. And, upon his release, Defendant likewise made no effort to investigate the SORNA registration requirement, either personally or with the help of a lawyer, instead choosing to dutifully register without voicing complaint. And, although Defendant suggests that he was "in the process of" getting a lawyer to help him investigate the SORNA registration requirement, that effort was ongoing for over two years. The fact that Defendant was only motivated to challenge his plea upon violating that plea two years after registering under SORNA is strong evidence that he in fact suffered no prejudice.

{27} Defendant requests that we consider his argument by framing the issue more broadly, in that under *Strickland* "a defendant [need only] show that there is a reasonable probability that but for counsel's ineffectiveness, the result of the *proceeding* would have been different." *See id.* at 693-94. Essentially, because a plea without a sex offense may have been possible because plea counsel testified that had he known Defendant was pleading to a sex offense he would have renegotiated a different plea agreement, Defendant asks us to find prejudice in the same way as the Court of Appeals. And, we have, on occasion, considered whether a defendant could show sufficient prejudice by evidence demonstrating that he or she would not have entered *this plea agreement*, had defense counsel performed adequately, because with effective representation, a *different plea agreement* might have been reached. *See Garcia v. State*, 2010-NMSC-023, ¶ 47, 148 N.M. 414, 237 P.3d 716 (suggesting that the defendant may have been prejudiced by his attorney's misunderstanding of the law and the facts of the case, insofar as it made defense counsel unable to "competently negotiate a plea agreement" to a lower, potentially more appropriate, sentence). Yet, in *Garcia*, the evidence suggested that "defense counsel . . . advise[d] [the d]efendant to agree to a plea agreement that resulted in a minimum of 30 years in prison—notwithstanding the fact that even if [the d]efendant had been convicted . . . he would have received only 24 years," if that conviction was for the State's charge of negligent, as opposed to intentional, child abuse—the issue being that defense counsel had advised the defendant that the sentence for either would be thirty years regardless. *Id.* In this case Defendant urges us to rely on speculation by his plea counsel that a different result in the proceedings would have been reached had the SORNA requirements of his plea not been overlooked. We cannot take such a leap without a more robust offer of evidence—beyond the self-serving testimony of Defendant and the speculation of his plea counsel. Thus, we conclude that Defendant has provided insufficient evidence that he would have rejected the instant plea agreement in favor of a trial on the merits, or some other result of the proceeding. Despite holding that Defendant's counsel acted deficiently in failing to advise Defendant of his plea agreement's SORNA registration requirements, we further hold that he failed to present sufficient evidence that he was thereby prejudiced by said deficiency. Defendant's claim of ineffective assistance of counsel therefore fails.

IV. CONCLUSION

{28} Defendant was not prejudiced by his plea counsel's per se deficient performance in failing to advise him of his plea agreement's collateral SORNA registration requirement. We therefore reverse the Court of Appeals and remand to the district court for entry of an order denying Defendant's motion to withdraw his plea agreement in accordance with this opinion.

{29} IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:
CHARLES W. DANIELS, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
JUDITH K. NAKAMURA, Justice

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-031

No. S-1-SC-34733 (filed August 8, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ANTHONY SAMORA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Ross C. Sanchez, District Judge

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

HECTOR H. BALDERAS
Attorney General
STEVEN H. JOHNSTON
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

Opinion

Edward L. Chávez, Justice

{1} Defendant Anthony Samora was accused of luring a sixteen-year-old male into his truck by deception, driving him to a secluded location in Albuquerque, and then forcibly penetrating him in the anus. A jury convicted Defendant of second-degree criminal sexual penetration in the commission of a felony (CSP-felony), contrary to NMSA 1978, Section 30-9-11(E)(5) (2007, amended 2009), and first-degree kidnapping, contrary to NMSA 1978, Section 30-4-1(A)(4) (2003). Due to sentencing enhancements, Defendant was sentenced to life imprisonment with the possibility of parole after thirty years for his CSP-felony conviction plus a consecutive eighteen-year sentence for his kidnapping conviction. In this direct appeal, Defendant brings a variety of challenges to both convictions, including a challenge to the district court for omitting that the sexual act must have been non-consensual when instructing the jury on CSP-felony.

{2} Because we conclude that it was fundamental error to omit the phrase "without consent" from the jury instructions relevant to CSP-felony, we must reverse Defendant's CSP conviction. The same fundamental error also infected the jury's findings with respect to Defendant's intent to inflict a sexual offense against the alleged victim, and we must therefore also reverse Defendant's kidnapping conviction. Accordingly, we remand this case to the district court, where Defendant may be retried on both charges.

I. BACKGROUND

{3} J.Z.[1] was at a bus stop in downtown Albuquerque "bugging people for money" so that he could catch a bus home. Defendant approached him, stated that he knew J.Z.'s family, and offered to give J.Z. a ride home. J.Z. got into Defendant's pickup truck, and Defendant started driving.

{4} J.Z. testified that he soon noticed that Defendant was not driving J.Z. toward his house. J.Z. told Defendant he was driving the wrong way, and Defendant did not respond. Defendant eventually stopped the truck in a remote location under a highway underpass. Defendant then punched J.Z. in the head, and J.Z. became "dizzy." Defendant pulled down J.Z.'s pants, maneuvered him into a receptive position, got on top of J.Z., and penetrated J.Z.'s anus with his penis. J.Z. further testified that he tried to escape by opening the passenger-side door of Defendant's truck, but the door would not open. After a few minutes Defendant ejaculated and said, "Now I can take you home." Defendant dropped off J.Z. on the west side of Albuquerque at a gas station near a Walmart. J.Z. testified that he was afraid to call the police because he did not want to be arrested for a probation violation. He also testified that he fought back throughout the encounter but that Defendant threw him around and overpowered him. J.Z. was sixteen years old at the time of the alleged crime.

{5} Two days later, J.Z. was arrested for absconding from juvenile probation. In jail, J.Z. told a counselor that he had been sexually assaulted. J.Z. went through a sexual assault nurse examination (SANE exam) four days after the alleged attack. During the SANE exam, a nurse took swabs from J.Z.'s anus, penis, and mouth. The nurse found no evidence of any injuries on his body, and no DNA from Defendant was found on the swabs.

{6} After his release from custody about thirty days later, J.Z. told Jennifer Brown, his big sister under the Big Brothers Big Sisters program, what had happened to him and described his attacker, including the fact that the attacker wore a GPS monitor on his belt. Ms. Brown located a photograph of Defendant and Defendant's address on a website, and from that website photograph J.Z. recognized Defendant as his attacker. J.Z. drove to the address listed on the website, and J.Z. identified Defendant's truck as the truck in which he was attacked. State employees later matched the locations and sequence of Defendant's GPS coordinates to those described in J.Z.'s story.

{7} Defendant was indicted on two counts of criminal sexual penetration in the second degree "by the use of force or coercion on a child thirteen to eighteen years of age" (CSP-force/coercion). Section 30-9-11(E)(1). Each count was alternatively charged as CSP-felony. Section 30-9-11(E)(5). Defendant was also

[1]Although some mention of the alleged victim's name was inevitable at trial, we do not refer to him by name here because "the constitution and laws of New Mexico require that we respect 'the victim's dignity and privacy throughout the criminal justice process,' " *State v. Allen*, 2000-NMSC-002, ¶ 2 n.1, 128 N.M. 482, 994 P.2d 728 (quoting N.M. Const. art. II, § 24(A)(1)), and because the alleged victim was a child under NMSA 1978, Section 32A-1-4(B) (2005, amended 2016), since state law affords some degree of confidentiality in child abuse and neglect cases. *See generally* NMSA 1978, § 32A-4-33 (2005, amended 2016); *see also Allen*, 2000-NMSC-002, ¶ 2 n.1.

charged with criminal sexual contact of a minor in the fourth degree (CSC), contrary to NMSA 1978, Section 30-9-13(D)(1) (2003), and kidnapping, contrary to Section 30-4-1(A)(4). With respect to an allegation that Defendant forced J.Z. to engage in fellatio or touched J.Z.'s penis without his consent, the jury unanimously found Defendant not guilty of CSP-felony or CSP-force/coercion and not guilty of the charge of CSC. The jury also unanimously found Defendant guilty of CSP-felony with respect to the allegation of anal penetration and guilty of kidnapping. The jury hung on whether Defendant was guilty of CSP-force/coercion with respect to the allegation of anal penetration.

{8} At a separate sentencing proceeding, *see* NMSA 1978, § 31-18-26 (1996), the jury unanimously found by a preponderance of the evidence that Defendant had been convicted of two violent sexual offenses pursuant to NMSA 1978, Section 31-18-25(F) (1997, amended 2015), and was accordingly subject to a mandatory enhancement by a sentence of life imprisonment. Defendant was sentenced to nine years imprisonment enhanced by a term of life imprisonment with the possibility of parole in thirty years for the second-degree CSP-felony conviction and to eighteen years imprisonment for first-degree kidnapping, to be served consecutively.

II. DISCUSSION

A. Defendant's Right to a Speedy Trial Was Not Violated

{9} The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." *See also* N.M. Const. art. II, § 14 ("[T]he accused shall have the right to . . . a speedy . . . trial."). Preventing prejudice to the accused is at the heart of the speedy trial right, which also emanates from "the concomitant 'societal interest in bringing an accused to trial.' " *State v. Serros*, 2016-NMSC-008, ¶ 4, 366 P.3d 1121 (quoting *State v. Garza*, 2009-NMSC-038, ¶ 12, 146 N.M. 499, 212 P.3d 387). To determine whether the accused has been deprived of his speedy trial right, this Court follows the four-factor test established by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), and considers "(1) the length of delay in bringing the case to trial, (2) the reasons for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) the prejudice to the defendant caused by the delay." *Garza*, 2009-NMSC-038, ¶ 5 (citing *Barker*, 407 U.S. at 530). The Court "weigh[s] these factors according to the unique circumstances of each case in light of 'the State and the defendant's conduct and the harm to the defendant from the delay.' " *Id.* ¶ 5 (quoting *Garza*, 2009-NMSC-038, ¶ 13). "In reviewing a district court's ruling on a speedy trial violation claim, we defer to the court's findings of fact, and we weigh and balance the *Barker* factors de novo." *Id.* ¶ 20.

1. Length of the delay

{10} The Court must first determine whether the length of the delay is presumptively prejudicial. "The first factor, the length of delay, has a dual function: it acts as a triggering mechanism for considering the four *Barker* factors if the delay crosses the threshold of being presumptively prejudicial, and it is an independent factor to consider in evaluating whether a speedy trial violation has occurred." *Serros*, 2016-NMSC-008, ¶ 22 (internal quotation marks and citation omitted). Defendant was arrested and indicted on September 8, 2008, and his trial began on November 12, 2013. The State therefore failed to bring the case to trial for more than five years. This delay is presumptively prejudicial, regardless of the complexity of the case. *See Serros*, 2016-NMSC-008, ¶¶ 21-23 (determining that a delay of more than four years was "presumptively prejudicial irrespective of the case's complexity"). This sixty-two-month delay is extraordinary and weighs heavily against the State. Because the delay is presumptively prejudicial, we must consider the remaining *Barker* factors. *Serros*, 2016-NMSC-008, ¶ 22.

2. Reasons for the delay

{11} The Court must evaluate "the reason the government assigns to justify the delay," which "may either heighten or temper the prejudice to the defendant caused by the length of the delay." *Id.* ¶ 29 (internal quotation marks and citation omitted). If the State deliberately attempts to delay the trial to hamper the defense, the delay weighs heavily against the State. *Id.* Negligent or administrative delay must be considered because "the ultimate responsibility for such circumstances must rest with the government," although such delay is not weighed as heavily against the State. *Id.* (internal quotation marks and citation omitted). However, "[a]s the length of delay increases, negligent or administrative delay weighs more heavily against the State." *Id.* Finally, " 'appropriate delay,' justified for 'a valid reason, such as a missing witness,' is neutral and does not weigh against the State." *Id.* (quoting *Garza*, 2009-NMSC-038, ¶ 27). Delay caused by a defendant weighs against that defendant. *See Vermont v. Brillon*, 556 U.S. 81, 90, 94 (2009) (holding that the defendant's "deliberate attempt to disrupt proceedings" weighed heavily against the defendant).

{12} In this case, the pretrial delay can be grouped into three time periods: (1) from September 8, 2008 until April 2010; (2) from April 2010 until September 2011; and (3) from September 2011 until trial in November 2013.

{13} During the first time period, the parties individually or jointly filed at least a dozen motions for continuance stating a variety of reasons, including to negotiate a plea deal that potentially included other charges against Defendant, to prepare for trial, and to complete discovery. Defendant either stipulated to each of the State's motions or did not oppose them. For the first time on appeal, Defendant asserts that he stipulated to or jointly filed the numerous motions for continuance which stated as grounds the need to continue plea discussions because of the apparent policy of the Second Judicial District Attorney's Office that only allowed plea negotiations prior to the victim being interviewed. This is the same policy that we previously disfavored in *Serros* because "it is well settled that the possibility of a plea agreement does not relieve the State of its duty to pursue a timely disposition of the case." 2016-NMSC-008, ¶¶ 69, 71-72 (citing *State v. Maddox*, 2008-NMSC-062, ¶ 26, 145 N.M. 242, 195 P.3d 1254 ("The State must affirmatively seek to move the case to trial, even while plea negotiations are pending.")). Here, the plea negotiations were complicated and delayed by Defendant's admission to a parole violation on June 2, 2009, the filing of additional criminal sexual penetration charges against Defendant in September 2009, and the parties' effort to reach a plea deal with respect to all charges pending against Defendant and not just the charges in this case. There is no evidence that the State deliberately delayed the case during this time, and therefore these nineteen months from September 8, 2008 until April 2010 weigh only slightly against the State.

{14} During the second time period, Defendant concedes that he was responsible for delaying the trial from April 2010 until February 2011. However, Defendant was also responsible for the delay from March 2011 until April 2011 because his attorney missed a hearing and filed a motion for a

continuance due to a scheduling conflict in another case. On May 2, 2011, Defendant filed a request for judicial recusal. This motion was denied, and the judge found that the motion was filed for the purpose of delaying the trial. On May 6, 2011, Defendant petitioned this Court to issue an extraordinary writ reversing the district judge. We denied the writ on May 27, 2011. The time relating to Defendant's petition for an extraordinary writ cannot be weighed against the State, and in any event, Defendant accepted responsibility for this delay. The district court set the trial for September 6, 2011; therefore, we hold that Defendant is solely responsible for the seventeen-month delay from April 2010 to September 2011.

{15} The third time period, the twenty-six-month delay from September 2011 until November 2013, involved the district court's consideration of numerous motions filed by both parties and an appeal to this Court. The State appealed an order which excluded a statement Defendant made to his counselor, Tewana Bell, which Bell later relayed to police officers. In that statement, Defendant told Bell that he had sex with someone whose description was consistent with the physical characteristics of the alleged victim. The district court entered its order on December 15, 2011 excluding Defendant's statement because of the psychotherapist-patient privilege. *See* Rule 11-504 NMRA.

{16} The State then filed a notice of appeal with the district court on December 16, 2011. The State appealed to the Court of Appeals, which transferred the appeal to this Court pursuant to *State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821, because Defendant, if found guilty, might be sentenced to life in prison. For speedy trial purposes in weighing the responsibility assigned to a party for delay caused by an interlocutory appeal, courts may consider several factors, including "the strength of the Government's position on the appealed issue, the importance of the issue in the posture of the case, and—in some cases—the seriousness of the crime." *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). Applying the *Loud Hawk* analysis, we conclude that the delay from the filing of the appeal until our disposition should weigh neutrally because there were no unusual delays. First, the State certified that the appeal was not taken for the purpose of delay and that the evidence would have been substantial proof of a material fact. Second, we are persuaded that the evidence was important because, if admitted, it served as evidence that Defendant admitted to having sex with someone who had the specific characteristics of the alleged victim. Third, it illustrated the seriousness of a crime that Defendant could be subjected to a sentence of life in prison if he were found guilty. Ultimately, this Court issued a dispositional order affirming the district court. *State v. Samora*, No. 33,394, dispositional order of affirmance ¶ 13 (N.M. Sup. Ct. Aug. 29, 2013).

{17} Further, the three and one-half months of motions from September 6, 2011 until December 16, 2011 and the two and one-half months between our dispositional order and the actual trial on November 12, 2013 are administrative delays which weigh, if at all, only slightly against the State.

{18} To summarize how we have weighed the reasons for the delay, twenty-five months weigh slightly against the State, seventeen months weigh against Defendant, and twenty months weigh neutrally. Considered together, the parties bear a similar responsibility for the delays, and this factor weighs only slightly against the State.

C. Assertion of the right

{19} Under this factor, "[w]e accord weight to the frequency and force of the defendant's objections to the delay and analyze the defendant's actions with regard to the delay." *State v. Spearman*, 2012-NMSC-023, ¶ 31, 283 P.3d 272 (internal quotation marks and citation omitted). This inquiry is "closely related to the other *Barker* factors, because '[t]he strength of [the defendant's] efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that [the defendant] experiences.' " *Garza*, 2009-NMSC-038, ¶ 31 (quoting *Barker*, 407 U.S. at 531) (alterations in original). Further, "[t]he timeliness and vigor with which the right is asserted may be considered as an indication of whether a defendant was denied needed access to [a] speedy trial over his objection or whether the issue was raised on appeal as [an] afterthought." *Serros*, 2016-NMSC-008, ¶ 76 (second and third alterations in original) (internal quotation marks and citation omitted).

{20} Defendant did not meaningfully assert his right, and therefore this factor does not support his speedy trial claim. Defendant made a pro forma assertion of his right on October 30, 2008, when the Public Defender Department entered its appearance on his behalf. The only other time he asserted the right was five years later in his October 25, 2013 motion to dismiss on speedy trial grounds. Considered alone, these two assertions would often be enough to weigh this factor slightly in favor of Defendant. *See, e.g.*, *Spearman*, 2012-NMSC-023, ¶¶ 32-33 (holding that the defendant's initial pro forma assertion along with a motion to dismiss based on a speedy trial violation weighed against the State). However, Defendant's assertions of the right were mitigated by his acquiescence to, and responsibility for, numerous delays. *See Garza*, 2009-NMSC-038, ¶ 34 (holding that the defendant's assertion of the right at the outset of the case along with a motion to dismiss based on a speedy trial violation weighed "slightly" in the defendant's favor where the assertion was not "mitigated . . . by any apparent acquiescence to the delay" by the defendant). In this case, Defendant either stipulated to or did not oppose the State's numerous motions for a continuance and was himself responsible for seventeen months of delay. Admittedly, it is difficult to determine whether Defendant only stipulated to the continuances because of the district attorney's policy of not allowing plea deals after pretrial interviews with victims. In inethe petition for continuance filed on December 4, 2009, the State noted that "Defendant has chosen to forgo pretrial interviews of the victims until all written discovery is complete in both cases and to encourage a more favorable plea offer from the State." This may suggest that Defendant at least partially stipulated to the continuances because of the district attorney's policy. Further, in the petition for continuance filed on March 3, 2010, the State said that "[t]he parties are in the process of setting up pretrial interviews and preparing for trial in both cases should negotiations fall through . . . ." While this also may suggest that Defendant stipulated due to the policy, it is certainly not conclusive. If Defendant felt compelled to concur in the State's motions for a continuance because of the district attorney's policy, he could have stated so in a pleading to the district court so that the court could consider Defendant's position in assessing whether to grant or deny the motion. We are left to speculate whether Defendant truly felt compelled to stipulate to the continuances or whether his counsel simply decided it was not urgent to conduct pre-trial interviews because

Defendant had access to J.Z.'s safehouse interview and could prepare his case on that basis. Defendant also demonstrated a lack of concern for his speedy trial right by delaying his trial for seventeen months. Defendant's assertion of his speedy trial right only at the very beginning and very end of the pretrial period, his continued stipulations to the State's continuances, and his own significant contributions to the delay all show that his assertion of his speedy trial right was only an afterthought, and therefore this factor does not weigh in his favor.

D. Prejudice

{21} This Court must analyze three separate interests to determine whether Defendant suffered prejudice: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Garza*, 2009-NMSC-038, ¶ 35 (internal quotation marks and citation omitted). Defendant must make a particularized showing of prejudice to demonstrate a violation of any of the three interests. *Id.* ¶¶ 35, 37. Because some oppression and anxiety are inevitably suffered by every defendant awaiting trial, "we weigh this factor in the defendant's favor only where the pretrial incarceration or the anxiety suffered is undue." *Id.* ¶ 35.

{22} Here, Defendant has not asserted any particularized prejudice, such as identifying a witness whose memory may have been impaired by the delay. *See Serros*, 2016-NMSC-008, ¶ 92 (holding that the inability to interview the very young victim for four years prejudiced the defendant's ability to defend himself at trial). Nor has Defendant made a particularized showing that he suffered undue anxiety or oppressive pretrial incarceration. Furthermore, despite being incarcerated for more than five years while awaiting trial in this case, Defendant would have been incarcerated on the new CSP charge brought in September 2009, and other serious criminal charges were also brought against him a year into the pendency of this case. *Cf. id.* ¶¶ 88-91 (determining that the defendant being held in segregated protective custody on a single charge for over four years was extremely prejudicial). We hold that Defendant did not articulate any particularized prejudice that he suffered as a result of the lengthy delay in this case.

5. Balancing the factors

{23} To find a speedy trial violation without a showing of actual prejudice, the Court must find that the three other *Barker* factors weigh heavily against the State. *Garza*, 2009-NMSC-038, ¶ 39. While the extraordinary length of the delay in this case weighs heavily against the State, the reasons for the delay weigh only slightly against the State, and Defendant did not meaningfully assert his speedy trial right. Therefore, we conclude that there was no speedy trial violation. Accordingly, we must examine Defendant's other claims.

B. The District Court Committed Fundamental Error by Failing to Instruct on the Consent Element of CSP-Felony

{24} The district court instructed the jury that to convict Defendant of CSP, CSC, or kidnapping, the jury must find beyond a reasonable doubt that he committed an act that was "unlawful." The jury instructions defined an unlawful act as follows: "For the act to have been unlawful it must have been done with the intent to arouse or gratify sexual desire or to intrude upon the bodily integrity or personal safety of [J.Z.]." This instruction reflected UJI 14-132 NMRA, except that it failed to include the bracketed phrase "without consent," which would have clarified that any sexual contact between J.Z. and Defendant had to be non-consensual for the jury to determine that Defendant's act was "unlawful."

{25} If unlawfulness is at issue, then consent is an essential element of CSP-felony. CSP is defined, in relevant part, as "the unlawful and intentional causing of a person to engage in . . . anal intercourse . . . whether or not there is any emission." Section 30-9-11(A). The crime of CSP-felony requires that CSP be perpetrated "in the commission of any other felony." Section 30-9-11(E)(5). In *State v. Stevens*, we examined historical sources relevant to CSP-felony and determined that the Legislature "has never deviated from the common law approach of criminalizing only those sex acts that are perpetrated on persons without their consent, either as a matter of fact or, in the case of children or other vulnerable victims, as a matter of law." 2014-NMSC-011, ¶ 27, 323 P.3d 901. Accordingly, we concluded that the CSP-felony offense was intended to criminalize only "sexual acts perpetrated on persons *without their consent* . . . ." *Id.* ¶ 39 (emphasis added). Therefore, to convict under this provision, the jury must determine that the underlying felony was "committed against the victim of, and . . . assist[ed] in the accomplishment of, sexual penetration perpetrated by force or coercion against a victim who, by age or other statutory factor," did not or could not give lawful consent. *Id.*

{26} Here, the State provided the unlawfulness jury instruction to the district court and argued that "without consent" had been properly omitted because the issue of consent was "legally irrelevant" to the unlawfulness of CSP-felony in this case under *State v. Moore*, 2011-NMCA-089, 150 N.M. 512, 263 P.3d 289. Yet, as the State acknowledges on appeal, *Moore* is inapplicable to this case. *Moore* held that "the consent of a statutorily defined child is irrelevant to the unlawfulness element of CSP[-felony]," and it was therefore proper in *Moore* to omit the phrase "without consent" from the jury instructions when the alleged victim was fourteen years old and the defendant was forty-six years old. *Id.* ¶¶ 13-16. As we noted in *Stevens*, 2014-NMSC-011, ¶¶ 20, 40, *Moore*'s reference to a " 'statutorily defined child' " meant a child "below the age of consent." The age of consent, and whether the lack of consent is an aspect of the unlawfulness element of CSP, varies statutorily depending on the perpetrator's age, the child's age, and other factors as follows. Under Section 30-9-11(D), any sexual penetration of a child under thirteen years old is first-degree CSP because the child cannot legally consent to sex. Section 30-9-11(E)(1) punishes as second-degree CSP any sexual penetration of a child between the ages of thirteen and eighteen years old by the use of force or coercion. Under that form of CSP, if the prosecution has proved that force or coercion was used by the perpetrator, it has also necessarily proved that the act was non-consensual, and a separate finding of a lack of consent is not required. *See State v. Perea*, 2008-NMCA-147, ¶ 9, 145 N.M. 123, 194 P.3d 738 ("Consent of a child between the ages of thirteen and sixteen to engage in sexual intercourse is irrelevant where force or coercion is involved."). Section 30-9-11(G)(1) punishes any sexual penetration, regardless of consent, where the child is between thirteen and sixteen years old and the perpetrator is at least eighteen years old, is at least four years older than the child, and is not the child's spouse. *See Moore*, 2011-NMCA-089, ¶ 11 (concluding that "[a child's] consent or lack thereof is legally irrelevant" under Section 30-9-11(6)(1)). Finally, under Section 30-9-11(G)(2), consent is irrelevant when the child is between the ages of thirteen and eighteen years old and the perpetrator is a school

employee or volunteer, the perpetrator is at least eighteen years old, is at least four years older than the child, and is not the child's spouse, and the perpetrator learns while performing services for the school that the child is a student at the school. Unlike in *Moore*, where the victim was fourteen years old, whether J.Z. consented to sex with Defendant was legally relevant to the CSP-felony charge because sixteen-year-old J.Z. could have legally consented to sex with Defendant. Therefore, the omission of "without consent" from the jury instructions was erroneous.

{27} Because Defendant failed to object to the proffered jury instruction or otherwise preserve this issue at trial, we will only reverse if the omission of "without consent" was fundamental error. *See Stevens*, 2014-NMSC-011, ¶ 42. "Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." *Id.* (internal quotation marks and citation omitted). Under this standard, we must determine whether a reasonable juror would have been confused or misdirected "not only from instructions that are facially contradictory or ambiguous, but from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. "In applying the fundamental error analysis to deficient jury instructions, we are required to reverse when the misinstruction leaves us with 'no way of knowing whether the conviction was or was not based on the lack of the essential element.' " *State v. Montoya*, 2013-NMSC-020, ¶ 14, 306 P.3d 426 (quoting *State v. Swick*, 2012-NMSC-018, ¶ 46, 279 P.3d 747).

{28} "[I]f the instructions omitted an element which was at issue in the case, the error could be fundamental." *State v. Orosco*, 1992-NMSC-006, ¶ 9, 113 N.M. 780, 833 P.2d 1146. Accordingly, we initially examine whether J.Z.'s consent was at issue in this case to determine whether the omission of this element could be fundamental error. *Cf. id.* ¶¶ 9-20 (concluding that it was not fundamental error to omit the unlawfulness element of criminal sexual contact of a minor under age thirteen where there was no evidence putting the lawfulness of the alleged acts "in issue," and therefore "no rational jury could have concluded that defendants had committed the acts without also determining that the acts were performed in the manner proscribed by law"). There is some evidence in the record that could have led the jury to infer that consent was at issue in this case. First, there was no evidence of physical injuries to corroborate J.Z.'s story that Defendant held him down and forced him to have sex. Second, during his interview with police Defendant did not deny having sex on May 25, 2008, so it would be possible to infer that he had consensual sex with J.Z. on that date. Third, Defendant's rigorous cross-examination of J.Z. focused on J.Z.'s changing account of the alleged sexual assault and his alleged unreliability. If the jury believed that J.Z. was in some way unreliable or not telling the truth, the jurors could have reasonably concluded that Defendant and J.Z. went to a remote location and engaged in consensual sex. Based on this testimony, we conclude that there was sufficient evidence presented to the jury to put consent at issue in this case, and we must therefore determine whether the omission of this essential element was fundamental error.

{29} Fundamental error occurs when jury instructions fail to inform the jurors that the State has the burden of proving an essential element of a crime and we are left with "no way of knowing" whether the jury found that element beyond a reasonable doubt. *Swick*, 2012-NMSC-018, ¶ 46; *see also* Rule 5-608(A) NMRA ("The court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury."). However, we need not conclude that there was fundamental error despite the court's failure to instruct on an essential element where "the jury's findings, in light of the undisputed evidence in the case, necessarily establish that the [omitted] element was met beyond a reasonable doubt." *Orosco*, 1992-NMSC-006, ¶ 15. For instance, in *Stevens* we held that it was not fundamental error to omit the element of unlawfulness from a CSP-felony instruction because the jury found beyond a reasonable doubt that the alleged sexual act occurred between the thirteen-year-old victim and the defendant's boyfriend, who was at least ten years older than the victim, and that under those circumstances, the sexual act could not be other than unlawful. 2014-NMSC-011, ¶¶ 43-46. In other words, the jury's finding in *Stevens* that the sexual act occurred beyond a reasonable doubt was necessarily also a finding that the act was unlawful beyond a reasonable doubt because the victim in that case could not legally consent to sex with that defendant, and there was no other evidence suggesting that the alleged sexual act could have been otherwise lawful, such as a touching for purposes of reasonable medical treatment. *See id.* Further, in *State v. Cunningham*, the failure to instruct on the essential element of unlawfulness or self-defense was not fundamental error because the jury received a separate self-defense instruction containing the appropriate burden of proof and the jurors specifically found beyond a reasonable doubt that the defendant did not act in self-defense, a finding which also satisfied the essential element that was erroneously excluded. 2000-NMSC-009, ¶¶ 9, 20-22, 128 N.M. 711, 998 P.2d 176.

{30} Turning to this case, to ascertain whether fundamental error occurred, we must "review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the Defendant's conviction was the result of a plain miscarriage of justice." *State v. Sutphin*, 2007-NMSC-045, ¶ 19, 142 N.M. 191, 164 P.3d 72 (internal quotation marks and citations omitted). The State argues that if the omission of the entire "unlawful" element was not fundamental error in *Stevens*, then the district court's inclusion of that element and omission of only two words ("without consent") cannot be fundamental error in this case. However, as we have previously discussed, unlawfulness is at issue in this case, where at age sixteen the alleged victim had passed the age of consent, unlike the thirteen-year-old victim in *Stevens* who legally could not consent pursuant to Section 30-9-11(G)(1), and the conclusion that no fundamental error occurred in *Stevens* is therefore not dispositive here. The State further contends that the jury's other findings demonstrate that the jurors must have ultimately concluded that J.Z. did not consent to anal penetration by Defendant.

{31} The jury convicted Defendant of kidnapping by finding beyond a reasonable doubt that J.Z. was taken, restrained, confined, or transported by force, intimidation, or deception by Defendant. As part of the kidnapping conviction, the jury also found that Defendant intended to hold J.Z. against his will to inflict death, physical injury, or a sexual offense on him. However, the jury's conclusions regarding Defendant's act of kidnapping do not establish beyond a reasonable doubt that it considered Defendant's separate act of anally penetrating J.Z. to have been non-consensual beyond a reasonable doubt,

despite the fact that it found the anal penetration in this case to have taken place during the commission of kidnapping. The jury further found that Defendant committed a "sexual offense" against J.Z. during the kidnapping, despite the absence of a definition of "sexual offense" in the jury instruction. Therefore, the jury also could have reached this finding without an understanding that in this case, it had to find beyond a reasonable doubt that the anal penetration was non-consensual for Defendant's act to constitute a sexual offense. Finally, the jury hung on an alternative CSP-force/coercion count with respect to Defendant's anal penetration of J.Z. The only significant distinction between the jury instructions regarding CSP-force/coercion and those regarding CSP-felony was that the CSP-force/coercion instruction required the jury to additionally conclude beyond a reasonable doubt that Defendant used physical force, physical violence, or threats of physical force or physical violence against J.Z. While a finding that force or coercion was used during the sexual penetration is certainly not necessary to establish a lack of consent, if the jury had found this element beyond a reasonable doubt under the alternative count, we would have no misgivings in concluding that the jury also necessarily found beyond a reasonable doubt that the sexual penetration in this case was non-consensual. Yet the jury apparently hung on this very element, and we therefore cannot draw any definitive conclusions regarding the jury's understanding of the role of consent from their findings regarding the CSP-force/coercion charge.

{32} Moreover, we agree with Defendant that the juror questions submitted during trial hinted at juror confusion regarding the issue of consent. The record indicates that several juror questions were submitted to the district judge after the jurors were provided with the instructions. In one of those questions, a juror asked "[h]ow old you have to be to have consentual [sic] sex . . . ? We think [the SANE nurse] said the age was 13." Indeed, the SANE nurse who examined J.Z. testified that the age of consent in New Mexico was thirteen. Another juror asked what it meant that Defendant's act needed to be "unlawful," and further stated that the term "seems conclus[ory] or unnecessary." The district court responded to these questions by instructing the jurors, "you are to decide this case based on the testimony at trial and the jury instructions as a whole." These questions indicate some level of confusion regarding the age of consent in New Mexico and the meaning of the "unlawful act" element of CSP-felony, and further support our conclusion that the jurors in this case may have been confused or misdirected as to whether Defendant could have still acted unlawfully if J.Z. had consented to sex. *See Benally*, 2001-NMSC-033, ¶ 12 ("Under [fundamental error review,] we seek to determine *whether a reasonable juror would have been confused or misdirected by the jury instruction*." (emphasis added) (internal quotation marks and citations omitted)). Accordingly, we hold that in the circumstances of this case, it was fundamental error to omit the element of consent from the jury instructions that were relevant to CSP-felony.

{33} Defendant only requests that his CSP-felony conviction be reversed as a result of this error. However, we are responsible for determining whether this fundamental error also infected his conviction for kidnapping. *See State v. Arrendondo*, 2012-NMSC-013, ¶ 20, 278 P.3d 517 (concluding that appellate courts have a responsibility to raise issues sua sponte when it is necessary to protect a party's fundamental rights); *see also State v. Cabezuela*, 2011-NMSC-041, ¶ 39, 150 N.M. 654, 265 P.3d 705 ("It is the fundamental right of a criminal defendant to have the jury determine whether each element of the charged offense has been proved by the state beyond a reasonable doubt." (internal quotation marks and citations omitted)). We conclude that the error of omitting the element of consent from the jury instruction affected the kidnapping conviction. The jury instructions did not define the term "sexual offense" beyond providing the elements of CSP and CSC through other instructions. Because the jury may have been confused or misdirected as to whether consensual sex between J.Z. and Defendant could still be a sexual offense, then the jury's finding under the kidnapping charge that Defendant intended to inflict death, physical injury, or a sexual offense on J.Z. was necessarily infected by the same potential confusion, affecting the verdict on the kidnapping charge in this case where there was not sufficient evidence to support the inference that Defendant intended to inflict death or a physical injury on J.Z. Therefore, because we cannot determine whether the jury found that the sexual act was non-consensual beyond a reasonable doubt, we must also reverse Defendant's kidnapping conviction for fundamental error.

{34} Because we have determined that we must reverse Defendant's convictions for CSP-felony and kidnapping, we are required to determine whether sufficient evidence was presented to support these convictions to avoid double jeopardy concerns should the State seek to retry Defendant. *State v. Dowling*, 2011-NMSC-016, ¶ 18, 150 N.M. 110, 257 P.3d 930; *Cabezuela*, 2011-NMSC-041, ¶ 40. "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *Id.* ¶ 42 (internal quotation marks and citation omitted). In doing so, we view "the 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." *Id.* (internal quotation marks and citation omitted).

{35} There was sufficient evidence to support Defendant's kidnapping and CSP-felony convictions. In this case, the alleged victim's testimony was by itself enough to establish every element of each offense beyond a reasonable doubt under a sufficiency of the evidence review. The jury could have reasonably inferred that Defendant took or transported J.Z. by deception based on J.Z.'s testimony that he got into Defendant's truck because Defendant said that he would take J.Z. home. Alternatively, J.Z. also testified that when he tried to escape from Defendant's truck, the door was locked—testimony from which the jurors could have reasonably concluded that Defendant confined J.Z. by force. Further, the jurors could have reasonably inferred that Defendant intended to hold J.Z. against J.Z.'s will to inflict a sexual offense against him based on J.Z.'s testimony that Defendant took him to a remote location, pulled down J.Z.'s pants, and then penetrated his anus. This evidence also supports a reasonable inference that Defendant caused J.Z. to engage in anal intercourse. Additionally, the jury also could have reasonably concluded that Defendant's statement to J.Z. after ejaculating—"Now I can take you home"—indicated that Defendant transported J.Z. to a remote location and confined him there for the purpose of inflicting a sexual offense on him. J.Z.'s testimony regarding the sexual act in this case also supported a reasonable inference that Defendant's act against J.Z. was unlawful because the jury could have inferred that it was done

without J.Z.'s consent and for the purpose of gratifying Defendant's sexual desire or to intrude upon J.Z.'s bodily safety or integrity. Further, because J.Z.'s account supported a conviction for kidnapping, the jury could have reasonably determined that the CSP in this case was committed during the course of the kidnapping since the sexual penetration occurred while J.Z. was either being transported by deception or confined by force. Ultimately, if the jury believed J.Z.'s story regarding his encounter with Defendant, it could have reasonably found that every element of both crimes was met beyond a reasonable doubt. Therefore, Defendant may be retried on both charges.

{36} Because we have determined that the omission of consent from the jury instructions rose to the level of fundamental error and requires reversal of both convictions, we need not reach the other issues raised by Defendant. However, to provide guidance on remand, we address (1) the admission of GPS evidence and online identification evidence, and (2) the scope of Defendant's cross-examination of J.Z., but not any of the other arguments raised by Defendant. *See State v. Allison*, 2000-NMSC-027, ¶ 1, 129 N.M. 566, 11 P.3d 141 (stating that the Court may address additional issues "[f]or guidance upon remand"); *State v. Torres*, 1999-NMSC-010, ¶ 8, 127 N.M. 20, 976 P.2d 20 (same).

III. The District Court Did Not Abuse Its Discretion by Admitting Evidence Regarding J.Z.'s Identification of Defendant via the Internet or by Allowing Testimony Regarding the Fact that Defendant Was Subject to GPS Monitoring

{37} Defendant claims that the district court abused its discretion by admitting evidence that he wore a GPS monitoring device and that J.Z. found Defendant's picture, name, and address on an Internet website. Absent a clear abuse of discretion, we will not reverse a trial judge's decision to admit evidence. *State v. Apodaca*, 1994-NMSC-121, ¶ 23, 118 N.M. 762, 887 P.2d 756. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *Id.* (internal quotation marks and citations omitted).

{38} Prior to trial, Defendant filed a motion to exclude any evidence that he wore a GPS tracker and was subject to GPS monitoring by the State, and any evidence that J.Z. identified Defendant while viewing New Mexico's online sex offender registry. The district court ruled that the State could elicit the fact that Defendant was wearing a GPS device, but that it could not describe the nature of Defendant's underlying conviction. The district court later specified that if the GPS monitoring information was elicited through the testimony of parole authorities, they should simply be introduced as employees of the State of New Mexico without any further detail. The district court further held that the State could introduce evidence that J.Z. found Defendant's picture and other identifying information "on the Internet," but could not be more specific about the nature of the website.

{39} As an initial matter, we reject Defendant's argument that we should consider his offer to stipulate to being with J.Z. at the time and place of the alleged sexual assault as precluding the State's need for the online identification and GPS evidence admitted by the district court. The State is "not bound to present its case to the jury through abstract stipulations," despite a defendant's offer to stipulate to certain facts. *State v. Martinez*, 1999-NMSC-018, ¶ 34, 127 N.M. 207, 979 P.2d 718. For example, in *State v. Sarracino*, this Court held that it was not an abuse of discretion to allow the State to elicit testimony regarding statements made by the defendant while threatening a couple with a gun when the defendant had offered to stipulate to making the statements and had claimed that the circumstances surrounding their admission would be impermissible evidence of prior bad acts. 1998-NMSC-022, ¶¶ 5, 21-22, 125 N.M. 511, 964 P.2d 72. In that case, we looked only to whether the evidence of this uncharged prior bad act fit within an exception to Rule 11-404(B) NMRA, and did not consider the defendant's stipulation offer in our analysis. *See Sarracino*, 1998-NMSC-022, ¶ 22. Similarly, in this case we need not consider Defendant's offer to stipulate that he was with J.Z. at the times and places alleged to determine whether the GPS and online identification evidence was admissible under either Rule 11-404(B) or Rule 11-403 NMRA, or whether it improperly bolstered J.Z.'s testimony.

{40} We also disagree with Defendant's contention that admission of "[t]he fact that [Defendant] was on GPS monitoring and that his name and address were listed on a website inexorably leads to one conclusion: he was a convicted sex offender" and that this evidence was therefore improper evidence of prior bad acts under Rule 11-404(B). Rule 11-404(B)(1) excludes "[e]vidence of a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with [that] character." This rule only "prohibits the use of otherwise relevant evidence when its *sole purpose or effect* is to prove criminal propensity." *State v. Gallegos*, 2007-NMSC-007, ¶ 22, 141 N.M. 185, 152 P.3d 828 (emphasis added). However, such "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Rule 11-404(B)(2). In considering the online identification evidence in this case, the district court opined that "nowadays computer access and computer use is very common . . . . I've thought about the whole issue of computer access and computer use, and we're in a new age, and it's the 21st century, and it's just a fact of life." We hold that it was not an abuse of discretion for the district court to conclude that the limited information admitted regarding J.Z.'s identification of Defendant through online information did not constitute evidence of a crime, a wrong, or another act under Rule 11-404(B). The district court also determined that evidence of Defendant's GPS coordinates on the date of the alleged crime and the fact that he was wearing a GPS tracking device were admissible because they showed "identity, opportunity and lack of mistake." We again conclude that it was not an abuse of discretion in this case to admit limited evidence that Defendant was on GPS monitoring. The evidence did not have the sole purpose or effect of proving criminal propensity, but was instead probative to material facts in the case because (1) J.Z. testified that the person who assaulted him was wearing a GPS monitor on his belt, which Defendant was required to wear; and (2) Defendant's GPS coordinates placed him in the same locations where J.Z. claimed to have been assaulted.

{41} We reject Defendant's additional contention that the probative value of the online identification and GPS evidence was substantially outweighed by a danger of unfair prejudice from its admission under Rule 11-403. As we have previously discussed, the district court limited the online identification evidence presented

at trial to completely exclude the fact that J.Z. found Defendant's picture at an online sex offender registry. The district court did not abuse its discretion by admitting this limited version of J.Z.'s identification of Defendant because it was reasonable to conclude that the mere fact that J.Z. found Defendant's picture, name, and address online, without any additional information, was completely unremarkable and neither reflected negatively on Defendant nor created a danger of unfair prejudice. Similarly, the GPS evidence was limited to prevent any mention of why Defendant was being monitored. Under the circumstances of this case, the generic information that Defendant was subject to GPS monitoring was not overly prejudicial, and contrary to Defendant's suggestion, did not strongly imply that Defendant was a sex offender. During the hearing on Defendant's motion to exclude, the district court concluded that individuals may wear a GPS device and be monitored by state employees for a variety of reasons, including pretrial monitoring programs and probation in cases not involving sex offenses. Indeed, during voir dire, two prospective jurors mentioned that they associated GPS monitoring with a DWI or other alcohol-related offense, but none of the prospective jurors mentioned any specific association with sex offenses. Thus, we do not conclude that there was an abuse of discretion in the district court's admission of the information that Defendant was subject to GPS monitoring by the State, without anything more, because any prejudice to Defendant did not substantially outweigh the probative value of this evidence in identifying Defendant as J.Z.'s alleged attacker.

{42} Finally, we reject Defendant's contention that presenting the online identification and GPS evidence improperly bolstered J.Z.'s credibility. Evidence will be excluded as improper bolstering when it directly comments on a witness's credibility, but not when it provides "[i]ncidental verification" of a witness's story or only indirectly bolsters that witness's credibility. *State v. Alberico*, 1993-NMSC-047, ¶ 89, 116 N.M. 156, 861 P.2d 192. For example, in *State v. Lucero*, a psychiatrist's testimony was improper bolstering when she commented directly on the victim's credibility, repeatedly mentioned that the victim claimed to have been assaulted by the defendant, and opined that the victim's post-traumatic stress disorder was caused by sexual molestation. 1993-NMSC-064, ¶¶ 5-6, 15-17, 116 N.M. 450, 863 P.2d 1071. However, in this case the GPS evidence and online identification evidence only corroborated J.Z.'s testimony; it did not comment directly on his credibility or impinge in any way on the jury's role of assessing J.Z.'s story and determining whether he was telling the truth. Therefore, the admission of this evidence was not an abuse of the district court's discretion.

IV. The District Court's Limitation of Defendant's Cross-Examination of J.Z. Was Not an Abuse of Discretion and Did Not Violate Defendant's Rights under the Confrontation Clause

{43} Defendant argues that the district court erred by limiting his cross-examination of J.Z. Generally, "[t]he district court has broad discretion to control the scope of cross-examination, including the discretion to control cross-examination to ensure a fair and efficient trial." *State v. Bent*, 2013-NMCA-108, ¶ 10, 328 P.3d 677 (citation omitted). Prior to trial, the State filed a motion seeking to exclude Defendant from using any of J.Z.'s juvenile adjudications for impeachment purposes, to limit Defendant to only inquiring about the number of J.Z.'s felony convictions, and to exclude Defendant from using the names of any of those felonies with the exception of J.Z.'s conviction for commercial burglary. The record indicates that Defendant did not file a written response. The district court held a hearing on this motion and ruled that (a) the names of J.Z.'s juvenile adjudications were not to be presented to the jury; (b) Defendant could mention J.Z.'s violations of his juvenile probation right after the alleged incident with Defendant because that was "a matter of motive"; (c) Defendant could not cross-examine J.Z. regarding J.Z.'s convictions for possession of a firearm by a felon and contributing to the delinquency of a minor as a result of a DWI because "it confuses the jury, it gets [them] into a mini trial," while J.Z.'s other felony convictions went to credibility and were fair game; (d) however, Defendant *could* refer to the existence of these other felony convictions without naming them; and (e) Defendant could ask about charges pending against J.Z., but could not detail those charges and could not bring in extrinsic evidence to prove them.

{44} First, Defendant contends that it was improper to limit cross-examination regarding J.Z.'s prior convictions and his experience with the criminal justice system as an adult and as a juvenile. Under Rule 11-609(D) NMRA, prior juvenile adjudications are admissible for impeachment of a witness only when they are offered in a criminal case, the witness is not the defendant, an adult's conviction for that offense would normally be admissible to attack credibility, and admitting the evidence is necessary to fairly determine guilt or innocence. At the hearing on the State's motion, the district court indicated that Defendant could use J.Z.'s juvenile criminal history to show that J.Z. was in juvenile detention when he first accused Defendant and that his detention may have given him a motive to lie. At the hearing, Defendant agreed that he did not need to name J.Z.'s prior juvenile convictions, and the district court acknowledged that concession on the record. Therefore, Defendant did not properly preserve for appeal any objection with respect to the scope of permissible cross-examination regarding J.Z.'s juvenile convictions. *See State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 ("In order to preserve an error for appeal, it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked." (internal quotation marks and citation omitted)).

{45} As to J.Z.'s adult convictions, under Rule 11-609(A) the district court must admit prior adult convictions for impeachment purposes if (1) the conviction is for any crime that is punishable by imprisonment for more than a year, subject to the balancing test of Rule 11-403, or (2) the conviction is for any crime involving a dishonest act or false statement. The district court permitted Defendant to refer by name to J.Z.'s felony convictions for commercial burglary, conspiracy to tamper with evidence, and a probation violation on the charge of receiving or transferring a stolen vehicle. The district court also exercised its discretion under Rule 11-609(A)(1) by preventing Defendant from mentioning by name J.Z.'s prior convictions for possession of a firearm by a felon and contributing to the delinquency of a minor under Rule 11-403. However, Defendant would still be allowed to refer to the existence of these other felony convictions without naming those offenses. On appeal, Defendant does not state which specific convictions he should have been allowed to name, but instead merely makes a general reference to the jury's potential "misunderstanding of [J.Z.'s] possible

motives and the extent to which he was familiar with the horse-trading aspect of the criminal justice system." We hold that the district court did not abuse its discretion in limiting how Defendant could refer to two of J.Z.'s prior adult felony convictions. Contrary to Defendant's arguments, the district court's ruling still allowed Defendant to elicit that J.Z. had frequent encounters with the criminal justice system and to argue that J.Z. was exaggerating his story to get a deal on some of his other charges.

{46} Second, Defendant asserts that it was an abuse of discretion for the district court to limit his cross-examination of J.Z. regarding how J.Z. made his living on the streets, including the fact that J.Z. "used and/or sold drugs." The record reflects that Defendant elicited testimony from J.Z. that J.Z. was hustling, panhandling, and selling drugs to survive on the streets. The district court then cut off any additional questions from Defendant regarding how J.Z. made his living on the streets because the court reasoned that selling drugs and being homeless was impermissible character evidence that was not relevant to any issues either in the case or to J.Z.'s credibility. However, the district court later allowed Defendant to elicit testimony from J.Z. that he had a bad memory from using drugs, presumably because that testimony was relevant to the jury's assessment of J.Z.'s reliability as a witness. Under these circumstances, we conclude that it was not an abuse of discretion for the district court to limit Defendant's cross-examination regarding J.Z.'s homelessness or drug use since the specific issue of how J.Z. made his living on the streets was of minimal relevance to any issues either in the case or to J.Z.'s credibility.

{47} Third, Defendant claims that it was an improper abuse of discretion for the district court to prevent Defendant from providing J.Z. with transcripts of his safehouse interview while J.Z. was on the stand to refresh J.Z.'s recollection and then impeach him with prior inconsistent statements. "The admission or exclusion of [an] inconsistent statement rests within the sound discretion of the trial court under the particular facts in this case and will not be reversed absent an abuse of that discretion." *State v. Davis*, 1981-NMSC-131, ¶ 20, 97 N.M. 130, 637 P.2d 561. During cross-examination, Defendant asked J.Z. whether J.Z. had stated during his safehouse interview that Defendant punched him. J.Z. responded, "I believe so." Defense counsel asked J.Z. to show him where in the transcript he had made this statement. The State objected that showing J.Z. the transcript would be improper refreshment and improper impeachment. The district court sustained this objection and did not agree to Defendant's proposal of letting J.Z. review the entire transcript because it would have taken a significant amount of time and the issue was de minimus. Defendant was then allowed to resume his cross-examination of J.Z. regarding J.Z.'s safehouse statement, during which J.Z. stated that he was not sure what he said, that he may not have said it, and that he did not know if he said it. J.Z. finally agreed that he did not say that Defendant had punched him in the head during the interview. We conclude that the district court acted within its discretion to control cross-examination to ensure an efficient trial by denying Defendant's request to have J.Z. review the entire transcript of the safehouse interview to confirm that he never said he was hit in the head, and instead requiring Defendant to continue to cross-examine J.Z. to elicit this statement through testimony. *See Bent*, 2013-NMCA-108, ¶ 10.

{48} Fourth and finally, Defendant argues that these limitations on his cross-examination of J.Z. collectively violated Defendant's rights under the Confrontation Clause. The Confrontation Clause "guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him." *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (internal quotation marks and citation omitted). However, "the trial court retains wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant." *State v. Smith*, 2001-NMSC-004, ¶ 19, 130 N.M. 117, 19 P.3d 254 (omission in original) (internal quotation marks and citation omitted). Although the extent of cross-examination is within the sound discretion of the district court, we still review de novo whether limits on cross-examination have violated the Confrontation Clause. *Id.*

{49} We disagree with Defendant's argument that the limitations on cross-examination in this case were analogous to those limitations held to be violations of the Confrontation Clause by the United States Supreme Court in *Davis*. In *Davis*, the defendant, who was accused of stealing a safe, was prohibited from cross-examining a witness against him regarding the fact that the witness was on probation for burglary. 415 U.S. at 311-12. *Davis* held that the district court's limitations on cross-examination of the witness violated the defendant's confrontation rights because he was not permitted to produce evidence to create any record of the reason that the witness might potentially be biased or motivated to lie, such as the witness's fear that the police might otherwise suspect the witness of committing the crime, based on his prior criminal history. *See id.* at 317-18. Instead, "defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.* By contrast, here the district court's limitations on cross-examination did not prevent Defendant from creating a record regarding potential credibility problems with J.Z.'s testimony. Indeed, the district court specifically *did not* limit Defendant's cross-examination regarding J.Z.'s prior convictions for crimes of dishonesty, and permitted Defendant to elicit general information illustrating that J.Z. had significant experience with the criminal justice system and made his living by hustling on the streets, both of which also provided fodder for Defendant's argument that J.Z. had motivations to fabricate his story. Therefore, we conclude that the district court's exercise of discretion to limit the extent of Defendant's cross-examination of J.Z. was proper and did not violate Defendant's rights under the Confrontation Clause.

CONCLUSION

{50} We reverse Defendant's convictions for CSP-felony and kidnapping and remand to the district court, where Defendant may be retried on those charges.

{51} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

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

Certiorari Granted, July 29, 2016, No. S-1-SC-35976

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-073

No. 33,666 (filed June 06, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
WESLEY DAVIS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
LISA B. RILEY, District Judge

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

JOHN A. MCCALL
LAW WORKS LLC
Albuquerque, New Mexico
for Appellant

Opinion

Michael E. Vigil, Chief Judge

{1} The issue in this case is whether the warrantless search of Defendant's backpack was permissible under the inventory search exception to the warrant requirement. We conclude it was not and reverse the order of the district court, which denied Defendant's motion to suppress.

I. BACKGROUND

{2} Defendant moved the district court to suppress evidence seized in a warrantless search of his backpack, arguing that the search was per se unreasonable under the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution. The district court ruled that the search was valid as an inventory search and denied the motion to suppress. Defendant entered into a conditional plea agreement, reserving his right to appeal the order denying the motion to suppress. Defendant appeals.

{3} The following evidence was presented at the hearing on the motion through Deputy Daniel Vasquez. Deputy Vasquez was driving on patrol when he saw a motorcycle at a stop sign being driven by Defendant, whom he recognized. Deputy Vasquez said he knew, without giving any specific explanation, that Defendant did not have a valid driver's license. Deputy Vasquez began to follow Defendant and as Defendant pulled into his driveway, the deputy turned on his lights. Defendant parked his motorcycle, took off his backpack, and placed it on top of his car that was parked in his carport. Deputy Vasquez had parked his vehicle behind the motorcycle in Defendant's driveway and Defendant went to speak with Deputy Vasquez. They met in the driveway between the motorcycle and the carport and Deputy Vasquez asked Defendant for his license and registration. After contacting dispatch and being informed that Defendant's license was in fact revoked with an arrest clause, he arrested Defendant for driving with a suspended or revoked driver's license.

{4} Deputy Vasquez patted Defendant down and asked Defendant "if there was anything in the backpack that [he] needed to be aware about." Defendant answered that there was marijuana in the backpack. Deputy Vasquez then walked to Defendant's car, seized the backpack and searched it, finding three plastic bags with marijuana inside.

{5} Deputy Vasquez asserted that he inquired about the backpack because the backpack had been on Defendant's person and to inquire about valuables. Deputy Vasquez also testified that the Sheriff's Department has a guideline that any belongings in a person's possession at the time of an arrest must be inventoried, regardless of whether it has value or not. He explained that under the policy, "anything on your person is going to go with you when you are arrested." However, Deputy Vasquez also acknowledged that the backpack was not on Defendant's person at the time of his arrest.

II. MOTION TO SUPPRESS

A. Standard of Review

{6} The only issue on appeal is whether the warrantless search of Defendant's backpack qualifies as an inventory search exception to the warrant requirement. The State does not argue any other exception, and the district court relied solely on the inventory search exception in denying the motion to suppress. We therefore only review whether the State has satisfied the requirements of this exception.

{7} In examining the denial of a motion to suppress, "we observe the distinction between factual determinations, which are subject to a substantial evidence standard of review and application of law to the facts, which is subject to de novo review." *State v. Lopez*, 2009-NMCA-127, ¶ 7, 147 N.M. 364, 223 P.3d 361 (alterations, internal quotation marks, and citation omitted). "We view the facts in the manner most favorable to the prevailing party and defer to the district court's findings of fact if substantial evidence exists to support those findings." *Id.* (internal quotation marks and citation omitted).

B. Inventory Search Exception

{8} Warrantless searches by law enforcement are permissible pursuant to the Fourth Amendment of the United States Constitution if they qualify under one of the exceptions to the warrant requirement. *State v. Ruffino*, 1980-NMSC-072, ¶ 3, 94 N.M. 500, 612 P.2d 1311. An inventory search is such an exception. *State v. Nysus*, 2001-NMCA-102, ¶ 26, 131 N.M. 338, 35 P.3d 993. An inventory search is justified because:

> An inventory protects a defendant's property in police custody from theft; conversely, it protects the police from accusations or false claims of theft of the property that was in an arrestee's possession. Moreover, the inventory prevents the introduction into the custodial setting of dangerous instrumentalities that may be concealed in innocent-looking

> articles. In other words, orderly police administration justifies examination and inventorying of items removed from an arrestee's possession or person.

State v. Boswell, 1991-NMSC-004, ¶ 10, 111 N.M. 240, 804 P.2d 1059. "[I]nventory searches are presumed to be unreasonable and the burden of establishing their validity is on the [s]tate." *State v. Shaw*, 1993-NMCA-016, ¶ 5, 115 N.M. 174, 848 P.2d 1101.

{9} Three requirements must exist for a constitutional, lawful inventory search: "(1) the police must have control or custody of the object of the search[;] (2) the inventory must be carried out pursuant to established police regulations[;] and (3) the search must be reasonable." *In re Jeff M.*, 1999-NMCA-045, ¶ 14, 127 N.M. 87, 977 P.2d 352. The inventory search must also be conducted in good faith. *Id.*

{10} Under the first prong, law enforcement obtains custody or control of an object when there is "a reasonable nexus between [the] arrest and the seizure of the [property]." *Boswell*, 1991-NMSC-004, ¶ 8. A reasonable nexus is "the need to safeguard defendant's property from loss and to protect the police from liability and charges of negligence[,]" *id.* ¶ 14, which is grounded on a defendant's possession of property when an arrest occurs. *See id.* ¶ 10; *see also Illinois v. Lafayette*, 462 U.S. 640, 646 (1983) (stating that it is appropriate to inventory property at a station house when the items are "found on the person or in the possession of an arrested person who is to be jailed"). Our use of the term "possession" herein is limited to having physical custody or control of an object, and not to other legal meanings and connotations that may otherwise be associated with "possession." *See United States v. Nenadich*, 689 F.Supp. 285, 288 n.1 (S.D.N.Y. 1988) ("Actual possession is what most of us think of as possession—that is, having physical custody or control of an object.").

{11} Here, Defendant did not have the backpack on his person or in his physical possession at the time of his arrest. After parking his motorcycle in his driveway, Defendant walked to his carport and placed his backpack on top of his car. This occurred before Deputy Vasquez arrived in the driveway to conduct his investigation. Defendant walked back to meet Deputy Vasquez when the officer arrived, and that interaction led to the subsequent investigation of a traffic violation, arrest, pat down, and search. None of these facts show that Defendant's backpack was on his person or in his physical possession during the time Deputy Vasquez conducted his investigation or arrest. Without the backpack being on Defendant's person or in his possession, the necessity to safeguard Defendant's property and protect law enforcement from liability was absent.

{12} It is important to recognize that under the undisputed facts in this case, Deputy Vasquez seized the backpack at Defendant's home and this is a significant factor in our ultimate determination. *See United States v. Perea*, 986 F.2d 633, 643 (2d Cir. 1993) ("When a person is arrested in a place other than his home, the arresting officers may impound the personal effects that are with him at the time to ensure the safety of those effects or to remove nuisances from the area." (internal quotation marks and citation omitted)). A defendant has a right to place his personal items on his private property and reasonably expect that law enforcement will not seize it without a warrant. *See* U.S. Const. amend. IV; N.M. Const. art. X; *see also State v. Crane*, 2014-NMSC-026, ¶ 30, 329 P.3d 689 (recognizing that "there is a heightened expectation of privacy in one's home" and that "what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected" (alteration, internal quotation marks, and citations omitted)). We decline to conclude that the government interests in the inventory search exception permit law enforcement to walk on Defendant's property, enter his carport, and seize his backpack. *See* 3 C.J.S. Search & Seizure § 5.5(b) (2015) (regarding inventory searches, "[i]f . . . the defendant is arrested in his own permanent residence, then the police would have no basis for carrying off such objects as suitcases merely because they were observed there at the time of the arrest"). A reasonable nexus between the arrest and the seizure was absent because Defendant did not have possession of the backpack at the time of his arrest and because it was seized at Defendant's home. *Cf. United States v. Matthews*, 532 Fed. App'x 211, 224 (3d Cir. 2013) ("In our view, when a valid arrest has been made in a public place, which requires that the arrested person be transported from the scene, police may search any luggage that the person has in his possession at the time of the arrest, and which must accompany him to the police station, prior to transporting it.").

{13} The State relies on purported similarities in *Boswell* to justify the search as an inventory search; however, the facts are clearly distinguishable from this case. In *Boswell*, the defendant was detained in an office by the manager of a grocery store as an alleged shoplifter. 1991-NMSC-004, ¶ 2. When a police officer arrived and found evidence of shoplifting, the officer asked for identification. *Id.* The defendant produced the identification from his wallet and was arrested and taken into custody; however, he inadvertently left his wallet on a file cabinet in the grocery store office. *Id.* After the defendant was booked, the officer returned to the store to retrieve the wallet and discovered a blotter of LSD in the wallet. *Id.* Our Supreme Court concluded that the government interests for the inventory search exception justified the officer's return to recover the wallet and concluded that a reasonable nexus between the arrest and seizure was therefore present. *Id.* ¶ 14. In *Boswell*, (1) the defendant had possession of the wallet on his person at the time of his arrest; and (2) both law enforcement and the defendant mistakenly forgot to take the wallet to the station and it was temporarily left behind at a public grocery store. *Id.* ¶ 2. Whereas, in the present case, the backpack was not on Defendant's person or in his physical possession when he was arrested, but was placed in the carport of his home before law enforcement pulled into the driveway.

{14} The State also fails to satisfy the requirement that the purported inventory search was made in accordance with police guidelines. While an inventory search is not required to be in writing, it must be standardized. *State v. Wilson*, 1994-NMSC-009, ¶¶ 7, 16, 116 N.M. 793, 867 P.2d 1175; *Shaw*, 1993-NMCA-016, ¶ 9 ("[W]ritten procedures are unnecessary as long as the inventory search is carried out in accordance with established inventory procedures."). We therefore assume, without deciding, that Deputy Vasquez's testimony was sufficient to prove a standardized police inventory procedure. Even with this assumption, Deputy Vasquez did not carry out the seizure in accordance with the guideline. According to the guideline as described, law enforcement at the Sheriff's Department only inventory items on the person of an arrestee at the time of the arrest. However, as we have already noted, Defendant did not have physical possession of the backpack when he was arrested, and Deputy Vasquez acknowledged that the backpack was not

on Defendant's person at the time of his arrest. By Deputy Vasquez's own admission, and the undisputed facts, the seizure of the backpack was not in accordance with the Sheriff's Department's guideline.

{15} Finally, the State failed to establish that the search was reasonable. To be a reasonable search under this exception, it must be made pursuant to an established procedure and further any one of the three purposes: "(1) to protect the arrestee's property while it remains in police custody; (2) to protect the police against claims or disputes over lost or stolen property; or (3) to protect the police from potential danger." *Id.* ¶ 10. We have already concluded that the seizure did not comply with the Sheriff's Department procedure. Furthermore, the backpack was seized only because Defendant said it had marijuana inside in response to Deputy Vasquez's questioning after he arrived and began investigating a potential traffic violation. There is no evidence that Deputy Vasquez expressed any concern with protecting the backpack or its contents while Defendant was in the custody of the police; with protecting the police against claims or disputes over lost or stolen property; or because of concerns about officer safety. Based upon the record before us, the only reason Deputy Vasquez seized and searched the backpack was because Defendant responded to questioning and said it contained marijuana. We therefore conclude that the seizure and search of the backpack was not a reasonable inventory search. *Cf. Florida v. Wells*, 495 U.S. 1, 4 (1990) ("[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.").

{16} The State failed to establish any of the elements required to justify the search of Defendant's backpack as an inventory search. Defendant does not contest whether Deputy Vasquez had reasonable suspicion to conduct the traffic stop or was required to give *Miranda* warnings prior to asking about the contents of the backpack. *See State v. Funderburg*, 2008-NMSC-026, ¶ 15, 144 N.M. 37, 183 P.3d 922 ("We agree that reasonable suspicion is a commonsense, nontechnical conception, which requires that officers articulate a reason, beyond a mere hunch, for their belief that an individual has committed a criminal act." (alteration, internal quotation marks, and citation omitted)); *State v. Snell*, 2007-NMCA-113, ¶ 10, 142 N.M. 452, 166 P.3d 1106 (stating that *Miranda* warnings are necessary prior to a custodial interrogation). Additionally, and most importantly in the present case, the State and the district court only identified and relied upon the inventory search exception to justify the warrantless search of Defendant's backpack at his home. As such, we do not address any other exception to the warrant requirement.

III. CONCLUSION

{17} The order of district court is reversed and this case is remanded for further proceedings consistent with this opinion.

{18} **IT IS SO ORDERED.**
MICHAEL E. VIGIL, Chief Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
TIMOTHY L. GARCIA, Judge

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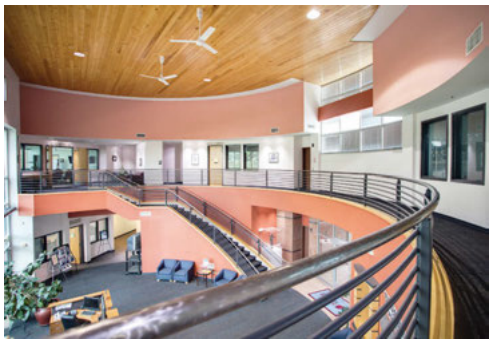

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