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Bar Bulletin

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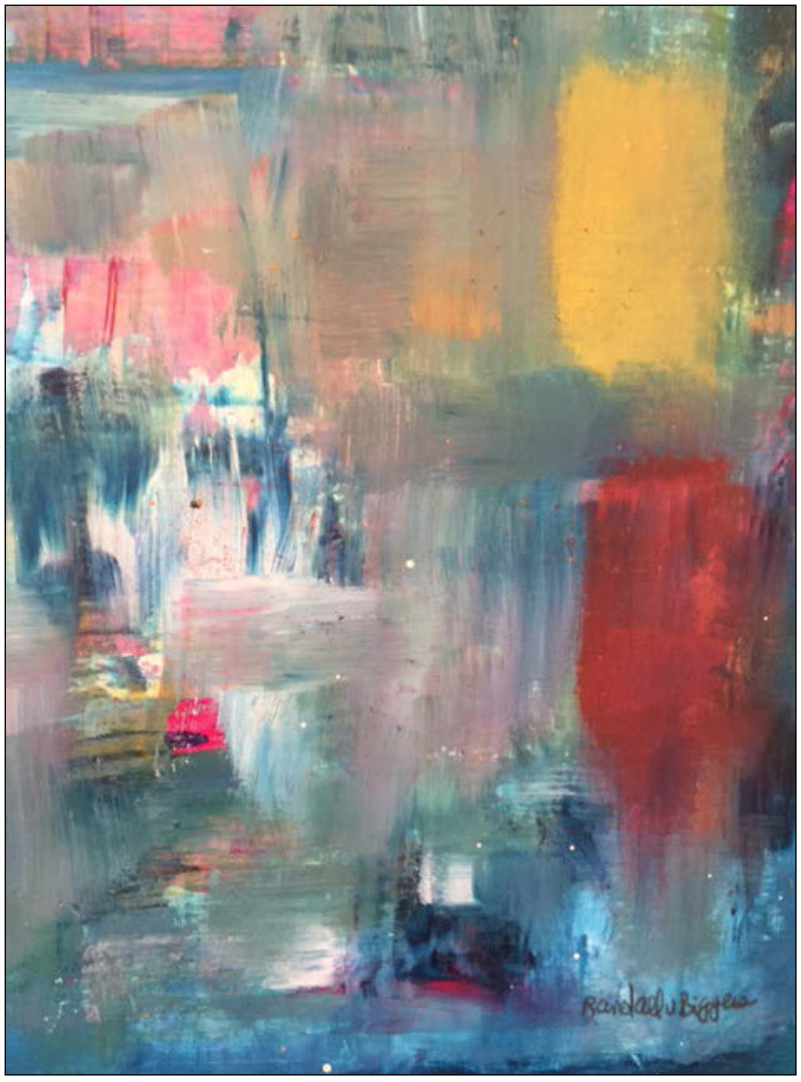

Untitled, by Randall V. Biggers (see page 3)

Inside This Issue

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December

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Noon, State Bar Center

14
Children's Law Section BOD
Noon, Juvenile Justice Center, Albuquerque

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Taxation Section BOD
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16
Family Law Section BOD
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16
Natural Resources, Energy and Environmental Law Section Annual Meeting, noon, State Bar Center

16
Trial Practice Section BOD
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Workshops and Legal Clinics

December

14
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6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

20
Cibola County Free Legal Clinic
10 a.m.–2 p.m., 13th Judicial District Court, Grants, 505-287-8831

21
Family Law Clinic
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Second Judicial District Court,
Albuquerque, 1-877-266-9861

Cover Artist: Randall V. Biggers was born in Roswell. He is a returned Peace Corp. volunteer (Afghanistan 1974–1976) and served 21 years in the Foreign Service. He has been actively painting for the past 10 years. The Majority of his work is non-objective. In addition to painting with acrylics, Biggers makes collages and does photography. To schedule a private viewing, email nmvrb2@gmail.com or call 505-366-3525.

Notices

Court News

New Mexico Supreme Court Disciplinary Board

Phishing Attempt

A new phishing attack is targeting various bar associations around the country. Emails are being sent to lawyers notifying them of a purported disciplinary complaint and setting a deadline for the lawyer to respond. The email instructs the lawyer to click on a link or attachment to view the complaint. Once the lawyer opens the link or attachment, the lawyer's computer is infected with a virus that, in some cases, may download ransomware and hold the lawyer's computer system hostage. The fraudulent email may have the following as part of or as its entire subject line: "Bar Complaint."

Be aware that when the Disciplinary Board of the New Mexico Supreme Court receives a complaint against a lawyer, the initial notice of the complaint, the complaint itself and a request for the lawyer's response to the complaint, is sent by regular mail, not email, to the lawyer's address of record with the New Mexico Supreme Court. If a lawyer fails to respond to the initial inquiry, the Disciplinary Board may send a second letter by both regular mail and email. The email will normally be from twilliams@nmdisboard.org and will state in the subject line "Disciplinary Complaint by [complainant's name]." The Board does not send email notices to lawyers with a subject line entitled "Bar Complaint." If you receive an email purporting to be related to a disciplinary complaint and are unsure as to its authenticity, call the Disciplinary Board at 505-842-5781.

Judicial Information Division

E-Filing Fee Increase

Effective Jan. 1, 2017, the fees for E-filing in New Mexico will increase. File and serve fees will go from $10 to $12. File only fees will go from $6 to $8. The $4 fee for serve only will be dropped to $0.

New Mexico Court of Appeals

Applicants Recommended for Judicial Vacancy

The Appellate Court Judicial Nominating Commission convened on Dec. 1 in Santa Fe and completed its evaluation of the nine applicants for the vacancy on the New Mexico Court of Appeals. The Commission recommends the following seven applicants (in alphabetical order) to Gov. Susana Martinez: **Kristina Bogardus**, **Henry Bohnhoff**, **Steve French**, **Emil Kiehne**, **Kerry Kiernan**, **Jacqueline Medina** and **Briana Zamora**.

Second Judicial District Court

Notices of Mass Reassignment

Gov. Susana Martinez has announced the appointment of Jane Levy to fill the vacancy of Division XXV of the Second Judicial District Court. Effective Jan. 1, 2017, Judge Levy will be assigned Family Court cases previously assigned to Judge Elizabeth Whitefield. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have 10 days from Jan. 4, 2017, to excuse Judge Levy.

Pursuant to the Constitution of the State of New Mexico, Cindy Leos has been elected to Division IX of the Second Judicial District Court. Effective Jan. 1, 2017, Judge Leos will be assigned Criminal Court cases previously assigned to Judge David N. Williams, Division IX. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have ten (10) days from Jan. 4, 2017, to excuse Judge Leos.

13th Judicial District Court

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.

Bernalillo County Metropolitan Court

Notice of Mass Reassignment

Bernalillo County Metropolitan Court Chief Judge Henry A. Alaniz announced a mass reassignment of cases in Division II as a result of the recent election of Judge-Elect Christine E. Rodriguez. Pursuant to Rule 23-109 NMRA, effective Dec. 19, all criminal court cases previously assigned to Judge Chris J. Schultz will be reassigned to Judge-elect Rodriguez. Parties who have not yet exercised a peremptory excusal, pursuant to Supreme Court Rule 7-106 NMRA, will have 10 business days from Dec. 19 to excuse Judge-elect Rodriguez.

U.S. District Court, District of New Mexico

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.

U.S. Courts Library

Holiday Open House

Join the staff of the U.S. Courts Library for an open house. Enjoy some cookies and punch from 10 a.m.–5 p.m., Dec.

Professionalism Tip

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

I will be open to constructive criticism and make such changes as are consistent with this creed and the Code of Judicial Conduct when appropriate.

14. Stop by and meet staff, peruse the collection and discover how the Library can become an integral part of your legal research team. The Library is located on the third floor of the Pete V. Domenici U.S. Courthouse at the northeast corner of Fourth St. and Lomas Blvd. in downtown Albuquerque. Normal hours of operation are 8 a.m.–noon and 1–5 p.m., Monday through Friday. For more information, call 505-348-2135.

State Bar News

Attorney Support Groups

- Dec. 19, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)
- Jan. 2, 2017, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the first Monday of the month.)
- Jan. 9, 2017, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.

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

2017 Licensing Notification

Due by Dec. 31

2017 State Bar licensing fees and certifications are due Dec. 31, 2016, and must be completed by Feb. 1, 2017, to avoid non-compliance and related late fees. Complete annual licensing requirements at www.nmbar.org/licensing. Payment by credit card is available (payment by credit card will incur a service charge). For more information, call 505-797-6083 or email license@nmbar.org. For help logging in or other website troubleshooting, call 505-797-6084 or email aarmijo@nmbar.org. Those who have already completed their licensing requirements should disregard this notice.

Board of Bar Commissioners

Commissioner Vacancies

Two vacancies exist on the Board of Bar Commissioners. Applicants should plan to attend the 2017 Board meetings scheduled for April 21, July 27 (Ruidoso, in conjunction with the annual meeting), Sept. 15 and Dec. 13, 2017 (Santa Fe). Members interested in serving on the Board should submit a letter of interest and résumé to Executive Director Joe Conte (jconte@nmbar.org) by Jan. 16, 2017.

A vacancy was created in the First Bar Commissioner District, representing Bernalillo County, due to Julie Vargas' appointment to the bench. The Board will make the appointment at the Jan. 27, 2017, meeting to fill the vacancy until the next regular election of Commissioners. The term will run through Dec. 31, 2017.

A vacancy exists in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. The Board will make the appointment at its Jan. 27, 2017, meeting to fill the vacancy until the next regular election of Commissioners, and the term will run through Dec. 31, 2017. Active status members with a principal place of practice located in the Third Bar Commissioner District are eligible to apply.

Election Results

The 2016 election of commissioners for the Board of Bar Commissioners in the **Seventh Bar Commissioner District** (Catron, Dona Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties) was held Nov. 30. The results are as follows: Mick I. R. Gutierrez and David P. Lutz. **The First Bar Commissioner District** (Bernalillo County) was uncontested, so Joshua A. Allison and Carla C. Martinez are elected by acclamation. The **Second Bar Commissioner District** (Cibola, McKinley, San Juan and Valencia counties) and **Fifth District** (Curry, DeBaca, Quay and Roosevelt counties) were also uncontested, so Joseph F. Sawyer and Wesley O. Pool are elected by acclamation to those districts, respectively. Only one nomination petition was received for the two positions in the **Third Bar Commissioner District** (Los Alamos, Rio Arriba, Sandoval and Santa Fe counties), so Carolyn A. Wolf is elected by acclamation, and the Board will appoint a member from that district at their January Board meeting. **The Fourth Bar Commissioner District** (Colfax, Guadalupe, Harding, Mora, San Miguel, Taos and Union counties) was uncontested, so Ernestina R. Cruz is elected by acclamation. The **Sixth Bar Commissioner District** (Chaves, Eddy, Lea, Lincoln and Otero counties) was also uncontested, so Erinna M. Atkins is elected by acclamation.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.
24-Hour Helpline
Attorneys/Law Students
505-228-1948 • 800-860-4914
Judges 888-502-1289
www.nmbar.org/JLAP

Accelerated *Bar Bulletin* Holiday Deadlines

Due to upcoming holiday closures, the *Bar Bulletin* has accelerated printing schedules.

Submit notices by Dec. 16 for the **Dec. 28 issue** and by Dec. 21 for the **Jan. 4, 2016, issue**. Submit content to notices@nmbar.org.

Committee on Diversity in the Legal Profession

2017 Jaramillo Summer Law Clerk Program Accepting Employers

For 25 years, the Arturo Jaramillo Summer Law Clerk Program has diversified applicant pools, lowered artificial barriers to employment opportunities and produced high-quality law clerks who have

become outstanding lawyers and judges in New Mexico. The Committee on Diversity invites you to join along in our common commitment to expand opportunities in the legal profession. To participate, contact Morris Chavez at mo@saucedochavez.com by Jan. 16, 2017. Visit www.nmbar.org/clerkshipprogram for more information.

Legal Services and Programs Committee

Breaking Good Video Contest Seeks Sponsor

The Legal Services and Programs Committee will host the second annual Breaking Good Video Contest for 2016–2017. The Video Contest aims to provide an opportunity for New Mexico high school students to show their creative and artistic talents while learning about civil legal services available to their communities. The 2016-2017 prompt is "Who needs legal services in our country and why are they important?" The LSAP Committee would like to invite a member or firm of the legal community to sponsor monetary prizes awarded to first, second and third place student teams and the first place teacher sponsor. The Video Contest sponsor will be recognized during the presentation of the awards, to take place at the Albuquerque Bar Association Law Day Luncheon in early May and on all promotional material for the Video Contest. For more information regarding details about the prize scale and the Video Contest in general or additional sponsorship information, contact Breanna Henley at bhenley@nmbar.org.

UNM

Law Library

Hours Through Dec. 18

Building & Circulation

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

Reference

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

Innocence and Justice Project

Seeking Donations

Contributions to the New Mexico Innocence and Justice Project are tax-deductible and count toward the financial contribution aspect of the pro bono rules governing the State Bar. The Project at UNM School of Law is a resource for persons convicted in New Mexico state courts who have a meritorious claim of factual innocence. See lawschool.unm.edu/ijp/ for more information or call 505-277-1457. To donate, visit www.unmfund.org/fund/other and type in "UNM School of Law Barbara Bergman Fund – for IJP only" in the comment box at the bottom.

Other Bars

First Judicial District Bar Association

Holiday Party in Santa Fe

Join the First Judicial District Bar Association for beer, wine, salad, pizza and good cheer at a holiday party at 5:30 p.m., Dec. 15, at the Draft Station, 60 East San Francisco St, Suite 313, Santa Fe. R.S.V.P.s are unnecessary. FJDBA members may bring a guest.

New Mexico Criminal Defense Lawyers Association

Fulfill Ethics Requirements

Get your end of year ethics credit and tips on trial skills at "Latest Techniques in Trial Skills & Sentencing" on Dec. 16 in Las Cruces. This CLE is open to criminal defense and civil attorneys, offers 2.0 ethics credits. Get a judge's perspective on ethical and effective arguments for sentencing. Visit the New Mexico Criminal Defense Lawyers Association website www.nmcdla.org to register for this seminar. Members can also renew for 2017.

New Mexico Defense Lawyers Association

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.

Other News

Workers' Compensation Administration

Notice of Vacancy

The Director of the New Mexico Workers' Compensation Administration hereby announces the vacancy of an Administrative Law Judge effective April 1, 2017. The primary location of the position is in Albuquerque, New Mexico, with travel throughout the state. The agency is currently accepting applications and will begin the review process beginning Jan. 3, 2017. The application process will be ongoing until the vacancy is filled. For more information about this position, visit www.workerscomp.state.nm.us. The Workers' Compensation Administration is an Equal Opportunity Employer.

UNM School of Law Students Receive Senior Lawyers Division Attorney Memorial Scholarship

For the third year in a row, the Senior Lawyers Division presented two $2,500 scholarships to UNM School of Law students in memory of attorneys who have died in the past 12 months. Many family members and colleagues of these attorneys attended the ceremony. The scholarship recipients, Philip Davies and Harlena Reed were selected based on their academic performance, career plan and an essay. The scholarships were presented on Nov. 15 at the State Bar Center.

Phil Davies

Terrence Revo, chair of the Senior Lawyers Division, opened the event and remarked that it was both a happy and sad event. Though the event gives the legal community a chance to acknowledge the quality of law students at the school, the attorneys who are recognized are missed.

State Bar President J. Brent Moore and UNM School of Law Deans Sergio Pareja and Alfred Mathewson all reflected on the value of senior lawyers who share their wisdom and practice advise with the rest of the members of the legal community.

The first recipient, Harlena Reed, has worked as a licensed clinical social worker for the past 10 years and has even served as a foster parent. Reed will graduate from the UNM School of Law in May. In her acceptance speech, Reed said she was touched by the honor of the scholarship and became emotional at seeing two of her classmates names among the In Memoriam list. This year, two UNM School of Law Students were included with the practicing attorneys who have passed away.

The second recipient, Philip Davies, was on internship in Washington, D.C. and could not attend the event. However, he sent a video acceptance speech and mentioned his inspiration for law school and the "senior lawyer in [his] life" Kendall Oliver Schlenker. Davies plans to practice immigration law upon graduation in May and successful passage of the Bar Exam.

State Bar President Brent Moore, UNM School of Law Deans Alfred Mathewson and Sergio Pareja, SLD Chair Terry Revo, Recipient Harlena Reed, SLD Past Chair Brad Zeikus and Previous UNMSOL Associate Dean Peter Winograd

Recipient Harlena Reed stands center with her family Chris, Gaylene, Christen, Alexcenia (in arms) and baby Shaw.

Merri Jean Jones, SLD Chair-elect Don Jones and recipient Davies' mother Cindy Schlenker Davies

Legal Education

December

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

15 **2016 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

15 **Professional Liability Insurance: What You Need to Know (2015)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

15 **2016 Employment and Labor Law Institute**
6.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

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

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

16 **Lawyers and Email: Ethical Issues in Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Latest Techniques in Trial Skills and Sentencing**
3.5 G, 2.0 EP
Live Seminar, Las Cruces
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

16 **Half-Day Defense Practice—Basic Skills**
3.0 G
Live Seminar, Albuquerque
New Mexico Defense Lawyers Association
www.nmdla.org

16 **Half-Day Ethics and Professionalism**
3.0 EP
Live Seminar, Albuquerque
New Mexico Defense Lawyers Association
www.nmdla.org

16 **Las Chance: Best of The Best Seminar**
3.6 G, 2.0 EP
Live Seminar, Santa Fe
New Mexcio Trial Lawyers Association
www.nmtla.org

19 **Attorneys vs. Judicial Discipline**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **2015 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **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

19 **Business Law Boot Camp**
6.0 G
Live Seminar, Albuquerque
NBI, Inc.
www.nmbi-sems.com

19 **The Ultimate Guide to Probate**
6.0 G
Live Seminar, Albuquerque
NBI, Inc.
www.nmbi-sems.com

20 **New Mexico DWI Cases: From the Initial Stop to Sentencing—Evaluating Your Case**
2.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

20 **Effective Mentoring—Bridge the Gap (2015)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **The Future of Cross-Commissioning (2015)**
2.5 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Escrow Agreements in Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **The Ultimate Guide to Probate**
6.0 G
Live Seminar, Roswell
NBI, Inc.
www.nmbi-sems.com

December

21 **The Fear Factor: How Good Lawyers Get Into (and Avoid) Ethical Trouble**
3.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Mastering Microsoft Word in the Law Office (2016)**
6.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **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

21 **Drafting Preferred Stock/Preferred Returs**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Drafting and Litigating Pre-Injury Exculpatory Contracts**
2.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

22 **The U.S. District Court: Appealing Disability Denials**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **If You Post, You May Pay... Ethically**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics and Confidentiality**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **How to Become Your Own Cybersleuth: Conducting Effective Investigative and Background Research**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Human Trafficking**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

29 **Trial Know-How (The Reboot)**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

January 2017

5 **2017 Wage & Hour Update: New Overtime Rules**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **"Saying Just Enough, But Not Too Much": Letters of Intent in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **2017 Uniform Commercial Code Update—Everything You Need to Know About the Past Year**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **The Law of Background Checks—What Clients May/May "Check"**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Property Management Agreements in Commercial Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Trust and Estate Planning Issues in Divorce**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Lawyer Ethics and Texting**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Capital Contributions, Capital Calls & Finance Provisions in Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **UCC Issues in Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

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

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

Effective December 2, 2016

Published Opinions

No. 33709	4th Jud Dist San Miguel CR-12-139, STATE v R HERNANDEZ (reverse and remand)	11/28/2016
No. 34429	1st Jud Dist Santa Fe CV-13-2048, A CARRILLO v MY WAY HOLDINGS (affirm in part and remand)	11/28/2016
No. 33692	3rd Jud Dist Dona Ana CR-12-1439, STATE v J HUERTA CASTRO (reverse and remand)	11/29/2016
No. 34724	8th Jud Dist Taos CV-11-368, S LITTLE v T BAIGAS (affirm)	11/29/2016
No. 34465	1st Jud Dist Santa Fe CV-11-1707, C TAFOYA v P MORRISON (affirm)	11/29/2016
No. 34253	1st Jud Dist Santa Fe CV-13-995, L MILLER v S KIRSCHENBAUM (affirm)	12/01/2016

Unpublished Opinions

No. 35572	9th Jud Dist Roosevelt CR-13-14, STATE v HANKS BAIL BOND (affirm)	11/28/2016
No. 34980	12th Jud Dist Otero PB-14-26, R HAROLD v J DOHERTY (affirm in part, reverse in part)	11/28/2016
No. 34293	2nd Jud Dist Bernalillo CR-13-1733, STATE v J WHITT (affirm)	11/29/2016
No. 35516	1st Jud Dist Santa Fe YR-14-2, STATE v IRIN K.M. (affirm)	11/29/2016
No. 34400	WCA 13-205, R BONILLA v SANDIA RESORT (reverse and remand)	11/29/2016
No. 35512	11th Jud Dist San Juan CR-15-307, STATE v I LISTER (affirm in part and remand)	11/29/2016
No. 35543	7th Jud Dist Torrance JQ-14-3, CYFD v AMANDA A (affirm)	11/29/2016
No. 35633	9th Jud Dist Curry CR-15-63, STATE v G TRUJILLO (affirm)	11/29/2016
No. 35018	9th Jud Dist Curry JQ-13-11, CYFD v CHRISTOPHER M (affirm)	11/30/2016
No. 35399	2nd Jud Dist Bernalillo JQ-11-81, CYFD v KAREN S (affirm)	11/30/2016
No. 33699	3rd Jud Dist Dona Ana CR-08-766, STATE v M LOPEZ (affirm)	11/30/2016
No. 35206	2nd Jud Dist Bernalillo CR-14-5607, STATE v E HOLGUIN (affirm)	11/30/2016

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 Correction

A clerk's certificate of reinstatement to active status dated Nov. 8, 2016, issued to **Paul Cattell Collins** contained a typographical error in the attorney's name. The correct name and address of record are as follows:
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Clerk's Certificate of Change to Inactive Status

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In Memoriam

As of October 18, 2016:
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Dated December 5, 2016

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective December 14, 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	
1 128.3	Proceedings pending before tribunal; status report; dismissal	
1 128.4	Emergency order	
1 128.5	Adoption of agreement by tribunal	
1 128.6	Disqualification of collaborative lawyer and lawyers in associated law firm	
1 128.7	Disclosure of information	
1 128.8	Standards of professional responsibility and mandatory reporting not affected	
1 128.9	Appropriateness of collaborative law process	
1 128.10	Coercive or violent relationship	
1 128.11	Confidentiality of collaborative law communication	
1 128.12	Privilege against disclosure for collaborative law communication; admissibility; discovery	
1 128.13	Authority of tribunal in case of noncompliance	

Rules of Civil Procedure for the Magistrate Courts

2 110	Criminal contempt	
2 114	Courtroom closure	
2 305	Dismissal of actions	
2 702	Default	
2 705	Appeal	

Rules of Civil Procedure for the Metropolitan Courts

3 110	Criminal contempt	
3 114	Courtroom closure	
3 204	Service and filing of pleadings and other papers by facsimile	
3 205	Electronic service and filing of pleadings and other papers	
3 702	Default	

Civil Forms

4 204	Civil summons	
4 226	Civil complaint provisions; consumer debt claims	07/01/2017
4 306	Order dismissing action for failure to prosecute	
4 309	Thirty (30) day notice of intent to dismiss for failure to prosecute	
4 310	Order of dismissal for failure to prosecute	
4 702	Motion for default judgment	
4 702A	Affirmation in support of default judgment	
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

7 109	Presence of the defendant	
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	

Children's Court Rules and Forms

10 103	Service of process	
10 163	Special masters	
10-166	Public inspection and sealing of court records	05/18/2016
10 168	Rules and forms	
10-171	Withdrawn	05/18/2016
10-315	Custody hearing	11/28/2016
10-318	Placement of Indian children	11/28/2016
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	
10-521	ICWA notice	11/28/2016
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	Withdrawn	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	
10 711	Waiver of arraignment and denial of delinquent act	
10 712	Plea and disposition agreement	
10 713	Advice of rights by judge	
10 714	Consent decree	
10 715	Motion for extension of consent decree	
10 716	Judgment and Disposition	
10 717	Petition to revoke probation	
10 718	Sealing order	
10 721	Subpoena	
10 722	Affidavit for arrest warrant	
10 723	Arrest warrant	
10 724	Affidavit for search warrant	
10 725	Search warrant	
10 726	Bench warrant	
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	
10 742	Ex parte order for forensic evaluation	
10 743	Order for diagnostic evaluation	
10 744	Order for pre dispositional diagnostic evaluation	
10 745	Order for evaluation of amenability to treatment for youthful offender (requested by defense counsel)	
Rule Set 10 Table	Table of Corresponding Forms	

On June 27, 2016, the Court issued Order No. 16-8300-003 provisionally approving amendments to Rule 10-166 NMRA and provisionally approving new Rule 10-171 NMRA and new Form 10-604 NMRA, effective retroactively to May 18, 2016. On November 28, 2016, the Court issued Order No. 16-8300-037, withdrawing the provisionally-approved amendments to Rule 10-166 NMRA and the provisionally-approved new Rule 10-171 NMRA and new Form 10-604 NMRA, effective retroactively to May 18, 2016. Accordingly, Rule 10-166 NMRA has been restored to the version approved by Order No. 11-8300-010, and Rule 10-171 and Form 10-604 have been withdrawn.

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
12 203.1	Appeals to the Court of Appeals from orders granting or denying class action certification
12 204	Appeals from orders regarding release entered prior to a judgment of conviction
12 206	Stay pending appeal in children's court matters
12 206.1	Expedited appeals from children's court custody hearings
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
12 305	Form of papers prepared by parties.
12 309	Motions
12 310	Duties of clerks
12 317	Joint or consolidated appeals
12 318	Briefs
12 319	Oral argument
12 320	Amicus curiae
12 321	Scope of review; preservation
12 322	Courtroom closure
12 402	Issuance and stay of mandate
12 403	Costs and attorney fees
12 404	Rehearings
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
12 505	Certiorari from the Court of Appeals regarding district court review of administrative decisions
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
12 607	Certification from other courts to the Supreme Court
12 608	Certification from the district court to the Court of Appeals

Uniform Jury Instructions – Civil

13-1830	Measure of damages; wrongful death (including loss of consortium)

Uniform Jury Instructions – Criminal

14 301	Assault; attempted battery; essential elements
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
14 374	Aggravated assault; attempted battery with a deadly weapon; "household member"; essential elements
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 weapon; essential elements
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
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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

Certiorari Denied, July 29, 2016, S-1-SC-35987

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-079

No. 34,298 (filed June 29, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ANDREA MONTOYA,
Defendant-Appellant.

and

No. 34,319

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MICHAEL YAP,
Defendant-Appellant.

APPEALS FROM THE DISTRICT COURT OF BERNALILLO COUNTY
JACQUELINE FLORES, District Judge (No. 34,298)
BRETT R. LOVELESS, District Judge (No. 34,319)

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Opinion

James J. Wechsler, Judge

{1} In the interest of judicial economy, the Court is filing a consolidated opinion addressing two different appeals. Defendant Andrea Montoya and Defendant Michael Yap appeal their convictions for driving under the influence of intoxicating liquor or drugs (DWI), contrary to NMSA 1978, § 66-8-102 (2010). Both Defendants were represented by the same trial counsel and argue on appeal that, because no uncertainty computation was applied to their breath alcohol test (BAT) results, the results are unreliable such that admission into evidence at trial constituted an abuse of discretion. Because the substance of Defendants' admitted evidence does not affirmatively demonstrate a lack of reliability within our regulatory scheme for determining breath alcohol content (BAC), we conclude that the admission of Defendants' BAT results did not constitute an abuse of discretion. Montoya's additional argument related to improper admission is mooted by this conclusion. Yap additionally argues that (1) his BAT results were inadmissable under Rule 11-403 NMRA and (2) even if his BAT results were admissible, they provide insufficient evidence upon which to base a DWI conviction beyond a reasonable doubt. Yap has neither demonstrated that his BAT results are subject to exclusion under Rule 11-403, nor that his conviction was supported by insufficient evidence. Therefore, we affirm as to both Defendants.

BACKGROUND

Montoya

{2} On May 19, 2012, Montoya was pulled over by an Albuquerque Police Department traffic officer for speeding. After approaching the vehicle, the officer observed that Montoya showed signs of intoxication. A DWI unit was dispatched to the location of the traffic stop. Upon arrival, Officer Peter Romero observed that Montoya had bloodshot, watery eyes, slurred speech, and an odor of alcohol emanating from her person. Montoya's performance on field sobriety tests indicated impairment. She was placed under arrest and transported for breath alcohol testing.

{3} Officer Romero conducted Montoya's BAT using the Intoxilyzer 8000 (IR 8000), which he was trained on and certified to operate. Officer Romero followed all pre-test protocol, including observation of a twenty-minute deprivation period. Montoya's first attempt to produce a breath sample was unsuccessful. On her second attempt, Officer Romero confirmed that the IR 8000 passed diagnostic checks and performed air blanks before and after each subject test. The calibration check was within the required range. Certification of the IR 8000 by the Scientific Laboratory Division of the New Mexico Department of Health (SLD) was current on the date of Montoya's breath test. Two separate breath tests resulted in readings of 0.11 and 0.10.

{4} Montoya filed a motion to suppress her BAT results in Bernalillo County Metropolitan Court. The motion asserted that the absence of uncertainty computations within the SLD regulatory scheme rendered the BAT results generated invalid for evidentiary purposes. Following testimony and argument on the motion, the metropolitan court ruled that Montoya's BAT results were sufficiently reliable to be admitted into evidence.

{5} Montoya was convicted in a bench trial on August 23, 2013. In its ruling from the bench, the metropolitan court found that substantial evidence existed to convict

Montoya of per se DWI under Section 66-8-102(C), but not of operating a motor vehicle while impaired to the slightest degree under Section 66-8-102(A). The district court affirmed Montoya's conviction.

Yap

{6} On March 17, 2013, Yap was pulled over by an Albuquerque Police Department traffic officer for speeding and a headlamp violation. After approaching the vehicle, the officer observed that Yap showed signs of intoxication. A DWI unit was dispatched to the location of the traffic stop. Upon arrival, Albuquerque Police Officer John Sandoval observed that Yap had bloodshot, watery eyes and an odor of alcohol emanating from his person. Yap's performance on field sobriety tests indicated impairment. He was placed under arrest and transported for breath alcohol testing.

{7} Officer Sandoval conducted Yap's BAT using the IR 8000, on which he was trained and certified to operate. Officer Sandoval followed all pre-test protocol, including observation of the twenty-minute deprivation period. Officer Sandoval confirmed that the IR 8000 passed diagnostic checks and performed air blanks before and after each subject test. The calibration check was within the required range. SLD's certification of the IR 8000 was current on the date of Yap's breath test. Two separate breath tests resulted in readings of 0.08.

{8} Yap filed a motion to suppress his BAT results in Bernalillo County Metropolitan Court. The motion asserted that the absence of uncertainty computations within the SLD regulatory scheme rendered the BAT results generated invalid for evidentiary purposes. Following testimony and argument on the motion, the metropolitan court ruled that Yap's BAT results were admissible and that challenges to the reliability of the evidence pertained to the weight, not the admissibility, of the evidence.

{9} Yap was convicted in a bench trial on December 16, 2013. In its ruling from the bench, the metropolitan court found that substantial evidence existed to convict Yap of either per se DWI, under Section 66-8-102(C), or of operating a motor vehicle while impaired to the slightest degree, under Section 66-8-102(A). The district court affirmed Yap's conviction.

STANDARD OF REVIEW

{10} We review a trial court's admission of evidence for an abuse of discretion. *State v. Jaramillo*, 2012-NMCA-029, ¶ 17, 272 P.3d 682. "A [trial] court abuses its discretion if its decision is obviously erroneous, arbitrary, or unwarranted[.]" *State v. King*, 2012-NMCA-119, ¶ 5, 291 P.3d 160 (internal quotation marks and citation omitted). To the extent that either Defendant's legal argument requires statutory interpretation, we apply de novo review. *State v. Lucero*, 2007-NMSC-041, ¶ 8, 142 N.M. 102, 163 P.3d 489.

ADMISSIBILITY OF BAT RESULTS

{11} In New Mexico, it is unlawful to operate a motor vehicle while under the influence of alcohol. Section 66-8-102. Section 66-8-102(C), commonly referred to as the "per se DWI statute," provides that a person violates the statute if his or her breath or blood contains an alcohol concentration of 0.08 or more. No additional indicia of impairment is required for a per se DWI conviction. *Bierner v. N.M. Taxation & Revenue Dep't*, 1992-NMCA-036, ¶ 6, 113 N.M. 696, 831 P.2d 995. A person may also be convicted of DWI without a BAT result of 0.08 or higher upon a determination that he or she was driving a vehicle while impaired to the slightest degree. *State v. Neal*, 2008-NMCA-008, ¶¶ 25, 27, 143 N.M. 341, 176 P.3d 330. Under the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2015), a person suspected of driving under the influence of alcohol is subject to SLD-approved chemical testing of his or her breath or blood. Section 66-8-107(A). Section 66-8-110(A) provides that "[t]he results of a test performed pursuant to the Implied Consent Act may be introduced into evidence" in criminal or civil cases.

{12} The provision of Section 66-8-110(A) permitting the introduction of BAT results into evidence is not without limitation. Generally speaking, the question of whether a defendant's BAT result is admissible "turns on each particular test and the officer's compliance with the SLD regulations[.]" *State v. Anaya*, 2012-NMCA-094, ¶ 20, 287 P.3d 956. SLD has promulgated breath alcohol testing regulations. *See* 7.33.2 NMAC (03/14/2001, as amended through 04/30/2010). Compliance with SLD regulations is a pre-condition for admissibility. *See State v. Dedman*, 2004-NMSC-037, ¶ 13, 136 N.M. 561, 102 P.3d 628 ("[I]f an accuracy-ensuring regulation is not satisfied, the result of the test in question may be deemed unreliable and excluded."), *overruled on other grounds by State v. Bullcoming*, 2010-NMSC-007, ¶ 16, 147 N.M. 487, 226 P.3d 1; *King*, 2012-NMCA-119, ¶ 10 ("Compliance with the SLD regulations intended to ensure accuracy is a predicate to admission in evidence of test results.").

{13} Unlike appeals arguing a lack of regulatory compliance, Defendants claim that their BAT results are inadmissible due to principles of uncertainty inherent to all systems of forensic measurement. As such, Defendants' arguments address the reliability of the regulatory scheme but in an area not contemplated by SLD in promulgating the regulations. *See* 7.33.2 NMAC (outlining breath alcohol testing requirements without reference to measurement uncertainty). Defendants claim that, in the absence of a confidence interval reflecting uncertainties in the breath alcohol testing process, their BAT results are not reliable enough to "assist the trier of fact" in their DWI prosecutions. *See State v. Alberico*, 1993-NMSC-047, ¶ 54, 116 N.M. 156, 861 P.2d 192 ("The proper inquiry under Rule [11-]702 [NMRA] is . . . whether the underlying scientific technique or method is reliable enough to prove what it purports to prove, that is probative, so that it will assist the trier of fact.").

{14} In *State v. Martinez*, 2007-NMSC-025, ¶ 17, 141 N.M. 713, 160 P.3d 894, our Supreme Court clarified that the admissibility of BAT results is determined by applying Rule 11-104(A) NMRA to the introduced evidence. *Martinez* did not foreclose future defendants from bringing reliability-based challenges to the admissibility of BAT results, discussing instead a defendant's opportunity to "critically challenge an officer's foundational testimony concerning certification [of the machine]." *Id.* ¶ 24. This Court reached a similar conclusion in *Anaya*, 2012-NMCA-094, ¶ 22, stating, "[i]f [a d]efendant desires to put the statutorily accepted scientific process on trial, then he must do so by calling an expert witness to testify pursuant to Rule 11-702 NMRA and properly raise a foundational challenge to the SLD's scientific procedure for establishing the reliability of the [machine]." Defendants have raised such challenges in these cases.[1]

{15} Unlike some jurisdictions, our appellate courts do not interpret the Im-

[1]In its answer brief, the State argues without citation to legal authority that cross-examination of the State's expert witness by Yap was an insufficient mechanism to challenge the admissibility of BAT results as articulated in *Anaya*, 2012-NMCA-094, ¶ 22. "We will not address contentions not supported by argument and authority." *Murken v. Solv-Ex Corp.*, 2006-NMCA-064, ¶ 6, 139 N.M. 625, 136 P.3d 1035.

plied Consent Act to establish an absolute presumption that regulatory compliance leads to reliable BAT results. *Compare King*, 2012-NMCA-119, ¶ 16 ("Nothing in . . . the Implied Consent Act, or the SLD regulations indicates that the Legislature intended that the results produced by a machine approved by the SLD that has been operated and maintained in accordance with the SLD regulations [are] conclusively reliable."), *with State v. Vega*, 465 N.E.2d 1303, 1307 (Ohio 1984) ("The judiciary must recognize the necessary legislative determination that breath tests, properly conducted, are reliable irrespective that not all experts wholly agree and that the common law foundational evidence has, for admissibility, been replaced by statute and rule[.]" (alteration, internal quotation marks, and citation omitted)). Nevertheless, this Court has expressly endorsed the reliability of breath alcohol testing systems. *See State v. Bearly*, 1991-NMCA-022, ¶ 13, 112 N.M. 50, 811 P.2d 83 ("[B]reath testing is generally regarded as highly reliable."). This endorsement is consistent with the principle that, absent "an affirmative showing that there is some reason to doubt the reliability of [accepted] science[,]" the state need not demonstrate reliability under Rule 11-702 as a condition for admissibility. *State v. Fuentes*, 2010-NMCA-027, ¶ 28, 147 N.M. 761, 228 P.3d 1181 (declining to require a reliability hearing into the science underlying ballistics evidence). The *Fuentes* analysis applies equally well to the instant cases. Breath alcohol testing is utilized and considered to be reliable throughout our country. As stated by one scholar,

> Breath alcohol analysis has largely become the standard analytical methodology employed in prosecuting drunk driving cases. Advancements in technology, immediate results, non-invasive protocol, improved understanding of respiratory dynamics, widespread legal acceptance among others, have all contributed to the increasing application and acceptance of forensic breath alcohol measurement.

R. G. Gullberg, *Methodology and Quality Assurance in Forensic Breath Alcohol Analysis*, 12 Forensic Sci. Rev. 46, 50 (2000); *see also* 1 Kenneth S. Broun et al., *McCormick on Evidence* § 205, at 1174 (7th ed. 2013) ("[V]arious instruments have been shown to be accurate in measuring [BAC] in laboratory studies, and arguments that particular instruments are not generally accepted or sufficiently accurate for the purpose of determining [BAC] usually fail."). More than sixty years ago, a Texas appellate court first determined that scientific testimony supported the admission of the defendant's BAT results. *McKay v. State*, 235 S.W.2d 173, 175 (Tex. Crim. App. 1950). Even the United States Supreme Court, in *California v. Trombetta*, endorsed the accuracy and reliability of breath alcohol testing systems. 467 U.S. 479, 489 (1984).

{16} Given the abundance of appellate case law endorsing the reliability of breath alcohol testing generally, a trial court is justified in presuming such reliability in the absence of an articulated challenge. *See State v. Onsurez*, 2002-NMCA-082, ¶ 10, 132 N.M. 485, 51 P.3d 528 ("The [s]tate need not independently prove the scientific reliability of the test as part of its prima facie case."). Whether Defendants' argument justifies further evaluation of the reliability of our regulatory scheme under Rule 11-702 turns on the standard articulated in *Fuentes*: whether Defendants' offered testimony and evidence "make an affirmative showing that there is some reason to doubt the reliability" of BAT results generated through SLD-approved chemical testing. 2010-NMCA-027, ¶ 28.

DEFENDANTS' UNCERTAINTY ARGUMENT

{17} What the inclusion of an uncertainty computation does, and does not, say about the reliability of a system of forensic measurement is central to our determination in this case. "Breath alcohol analysis results, like all measurements, possess uncertainty." R.G. Gullberg, *Common Legal Challenges and Responses in Forensic Breath Alcohol Determination*, 16 Forensic Sci. Rev. 92, 93 (2004). In the context of breath alcohol testing, uncertainty arises from factors that include biological and sampling considerations of the test subject, analytical and instrumental considerations of the system used, and traceability of the reference material. Rod G. Gullberg, *Estimating the Measurement Uncertainty in Forensic Breath-Alcohol Analysis*, 11 Accreditation and Quality Assurance 562, 563 (2006). In order to determine the uncertainty associated with a BAT result, these factors are quantified and calculated, a process that results in a combined uncertainty that is determined using standard statistical methods. *Id.* The outcome of this calculation is a range of possible results that, to a stated level of probability, includes the test subject's actual BAC somewhere along the range. *Id.* at 562. In essence, an uncertainty computation demonstrates the possibility that a test subject's actual BAC is higher or lower than the BAT result generated for evidentiary purposes. *Id.*

{18} At trial, Montoya introduced the following documents into evidence: National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (*Exhibit A*); ISO, *Guide 34: General Requirements for the Competence of Reference Material Producers* (3rd ed. 2009) (*Exhibit B*); ISO/IEC 17025, *General Requirements for the Competence of Testing and Calibration Laboratories* (2nd ed. 2005) (*Exhibit C*); ASCLD/LAB-International, *ASCLD/LAB Policy on Measurement Uncertainty* (2013) (*Exhibit D*); and ASCLD/LAB-International, *ASCLD/LAB Policy on Measurement Traceability* (2013) (*Exhibit E*) (collectively, *Exhibits A-E*). Montoya also introduced the testimony of Janine Arvizu, who was qualified as an expert in quality assurance and quality control.

{19} Yap's record on appeal does not include any documentary evidence.[2] He declined to call his own expert witness, but he elicited testimony related to uncertainty computations by cross-examining the State's expert witness, SLD toxicology bureau supervisor Jason Avery.

{20} With respect to evidence presented by Montoya, the ISO and ASCLD/LAB standards referred to in *Exhibits A-E* and by the expert witness are not directly applicable to the SLD. However, this evidence indicates that the inclusion of an uncertainty computation increases confidence in a given measurement, particularly when that measurement is being compared to a pre-determined threshold level. *Exhibit A*, for example, presents a clear argument in favor of applying uncertainty computations to breath alcohol testing systems, stating,

> In addition to the inherent limitations of the measurement

[2]Audio recordings of the metropolitan court proceedings indicate that the same documents referred to herein as *Exhibits A-E* were admitted without objection at Yap's suppression hearing. For reasons that are unclear to this Court, these exhibits are not part of the appellate record.

> technique, a range of other factors may also be present and can affect the accuracy of laboratory analyses. Such factors may include deficiencies in the reference materials used in the analysis, equipment errors, environmental conditions that lie outside the range within which the method was validated, sample mix-ups and contamination, transcription errors, and more. . . . [If] the average [BAT result] is 0.09 percent and the standard deviation is 0.01 percent . . . a two-standard-deviation confidence interval (0.07 percent, 0.11 percent) has a high probability of containing the person's true blood-alcohol level.

Exhibit A at 117. The obvious inference to be drawn from *Exhibit A* is that a test subject who registered 0.09 could have an actual breath alcohol content of 0.07; a level that is below the per se limit for intoxication in New Mexico.

{21} The troubling feature of Montoya's admissibility argument is articulated by Arvizu in her testimony on cross-examination, which included the following exchange:

> State: So the essence of your testimony regarding the breath card in this case is that the result is incomplete and therefore invalid.
>
> Arvizu: The result is incomplete and therefore invalid for the purpose of comparing it to the threshold of 0.08.
>
> . . . .
>
> State: Now would you say that all of [the results generated by the SLD regulatory scheme] are not valid and potentially misleading?
>
> Arvizu: You mean all of the results historically?
>
> State: Yes.
>
> Arvizu: Yes. Scientifically, without an uncertainty, the result is incomplete.

This conclusion highlights the deficiencies with the argument and evidence before this Court. In *State v. Johnson*, the defendant was arrested for DWI by an Aztec police officer. 2001-NMSC-001, ¶ 2, 130 N.M. 6, 15 P.3d 1233. The defendant's BAT results were 0.35 and 0.34—more than four times the legal limit. *Id.* Arvizu's testimony makes no distinction between this driver and Montoya, whose BAT results were 0.11 and 0.10.

{22} Because Arvizu's testimony does not apply an uncertainty computation to Montoya's BAT results or provide any indication of a point when SLD-approved chemical testing "becomes" reliable for evidentiary purposes, we must accept that her position is that SLD-approved chemical test results, regardless of the BAC reported, are never scientifically reliable. We cannot agree. Our Legislature has enacted a statute that prohibits operating a motor vehicle with a BAC of 0.08 or above. Section 66-8-102(C). Our Legislature has empowered the Department of Health to establish a system for calculating the BAC of suspected offenders. NMSA 1978, § 24-1-22 (2003). SLD has established a breath alcohol testing system that incorporates generally accepted technology and testing protocol. *See* Conforming Products List of Evidential Breath Alcohol Measurement Devices, 77 Fed. Reg. 35,747-01, 35,748 (June 14, 2012) (listing the IR 8000 as an approved device). Regardless of accepted scientific principles in the area of metrology, we do not believe that our entire breath alcohol testing system is not, and has never been, reliable with respect to any result generated.

{23} If we narrow Arvizu's conclusion by making the next logical leap, that, given the regulatory controls established by SLD, the breath alcohol testing system is reasonably accurate for scientific purposes, we are still left to draw arbitrary lines without an evidentiary record to support our determination. Neither the documents admitted into evidence nor Arvizu's testimony present any evidence as to how biological or sampling considerations specific to Montoya would contribute to an uncertainty computation in her particular case. Similarly, no evidence has been presented as to the manner in which instrumental considerations specific to the IR 8000 or the specific reference materials in question should be considered. Without this evidence, the question becomes whether an SLD-approved chemical test resulting in 0.09 is legally reliable or unreliable, and 0.10, and 0.11, and so on. Even were we to conclude from the evidence before us that results generated without an uncertainty computation are subject to a certain level of unreliability, such a conclusion does not result in a legal determination that all results generated within our regulatory scheme are so unreliable as to be inadmissible in every case.

{24} Yap's cross-examination of Avery provides even less support for the proposition that his BAT results are inadmissible. While Avery agreed that uncertainty computations function as described by defense counsel, at no point did Avery testify that SLD-approved chemical testing produces unreliable results. As discussed immediately above, such evidence does not support Defendants' legal argument.

{25} In *Fuentes*, the defendant failed to provide any support for his allegation that generally accepted principles underlying ballistics testimony and evidence lacked a sufficient scientific foundation to be admitted under Rule 11-702. *Fuentes*, 2010-NMCA-027, ¶ 27. We view the instant cases as scientifically analogous. By rejecting Arvizu's conclusion that all current BAT evidence is scientifically unreliable, we note that Defendants have presented no other evidence indicating that their specific BAT results are unreliable. The exhibits admitted into evidence by Montoya largely discuss standards for laboratory certification that are inapplicable to SLD. While these standards may represent best practices in the field of metrology, we have no evidence before us concerning the manner in which they apply to field testing BAC in police stations across the state of New Mexico. Both *Exhibit A* and the expert testimony are only helpful for the purpose of weighing the evidence of whether a given BAT result is sufficiently accurate for the court or a jury to find an individual guilty of per se DWI beyond a reasonable doubt. But neither is sufficient to exclude evidence that is generated through a highly scrutinized, judicially endorsed, regulatory scheme.

{26} Additionally, our Supreme Court has previously discussed error rates in determining the admissibility of evidence. While error rate and uncertainty are not interchangeable terms, the legal implication—whether a scientific test result is fit for its particular evidentiary purpose—is similar. In *Lee v. Martinez*, our Supreme Court reviewed the accuracy rates of polygraph results, noting that, while "far from conclusive[,] . . . numerous studies have shown that polygraph tests can detect deception at rates well above chance." 2004-NMSC-027, ¶ 32, 136 N.M. 166, 96 P.3d 291. Instead of holding the polygraph results to be inadmissible, our Supreme Court held that deficiencies in calculating the rate of error "spoke to the weight of the evidence and not to its admissibility." *Id.* (alterations, internal quotation marks, and citation omitted).

{27} We reach the same conclusion in these cases. Defendants were entitled to

present evidence, including expert testimony related to measurement uncertainty, to the finder of fact and make an argument that their BAT results should not support a finding of guilt beyond a reasonable doubt. But this inquiry regarding the weight to be given to expert testimony is a separate one from whether Defendants' evidence constituted an "affirmative showing that there is some reason to doubt the reliability of [accepted] science[,]" such that their SLD-approved chemical test results are inadmissible. *Fuentes*, 2010-NMCA-027, ¶ 28. We also note that our conclusion is consistent with relevant literature reviewed by this Court. For example, in *Estimating the Measurement Uncertainty in Forensic Blood Alcohol Analysis*, the author does not advocate that the absence of an uncertainty computation renders a test result inadmissible. Instead, he states that "[a]n appropriate uncertainty computation . . . would be relevant *for the trier of fact* to make an informed decision." Rod G. Gullberg, *Estimating the Measurement Uncertainty in Forensic Blood Alcohol Analysis*, 36 Journal of Analytical Toxicology 153, 153 (2012) (emphasis added).

{28} Nothing in this opinion should be construed as a statement by this Court that additional legal argument in the area of metrology is foreclosed. We recognize the valid concern expressed in the scientific literature and by Arvizu that BAT results, particularly those exactly at the per se limit, can present a reliability problem when attempting to scientifically prove guilt beyond a reasonable doubt. *See* UJI 14-5060 NMRA ("A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life."). This question, however, is for the finder of fact. *See Lee*, 2004-NMSC-027, ¶ 16 ("Given the capabilities of jurors and the liberal thrust of the rules of evidence, we believe any doubt regarding the admissibility of scientific evidence should be resolved in favor of admission, rather than exclusion.").

APPLICATION OF RULE 11-403

{29} Rule 11-403 states, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." While *Alberico* contemplates the possibility of a Rule 11-403 challenge to expert testimony, we are unclear how the rule would be properly applied in this case. *See Alberico*, 1993-NMSC-047, ¶ 35 n.5 ("After the expert opinion testimony is deemed admissible under Rule [11-]702, perhaps then a consideration of possible deference could be made under a Rule [11-]403 analysis of whether the probative value of the evidence might be substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury[.]" (internal quotation marks and citation omitted)).

{30} Yap's argument on appeal, essentially, is that BAT results that are generated without an uncertainty computation are potentially misleading to the finder of fact.[3] As stated in his brief in chief, "the value '[0].08' merely distracts the finder of fact from understanding that the actual value could be *any* number." Scientific evidence, once admitted, can carry with it an "aura of infallibility[.]" *State v. Anderson*, 1994-NMSC-089, ¶ 63, 118 N.M. 284, 881 P.2d 29. Were we convinced that Yap's BAT results could actually be "any number" as he asserts, the proper conclusion would be exclusion. As previously discussed, however, the testimony elicited in support of Yap's legal argument does not cause us to doubt the generally accepted science underlying breath alcohol testing. *See Bearly*, 1991-NMCA-022, ¶ 13 ("[B]reath testing is generally regarded as highly reliable."). Therefore, the danger of misleading the finder of fact did not substantially outweigh the probative value of Yap's BAT results such that admission constituted an abuse of discretion. *See State v. Chamberlain*, 1991-NMSC-094, ¶ 9, 112 N.M. 723, 819 P.2d 673 ("The trial court is vested with great discretion in applying Rule [11-]403, and it will not be reversed absent an abuse of that discretion."); *see also State v. Pickett*, 2009-NMCA-077, ¶ 13, 146 N.M. 655, 213 P.3d 805 (holding that application of Rule 11-403 was unnecessary in a bench trial).

SUFFICIENCY OF THE EVIDENCE

{31} Yap's final argument relates to the sufficiency of his BAT results to support a conviction for either per se DWI or driving while impaired to the slightest degree. Section 66-8-102(C); *Neal*, 2008-NMCA-008, ¶ 25. We address these arguments in turn.

Per Se DWI

{32} Yap's post-admission sufficiency of the evidence argument mirrors his pre-admission reliability argument—that uncertainty inherent to all systems of forensic measurement renders his BAT results insufficiently reliable to support a per se DWI conviction beyond a reasonable doubt. On cross-examination during Yap's October 15, 2013 motion hearing, Avery implied that SLD generated BAT results are subject to measurement uncertainty.[4] Finding this testimony to be credible, we must conclude that the scientifically appropriate way to view Yap's BAT results is 0.08 plus or minus the range represented by the unknown uncertainty computation.

{33} As a general rule, "in reviewing the sufficiency of the evidence, we must 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." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. The evidence shows that an SLD-approved chemical test result generated without an uncertainty computation does not accurately portray the possibility that a test subject's actual BAC is different from the BAT result. However, taking the viewpoint that the actual BAC was

[3]Yap's appellate briefing does not specifically raise any of the considerations contemplated by Rule 11-403. We discuss the potential for misleading the jury given our previous conclusion as to the reliability of BAT results generated by SLD-approved chemical testing. We decline to independently investigate if, or how, any of the other considerations raised in Rule 11-403 could apply to this or a similar case.

[4]Because this was a bench trial, it appears that the parties agreed to incorporate the substance of Yap's October 15, 2013 motion hearing into his December 16, 2013 trial. The apparent result of this agreement was that Yap did not call an expert witness at trial to dispute the reliability of his admitted BAT results. Because of the absence of expert testimony at trial, a plausible argument exists that Yap failed to challenge the weight of the evidence against him as discussed by the metropolitan court. However, the audio transcript of the December 16, 2013 trial makes clear that the metropolitan court relied on testimony and evidence from the October 15, 2013 motion hearing in determining that Yap's admitted BAT results were sufficiently reliable enough to support a conviction of per se DWI.

lower, instead of equal to or higher, than 0.08 would not constitute "view[ing] the evidence in the light most favorable to the guilty verdict,"—a standard that binds our determinations in sufficiency of the evidence analysis. *Id.* As an alternative, we consider whether our Legislature intended that such a possibility be a bar to certain per se DWI convictions. We decline to draw such a conclusion.

{34} Yap's BAT resulted in two readings of 0.08. In 1993, our Legislature unambiguously amended the then existing law for the purpose of establishing 0.08 as the breath and blood concentration at which a driver may not operate a motor vehicle in the state of New Mexico. 1993 N.M. Laws, ch. 66, § 7. We have no reason to believe that this legislative determination did not include consideration of measurement uncertainty in selecting 0.08 as the legal limit rather than, for example 0.07 or 0.09. For this Court to conclude that an SLD-approved chemical test result of 0.08 is legally insufficient to support a guilty verdict would defy the clear legislative intent embodied within Section 66-8-102. *See Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 40, 320 P.3d 1 ("When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." (alteration, internal quotation marks, and citation omitted)). This is not to say that a finder of fact presented with evidence of measurement uncertainty would be unjustified in concluding that SLD-approved chemical test results of 0.08 did not support a finding of guilt beyond a reasonable doubt in any given per se DWI case. Rather, we simply conclude that SLD-approved chemical test results of 0.08 or higher are sufficient on appeal to support such a conviction.

Driving While Impaired to the Slightest Degree

{35} Finally, Yap argues that if his BAT results were improperly admitted, it was error to consider those results in determining impairment to the slightest degree. While this argument conforms with precedent case law, our ruling as to admissibility moots its viability. *See Pickett*, 2009-NMCA-077, ¶¶ 14-15 (holding that BAT results are relevant to a finding of driving while impaired to the slightest degree).

CONCLUSION

{36} As to both Defendants, because the admitted evidence and expert testimony fail to undermine the accepted science underlying the SLD-approved chemical testing scheme, the admission of Defendants' BAT results was not "obviously erroneous, arbitrary, or unwarranted" and did not constitute an abuse of discretion. *King*, 2012-NMCA-119, ¶ 5 (alteration, internal quotation marks, and citation omitted). We therefore affirm Montoya's conviction for DWI contrary to Section 66-8-102(C). With respect to Yap's additional legal arguments, he has neither demonstrated that his BAT results are subject to exclusion under Rule 11-403 nor that insufficient evidence supported his conviction. We therefore affirm Yap's conviction for DWI under either Section 66-8-102(C) or Section 66-8-102(A) as articulated by the metropolitan court.

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

JAMES J. WECHSLER, Judge

WE CONCUR:
TIMOTHY L. GARCIA, Judge
M. MONICA ZAMORA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-080

No. 33,875 (filed July 7, 2016)

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

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
STAN WHITAKER, District Judge

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Opinion

J. Miles Hanisee, Judge

{1} Defendant Chris Hall appealed his conviction in the metropolitan (metro) court for driving while intoxicated (DWI), contrary to NMSA 1978, Section 66-8-102(C)(1) (2010), to the district court. The district court affirmed the metro court's sentencing order and filed a memorandum opinion. Defendant now appeals to this Court. He challenges the constitutionality of the sobriety checkpoint at which he was stopped, the admission into evidence of his breath test results, and the sufficiency of the evidence to support his conviction. We conclude that while the checkpoint was constitutional, the metro court erred in admitting Defendant's breath results. Because the evidence was otherwise sufficient to support Defendant's conviction, we reverse and remand for a new trial.

BACKGROUND

{2} Shortly after 10:00 p.m. on January 20, 2012, Defendant was stopped at a DWI checkpoint on Central Avenue in Albuquerque, New Mexico, just west of the Rio Grande River. The checkpoint—in place between 10:00 p.m. and 3:00 a.m.—had been planned by Sergeant Lecompte, DWI Unit Supervisor for the Bernalillo County Sheriff's Office (BCSO), and approved by his lieutenant. An approved tactical plan (tact plan) laid out the parameters of the checkpoint, including the placement of signs, cones, reflective tape, and emergency lighting at the checkpoint site. The tact plan also included guidelines for field officers conducting stops at the checkpoint, specifying that initial contact with each driver should be limited to 15-30 seconds, with the officer introducing himself, announcing the purpose of the checkpoint, and asking the driver if he or she has consumed alcohol or drugs. If additional investigation was required following the initial contact, the officer was to remove the driver from the vehicle to conduct standardized field sobriety tests (FSTs) in a separate investigation area. Sergeant Lecompte briefed each of the field officers on the tact plan prior to initiating the checkpoint and remained on-site to supervise and to ensure that the tact plan was being followed.

{3} The first officer to make contact with Defendant was BCSO Sergeant Perea, who upon making contact detected an odor of alcohol coming from inside Defendant's truck. In accordance with the suggested checkpoint dialogue contained in the tact plan, and because Defendant was the only person inside the truck, Sergeant Perea asked Defendant if he had consumed any alcoholic beverages that evening. Defendant responded that he had a beer about an hour prior. Sergeant Perea then conducted a seated horizontal gaze nystagmus (HGN) test on Defendant. Based on the odor of alcohol, Defendant's admission to drinking beer an hour prior, and Defendant's performance on the seated HGN test, Sergeant Perea removed Defendant from his truck and proceeded to conduct a battery of three standardized FSTs. Defendant's performance on the FSTs resulted in his arrest for DWI.

{4} Defendant was then taken to the "BATmobile"—located at the checkpoint site—where he consented to a breath test. Following a 20-minute deprivation period, as measured by Sergeant Perea's wristwatch, Defendant provided two breath samples using an Intoxilyzer 8000. The breath test results revealed that Defendant had 0.10 grams of alcohol per 210 liters of breath, which was above the "per se" legal limit. *See* § 66-8-102(C)(1) (providing that it is illegal for a person to drive a vehicle with "an alcohol concentration of eight one hundredths [0.08] or more in [his or her] blood or breath").

{5} At a bench trial in the metro court, Defendant challenged the constitutionality of the DWI checkpoint. He also objected to the admissibility of the breath test results. The metro court found that the checkpoint was constitutional and admitted the breath test results. The metro court then found Defendant guilty of per se DWI, although it acquitted Defendant of DWI based on impairment to the slightest degree, contrary to Section 66-8-102(B).

{6} On appeal, the district court affirmed Defendant's conviction for per se DWI, determining that the checkpoint was constitutional and that the breath results were properly admitted into evidence. While we agree with the district court that the checkpoint was constitutional, we disagree with respect to the breath test and conclude that the metro court erred in admitting the breath results.

DISCUSSION

{7} "For on-record appeals the district court acts as a typical appellate court, with the district court simply reviewing the record of the [metro] court trial for legal error." *State v. Trujillo*, 1999-NMCA-003, ¶ 4, 126 N.M. 603, 973 P.2d 855. "In subsequent appeals such as this, we apply the same standards of review employed by the district court." *State v. Bell*, 2015-NMCA-028, ¶ 2, 345 P.3d 342. "A trial court's determination on a motion to suppress evidence involves a mixed question of law and fact, as to which our review is de novo." *Id.*

I. The DWI Checkpoint Was Constitutional

{8} Defendant contends that the DWI checkpoint at which he was stopped was not constitutional under New Mexico law. This Court has held that a sobriety checkpoint is a seizure. *See State v. Bates*, 1995-NMCA-080, ¶ 9, 120 N.M. 457, 902 P.2d 1060 (stating "there is no question that a [checkpoint] is a seizure"). However, "a DWI [checkpoint], at which drivers are stopped without probable cause or reasonable suspicion, is not a per se violation of the Fourth Amendment to the United States Constitution; the constitutionality of the [checkpoint] depends on whether it is reasonable." *Id.* ¶ 6 (citing *City of Las Cruces v. Betancourt*, 1987-NMCA-039, ¶ 9, 105 N.M. 655, 735 P.2d 1161). The ultimate question for this Court is whether the facts and inferences before the lower courts support its conclusion that the checkpoint was reasonable. *Bates*, 1995-NMCA-080, ¶ 21.

{9} A sobriety checkpoint "is constitutionally permissible so long as it is reasonable within the meaning of the [F]ourth [A]mendment as measured by its substantial compliance with [eight factors]." *Betancourt*, 1987-NMCA-039, ¶ 16. The eight *Betancourt* factors are: (1) the role of supervisory personnel, (2) restrictions on the discretion of field officers, (3) safety, (4) reasonable location, (5) time and duration, (6) indicia of official nature of the checkpoint, (7) length and nature of detention, and (8) advance publicity. *Id.* ¶ 13. "[A] sobriety checkpoint conducted in substantial compliance with the eight *Betancourt* factors is [also] constitutional under the New Mexico Constitution." *State v. Madalena*, 1995-NMCA-122, ¶ 26, 121 N.M. 63, 908 P.2d 756.

{10} At trial, following the testimony of Sergeant Lecompte, which focused on the details of the tact plan, approval of the tact plan by his supervisor, restrictions on the discretion of field officers, and BCSO's efforts to ensure widespread advance publicity, the State moved the metro court to find the checkpoint constitutional under *Betancourt*. Defendant objected, arguing that three of the factors had not been met. Specifically, Defendant challenged the safety of the checkpoint, the reasonableness of the checkpoint's location, and whether there was advance publicity. The metro court heard Defendant's argument and the State's response and concluded that the checkpoint was constitutional. Later in the trial, Defendant renewed his challenge to the constitutionality of the checkpoint, arguing that the discretion of the field officers was not adequately constrained. The metro court again ruled that the checkpoint was reasonable and constitutional. The district court affirmed. We address each challenged *Betancourt* factor in turn.

A. Safety

{11} First, Defendant argues that the checkpoint was unsafe due to its location west of the bridge over the Rio Grande River. According to Defendant, the first checkpoint-related signage—a sign warning drivers to "reduce speed"—was located at the apex of the bridge, and the entirety of the checkpoint was not visible to westbound drivers prior to reaching the top of the bridge. Defendant testified at trial that another vehicle drove straight through the checkpoint presumably in an attempt to avoid being stopped. Defendant also points out that emergency maneuvers were limited by the nature of the bridge and by oncoming eastbound traffic and asserts that several vehicles attempted to avoid the checkpoint by making U-turns over the median on the bridge.

{12} The State responds by stressing that the "reduced speed" sign was followed by additional signage, cones, and flashing lights from marked police vehicles, and that the checkpoint site itself included signage, flashing lights, overhead lighting from the BATmobile, and officers wearing reflective vests. The State also argues that there was "no testimony that any officer or motorist was injured or involved in a vehicle collision" and that "Defendant's argument is premised on the actions of one motorist who attempted to evade the checkpoint," highlighting that such evasion is not necessarily indicative of the checkpoint's safety, but rather of the mindset of the driver of the vehicle, as noted by the district court in its memorandum opinion. *See State v. Anaya*, 2009-NMSC-043, ¶ 15, 147 N.M. 100, 217 P.3d 586 ("Evading a marked DWI checkpoint is a specific and articulable fact that is sufficient to predicate reasonable suspicion for an investigatory stop.").

{13} We note that there was testimony that the bridge over the Rio Grande River has a slight, "roughly" one percent grade and that two photographs of the checkpoint location were entered into evidence at trial. In light of the facts outlined above and the evidence presented to the metro court, we conclude no error in the metro court's determination that the safety factor was substantially complied with. *See Bates*, 1995-NMCA-080, ¶ 25 (weighing reasonableness in favor of the state where there were warning signs ahead of the checkpoint and a separate, lighted area for secondary investigations).

B. Reasonable Location

{14} Second, Defendant contends that the checkpoint's location was not reasonable. Sergeant Lecompte testified that he chose the location based upon DWI arrest statistics from past checkpoints conducted there. Defendant asserts that the location's "detection value" is questionable given the fact that no arrests were made during the most recent checkpoint at that location. We agree with the State, however, that the lack of arrests during the previous checkpoint could tend to demonstrate the successful deterrent effect of placing sobriety checkpoints at that particular location. Furthermore, while *Betancourt* made it clear that "a location chosen with the actual intent of stopping and searching only a particular group of people, i.e., Hispanics, [B]lacks, etc., would not be tolerated[,]" there was no evidence produced at trial to indicate any such discriminatory purpose, and Defendant does not argue that there was such a purpose. 1987-NMCA-039, ¶ 13. We conclude that Sergeant Lecompte's testimony was sufficient to establish that the checkpoint location was selected on the basis of prior arrest statistics and on the successful deterrent effect of past checkpoints at the same location, and therefore supported the trial court's determination that the checkpoint was reasonable. *See id.* ¶ 11 ("The need to deter, detect[,] and remove drunk drivers from the public highways weighs heavily in favor of the state.").

C. Advance Publicity

{15} Third, Defendant argues that the advance publicity factor was not met, based on the fact that the officer who was responsible for faxing notice to the media did not testify at trial. Although Sergeant Lecompte testified that the other officer faxed notice to several media outlets on January 16, 2012, Defendant contended that Sergeant Lecompte did not have personal knowledge regarding whether the media actually received notice and also that a four-day notice was not sufficient. While Defendant maintains that no actual confirmation receipt of the faxes were received from any media outlet, it appears from Sergeant Lecompte's testimony that fax confirmation sheets were included in the tact plan submitted to his supervisor, reflecting that the faxes successfully went

through to "several different media outlets." The metro court found that this factor was complied with by ruling that the checkpoint was constitutional. The district court, however, expressed that "[t]he State's failure to provide proof that the media was actually notified causes the [c]ourt some concern[.]" Nevertheless, given our conclusions in this opinion on the remaining *Betancourt* factors, we need not resolve the differing perspectives of the metro and district courts regarding whether BCSO's attempt to generate advance publicity of this checkpoint satisfies the final *Betancourt* factor. *See State v. Swain*, 2016-NMCA-024, ¶¶ 12-13, 366 P.3d 711 ("Based on our longstanding [caselaw], a lack of advance publicity, without more, is simply not sufficient to find that a DWI checkpoint constitutes an illegal seizure."); *see also Bates*, 1995-NMCA-080, ¶ 26 ("Whether or not there is advance publicity is not dispositive of the reasonableness of a DWI [checkpoint].").

D. Restrictions on the Discretion of Field Officers

{16} After the metro court found the checkpoint to be constitutional under *Betancourt*, Sergeant Perea took the stand. During voir dire by defense counsel, Sergeant Perea stated that his contact with Defendant—prior to removing Defendant from his vehicle to perform standardized FSTs—extended to somewhere between two and three minutes, included the giving of a "seated" HGN test, and "possibly" or "could have" included additional conversation. Defendant then renewed his objection to the constitutionality of the checkpoint, arguing that Sergeant Perea's testimony established that he was not limited in his discretion, as required by the second *Betancourt* factor. The metro court found that conducting the seated HGN test, as well as not doing the same with other motorists, "did widen the scope and was beyond the discretion of the stopping officer at that point," but the court ultimately concluded that the totality of the circumstances weighed against suppression of the evidence.

{17} For its part, the district court observed that a constitutionally reasonable checkpoint serves as an adequate substitute for reasonable suspicion and "can justify the stop and initial inquiry." An officer would then be permitted to expand the scope of the stop if he had reasonable and articulable suspicion of criminal activity. *State v. Leyva*, 2011-NMSC-009, ¶ 10, 149 N.M. 435, 250 P.3d 861. Importantly, this is the reasoning that undergirds the operation of sobriety checkpoints such as the one in question. Specifically, the tact plan guidelines here provided the officers with 15-30 seconds in which to observe the driver's condition and to ask about prior alcohol or drug consumption. The officer's observations, as well as the driver's answers to the initial inquiry, could then provide the officer with reasonable suspicion to support detaining the driver for additional investigation. *See id.* The district court in this case concluded that Sergeant Perea had reasonable suspicion based on his observation of Defendant and Defendant's affirmative answer to having consumed alcohol. *See State v. Walters*, 1997-NMCA-013, ¶ 26, 123 N.M. 88, 934 P.2d 282 (holding that an officer acting in a community caretaker role had reasonable suspicion to investigate further after the officer spoke to the defendant and detected the odor of alcohol).

{18} Notably, Defendant does not appear to challenge the determination that Sergeant Perea had reasonable suspicion to expand the checkpoint stop into a full-blown DWI investigation. Instead, he takes issue with the fact that Sergeant Perea had some additional conversation with him and conducted the seated HGN test instead of immediately removing him from his truck to undergo the full battery of FSTs. Thus, it appears that Defendant is arguing that Sergeant Perea's deviation from the tact plan guidelines—by not immediately removing Defendant from his vehicle—rendered the checkpoint unconstitutional. The district court agreed that the additional conversation and the abbreviated HGN test were not part of the script, but relying on *State v. Duarte*, 2007-NMCA-012, 140 N.M. 930, 149 P.3d 1027, determined that these actions did not unreasonably expand the stop, nor were they more invasive than removing Defendant from his vehicle to perform FSTs, which was the next step in the tact plan. *See id.* ¶ 39 (declining to "fix a deviation from a script of questions as a constitutional infirmity, without contemporaneous inquiry more broadly into the invasiveness and intrusion of the contact").

{19} Defendant contends that the metro court and the district court read *Duarte* too broadly. Defendant attempts to distinguish *Duarte* by stressing the "very limited scope of permitted 'initial contact' " in the present case and by stating that Sergeant Perea's "breach does not compare with the breach of procedure described in *Duarte*[] that was found 'too insubstantial to constitute constitutional harm.' " We observe, however, that in specifically addressing the issue of the constitutional propriety of departures from a pre-approved script, *Duarte* stated, "[w]hat makes this a viable issue is the unique substitution of a properly implemented [checkpoint] for the requirement of individualized suspicion." *Id.* ¶¶ 35, 38. We are cautioned by *Duarte* that it is the "elimination of the requirement for individualized suspicion" that creates the "serious concern about lack of uniformity and need for limitation of discretion." *Id.* But in *Duarte*, the deviation from the script occurred during the initial questioning of the driver and before the officer had reasonable suspicion that the driver had committed a crime. *Id.* ¶ 27. In the present case, Sergeant Perea had reasonable suspicion that Defendant was driving while intoxicated before any purported deviation from the tact plan. As such, the *Duarte* court's "fear of unrestricted discretion in questioning, and the invidious, intrusive invasion of privacy that can occur from such discretion" was not present in this case. *Id.* ¶ 38. Consequently, we conclude that the presence of reasonable suspicion following the initial contact justified further detention for additional investigation, notwithstanding Sergeant Perea's subsequent deviation from the tact plan guidelines. *Cf. State v. Villas*, 2002-NMCA-104, ¶ 10, 132 N.M. 741, 55 P.3d 437 (recognizing that "[u]nder the New Mexico Constitution, after the checkpoint stop, a police officer cannot further detain a motorist without reasonable suspicion of criminal activity"); *Brown v. Texas*, 443 U.S. 47, 51 (1979) (stating that "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, *or* that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers" (emphasis added)).

E. Other *Betancourt* Factors

{20} Finally, to the extent that Defendant is challenging the supervisory personnel factor and the length and nature of detention factor on appeal, we observe that these factors were not challenged in the metro court. Consequently, we conclude that Defendant's arguments on these factors were not preserved for appeal. *See State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (stating that "[i]n 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)).

{21} Therefore, because sufficient evidence was produced at trial to establish that the DWI checkpoint in this case substantially complied with all of the *Betancourt* factors, perhaps with the exception of advance publicity, we conclude that the metro court did not err in finding the checkpoint to be constitutional.

II. The Metro Court Abused Its Discretion by Admitting the Breath Card Into Evidence

{22} Defendant argues that his breath test results should not have been admitted for two reasons: (1) he presented evidence tending to show that the annual proficiency tests on the Intoxilyzer 8000 had not been conducted, and (2) the required twenty-minute deprivation period was not conducted prior to his breath test.

A. Proficiency Testing

{23} We observed in *State v. Hobbs*, 2016-NMCA-022, ¶ 1, 366 P.3d 304, *cert. denied*, 2016-NMCERT-002, ___ P.3d ___ that the Scientific Laboratory Division of the Department of Health (SLD) has administrative authority over blood and breath tests administered to persons suspected of driving under the influence of intoxicants. *See* NMSA 1978, § 24-1-22 (2003). Under its authority, the SLD has promulgated regulations under the New Mexico Administrative Code governing "the certification of laboratories, breath alcohol instruments, operators, key operators, and operator instructors of the breath alcohol instruments as well as establish[ing] the methods of taking and analyzing samples of blood and breath testing for alcohol or other chemical substances under the New Mexico Implied Consent Act, [NMSA 1978, § 66-8-107(B) (1993)]." 7.33.2.2 NMAC.

{24} At issue in this case is the certification of the Intoxilyzer 8000 used to measure Defendant's breath alcohol level. *See* 7.33.2.10(A) NMAC ("Any breath alcohol instrument to be used for implied consent evidential testing must be approved and certified by SLD."); *see also State v. Onsurez*, 2002-NMCA-082, ¶ 13, 132 N.M. 485, 51 P.3d 528 ("[T]he [s]tate must show that the machine used for administering a breath test has been certified by SLD.").

{25} In *State v. Martinez*, 2007-NMSC-025, ¶¶ 9, 11-12, 23, 141 N.M. 713, 160 P.3d 894, our Supreme Court held that a "threshold showing" that the instrument used to administer a breath alcohol test (BAT) was SLD-certified at the time of the test is a Rule 11-104(A) NMRA foundational requirement for admission of the BAT results into evidence. *Martinez* went on to state that this foundational requirement can be satisfied by the hearsay testimony of the officer who administered the BAT that he saw a "sticker" on the breathalyzer instrument indicating that it was SLD-certified at the time of the defendant's BAT. 2007-NMSC-025, ¶ 23. In the present case, Sergeant Perea testified in the metro court that the Intoxilyzer 8000 used to measure Defendant's breath alcohol level was certified by SLD. He testified that he observed the *Martinez* sticker reflecting that the date of Defendant's test was within the date range of the machine's certification.

{26} However, *Martinez* also held that "a defendant may be able to critically challenge an officer's foundational testimony concerning certification" based on information obtained during discovery. *Id.* ¶ 24. In this case, Defendant presented documentation obtained from SLD via subpoena indicating that SLD had no information available regarding proficiency tests conducted on the Intoxilyzer 8000 used to test Defendant's breath for the current certification year (2011-2012). Defendant also subpoenaed the proficiency testing documentation for the preceding period (2010-2011), but SLD's response did not mention or include such documentation. Defendant informed the court at trial that SLD "never responded to [the] 2010-2011 request." Therefore, we must presume none existed. Defendant used this information to challenge the officer's threshold showing that the BAT machine was certified under the SLD regulations and to argue for the inadmissibility of the breath results.

{27} The State argued in the metro court that the section of the SLD regulations dealing with proficiency testing does not set out a mandatory requirement. Instead, relying on the presence of the word "should" in the applicable section of the regulation, the State argued that failure to analyze proficiency samples does not affect the certification of the breath alcohol instrument. *See* 7.33.2.10(B)(1)(b) NMAC ("Four proficiency samples should be analyzed yearly on each such certified instrument."). The metro court agreed with the State's position. The district court affirmed, noting in a footnote that the previous version of the regulation, 7.33.2.11(G)(2) NMAC (2001), specifically stated that "[c]ertification of the breath alcohol testing instruments shall be dependent upon the following . . . Satisfactory performance on the requisite proficiency testing. Six (6) proficiency samples should be analyzed yearly on each such certified instrument." Although the proficiency test language is couched under "[c]ontinuing responsibilities" within the current version of the regulation, the district court concluded that removal of the previous mandatory language, "shall be dependent upon the following," made the proficiency tests no longer mandatory. *Compare* 7.33.2.10(B) NMAC, *with* 7.33.2.11 NMAC (2001).

{28} In *Martinez*, the Court held that the SLD regulations governing certification of a BAT machine are accuracy-ensuring. 2007-NMSC-025, ¶ 11. After listing a number of requirements for certification under the 2001 version of the regulations, including two yearly calibration tests, an annual inspection by SLD, monthly submission of records pertaining to all tests conducted on the machine, satisfactory performance of six yearly proficiency samples, and a calibration check at least every seven days and/or a 0.08 calibration check conducted on each subject, the Court held that before a BAT card is admitted into evidence, the State must make a threshold showing that the machine has been certified. *Id.* ¶¶ 11-12.

{29} In *Hobbs*, this Court—interpreting the current version of the regulation—noted that the "certification requirements for instruments are extensive." 2016-NMCA-022, ¶ 16. We observed that an instrument must obtain initial certification, that must then be renewed annually based on compliance with the 7.33.2.10. NMAC. *Hobbs*, 2016-NMCA-022, ¶ 16. We further noted that the regulation "contains numerous continuing requirements for individual instruments, including . . . annual analysis of four proficiency samples[.]" *Id.* Among the other requirements listed in the "[c]ontinuing responsibilities" section of the current version of the regulation are: submission of logbooks and records at scheduled times; calibration checks at least once every seven days or with each subject test or both; and biannual inspections of the machine at SLD. *Id.*; *see also* 7.33.2.10(B)(1). In other words, our jurisprudence permitting the admissibility of breath test results does so based upon ongoing accuracy-ensuring processes that

guard against inconsistent, varying, and erroneous results. Despite its use within 7.33.2.10(B)(1)(b), the word "should" does not precede the process for admissibility of breath test results and the requirement that they are produced by a properly certified device established in applicable caselaw. In light of our regulatory interpretation in *Hobbs* and the principle set forth in *Martinez*, we conclude that satisfactory performance on four annual proficiency tests is titled "[c]ontinuing responsibilities" for a reason and remains a mandatory accuracy-ensuring requirement for certification under the current version of the regulation.

{30} Because the metro court—based on its erroneous understanding that the proficiency tests are not mandatory under the SLD regulations—failed to consider whether Defendant sufficiently challenged the admissibility of the breath test results, it abused its discretion in admitting the results. *See State v. Favela*, 2013-NMCA-102, ¶ 16, 311 P.3d 1213 ("An abuse of discretion may . . . occur when the district court exercises its discretion based on a misunderstanding of the law." (internal quotation marks and citation omitted)). However, we do not determine as a matter of law that Defendant's challenge to the admissibility of the breath test results—through a document indicating that SLD does not have available records of the required proficiency tests for this particular machine—serves to defeat the State's threshold showing. Rather, we reverse and remand to the metro court in order for it to reach a determination that incorporates consideration of both the evidence produced by Defendant and Sergeant Perea's testimony that he observed a sticker indicating that the machine was certified by SLD on the date in question. *See State v. Willie*, 2009-NMSC-037, ¶ 12, 146 N.M. 481, 212 P.3d 369 (holding that whether a regulation relating to breath tests has been satisfied is a factual determination to be made by the trial court, that must be satisfied by a preponderance of the evidence).

B. Deprivation Period

{31} 7.33.2.15(B)(2) NMAC provides that "[b]reath [samples] shall be collected only after the certified operator or certified key operator has ascertained that the subject has not had anything to eat, drink[,] or smoke for at least twenty minutes prior to the collection of the first breath sample." In *Willie*, our Supreme Court held that the evidence was sufficient to satisfy the deprivation requirement when the defendants were restrained for nearly an hour after arrest "in such a way that it would be unlikely that they could have eaten, drunk, or smoked anything" even though they were not observed continuously. *Willie*, 2009-NMSC-037, ¶ 16.

{32} In this case, Sergeant Perea handcuffed Defendant and placed him in the BATmobile. Although Sergeant Perea left the room for a few moments to retrieve a laptop computer, he left Defendant with another officer. We agree, therefore, with the metro court and the district court that there was sufficient testimony to prove by a preponderance of the evidence that Defendant did not eat, drink, or smoke anything during that time frame and that the 20-minute deprivation period was satisfied.

III. Defendant's Conviction Was Supported by Sufficient Evidence

{33} Defendant argues that the breath test results—indicating that his breath alcohol level was 0.10/0.10, above the per se limit of 0.08—were not reliable, and consequently, the evidence presented at trial was insufficient to support his conviction. Specifically, Defendant contends that the lack of proficiency testing and the "suspect" compliance with the deprivation period combine to result in inadequately reliable BAT. In support, Defendant points to *State v. King*, 2012-NMCA-119, ¶ 16, 291 P.3d 160, where this Court recognized that "[t]he [I]ntoxilyzer reading, even though the machine has been approved by the SLD, and operated and maintained in accordance with the SLD regulations, is not conclusive evidence of the offense. Nor is it conclusive evidence of the reliability of the test results." We acknowledge that a defendant may challenge the reliability of a BAT machine's reading, and we note that Defendant has conducted such a challenge in this case, pointing to issues with verifying whether proficiency tests had been conducted and whether the twenty-minute deprivation period was complied with.

{34} On appeal, the appellate court views the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all reasonable inferences in favor of the verdict. *State v. Apodaca*, 1994-NMSC-121, ¶ 3, 118 N.M. 762, 887 P.2d 756. As stated earlier in this opinion, we have determined that the metro court did not err in concluding that the deprivation period was met. We have further observed that evidence was presented that there was documentation on this particular Intoxilyzer 8000 indicating that it was certified by SLD on the date of the tests in question. As such, we conclude that there was sufficient evidence to support Defendant's conviction for per se DWI, notwithstanding Defendant's attack on the reliability of the machine. *See State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that it is for the fact-finder (in this case, the judge) to resolve any conflict in the testimony of the witnesses and to determine where the weight and credibility lie).

CONCLUSION

{35} For the foregoing reasons, we conclude that the DWI checkpoint at which Defendant was stopped was constitutional. We further conclude that the 20-minute deprivation period was met and that the BAT results—0.10/0.10—constituted sufficient evidence to support Defendant's conviction for per se DWI. However, because the metro court admitted the breath results based on its erroneous determination that the annual proficiency tests were not required by SLD regulation, we reverse and remand to the metro court for a new trial.

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

J. MILES HANISEE, Judge

WE CONCUR:
MICHAEL E. VIGIL, Chief Judge
JONATHAN B. SUTIN, Judge

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-081

No. 33,390 (filed April 13, 2016)

ILA BETH HANCOCK,
Plaintiff-Appellant,
v.
RAY NICOLEY,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF QUAY COUNTY
ALBERT J. MITCHELL, JR, District Judge

CAREN I. FRIEDMAN
Santa Fe, New Mexico
for Appellant

DONALD SCHUTTE
SCHUTTE LAW OFFICE, LLC
Tucumcari, New Mexico
for Appellee

Opinion

Michael D. Bustamante, Judge

{1} Plaintiff Ila Beth Hancock appeals the district court's order in which it applied the doctrine of acquiescence to conclude that the boundary between her property and Ray Nicoley's property was marked by the fence line instead of the surveyed boundary because the parties had long treated the fence line as the boundary. In effect, the district court ordered the transfer of some of Hancock's property to Nicoley. We reverse and remand for further proceedings.

BACKGROUND

{2} Plaintiff Ila Beth Hancock owned two parcels of land in Quay County. The two parcels lay to the west and south of Defendant Ray Nicoley's property.[1] For ease of reference, we call Hancock's parcels "the west parcel" and "the south parcel." Hancock co-owned the south parcel with her nephew, W.A. Hancock (the nephew). The west and south parcels met at the southwest corner of Nicoley's property. Hancock permitted her cattle to cross the southwest corner of Nicoley's property to reach a windmill and well on the south parcel and had done so for "at least 65 years."

{3} In 2006, Hancock filed a complaint against Nicoley alleging that Nicoley had removed and relocated a portion of the fence between their properties at the corner such that her cattle could no longer pass from the west parcel to the south parcel. The theory of Hancock's complaint was that the previous location of the fence at the corner had become the boundary between the parties' properties by acquiescence. "The doctrine of acquiescence is principally based on an agreement, expressed or implied, of adjoining landowners, whereby they recognize or acquiesce in a certain line as the true boundary of their properties." *Stone v. Rhodes*, 1988-NMCA-024, ¶ 6, 107 N.M. 96, 752 P.2d 1112. "Generally, in order to prevail under the doctrine of acquiescence, a party must show by clear and convincing evidence that he and his neighbor recognize a physical boundary as the true dividing line of their property." *Id.* Under the doctrine, "[t]he 'boundary' is given such credence that after a certain period of time has lapsed, in the interest of peace and quiet, this dividing line is recognized as the true boundary dividing the properties." *Id.*

{4} Based on this theory, the complaint alleged that Nicoley had trespassed and encroached on Hancock's property by moving the fence[2] and that such acts had caused damages. In addition, the complaint requested an adjudication of boundaries. Finally and alternatively, Hancock requested that she either be declared the fee owner of the corner by adverse possession or granted a prescriptive easement for use of the corner.

{5} In his answer, Nicoley "agree[d] that an adjudication of the boundary together with rights of ingress and egress between the parties should be determined." He denied that Hancock had possession of the corner by adverse possession or held a prescriptive easement and denied Hancock's assertions as to the fence lines. Nicoley also counterclaimed, alleging that he held a prescriptive easement at the northeast corner of the west parcel. The counterclaim is not at issue in this appeal.

{6} At a bench trial on January 5, 2010, Hancock presented her own testimony as well as testimony by her nephew and her brother. Hancock testified that the fence that Nicoley had removed had been in the corner for "at least [sixty-five] years." Nicoley admitted a 1983 retracement survey of the parties' properties. This survey showed that the fence line between the south parcel and Nicoley's property was south of the surveyed boundary between the properties.

{7} After Hancock rested her case, Nicoley moved for dismissal of all counts except for the prescriptive easement claim. As to the claim for adjudication of boundaries, Nicoley argued specifically that the claim must be dismissed for failure to join an indispensable party, Hancock's nephew and co-owner. The district court denied the motion as to the trespass and encroachment claims, and stated that it would dismiss the adverse possession claim. It then stated that the claim for adjudication of boundaries would be dismissed because "we don't have indispensable parties because [the nephew], the co-owner of the [south parcel,] hasn't been joined." The district court reiterated after closing arguments that it would not address the boundary between the south parcel and Nicoley's property other than at the corner because the appropriate parties were not joined, stating, "What's in front of me is figuring out how you-all are going to get along on this corner." None of the dismissals were ever memorialized in writing.

{8} Hancock and Nicoley both submitted requested findings of fact and conclusions of law after the bench trial. Hancock requested findings that "[Hancock] and [Nicoley] have mutually recognized,

[1] See attachment 1.

[2] Nicoley disputed that he removed the old fence. He maintained that after the fence fell down, he replaced the old fence with a new one on the surveyed property line.

respected and honored the fences between them as boundary lines since [Nicoley] purchased his tract in 1993," and that "the . . . fence lines between the [south parcel and Nicoley's property] are the boundary fences at the locations where the fences have historically existed." She also requested a conclusion of law that "[t]he fence lines between [Hancock's] and [Nicoley's] properties are boundary lines."

{9} Nicoley requested a finding that the fence line between the south parcel and his property was "actually [five] feet south of the common [surveyed] boundary." He also requested a conclusion of law that "[Hancock] failed to show a boundary by acquiescence."

{10} Nine months after the bench trial, the district court issued a letter ruling. In the letter, the district court stated that both Hancock and Nicoley held easements across each other's property. The letter did not address the location of the boundary between the south parcel and Nicoley's property.

{11} Six months later, the district court held a status conference and stated that its final judgment would be issued within a week. At this conference, Hancock offered to provide the district court with a survey she did of her land. The judge stated he did not think the Hancock's survey would "have that much effect on the case." Another status conference was held nine months later, two years after the trial. The district court stated that the final judgment would be issued shortly thereafter. A third status conference occurred seven months later, but only Nicoley was present.

{12} A fourth status conference occurred in December 2012, nearly three years after trial. At this conference, Hancock pointed out that the fence between her south parcel and Nicoley's property was not on the surveyed property line. Hancock stated, "the other issue which was not before the court is that the [boundary between the south parcel and Nicoley's property] was off significantly from what the property line is, all the way down. And the court didn't rule on that. That's not something that we're here for." Nicoley agreed that the issue of the boundary "was an issue that really wasn't before the court" and that "[i]t was on the survey, but it wasn't an issue . . . anyone had asked the court to rule on, concerning whether or not . . . Nicoley owned that particular piece of land." The district court also appeared to agree and stated, "we [are] focusing really only on the corner," and that "if we have to take up [the fence line between the south parcel and Nicoley's property], counsel, I'll let you all talk about whether that needs to be a separate lawsuit, or whether it simply needs to be [an] amended pleading in this lawsuit." We infer from these comments by the parties and the district court that, even if the district court's dismissal of the adjudication of boundaries claim was not memorialized in writing after the bench trial, all involved agreed as late as December 2012 that the location of the boundary line between the south parcel and Nicoley's property was no longer before the court, except for as it pertained to Hancock's passage through the contested corner.

{13} This understanding is bolstered by subsequent events. Ten days after this status conference, the district court sent a letter to the parties in which it stated that Hancock had "chose[n] not to pursue" an action related to the difference between the fence line and the surveyed boundary. It also expressed concern that a new issue was being raised long after the bench trial on the merits.

> As we all know, the legal boundary between two properties can be either the survey line, the line agreed to by the parties, or the line ordered by the [c]ourt. I am greatly concerned that, frankly, years after what we all believed was the final [m]erits [h]earing, one party now wants to introduce evidence that was easily discoverable prior to the [m]erits [h]earing, and also raise additional issues that may arguably go to the merits that were already tried.

The letter concluded with an instruction to Hancock to "file an appropriate written motion with a supporting brief" if she wished to "expand the scope of litigation." Hancock did not do so.

{14} A final status conference was held in January 2013. Finally, in October 2013, just shy of four years after trial, the district court issued its final judgment. Contrary to the letter decision, the district court denied both parties' easement claims. In its findings of fact, the district court accepted Hancock's requested finding that "[Hancock] and [Nicoley] have mutually recognized, respected[,] and honored the fences between them as boundary lines since [Nicoley] purchased his tract in 1993." Although the district court also echoed Nicoley's requested finding that "the boundary fence line running east and west is actually south of the legal description," it found that "[Hancock] established by clear and convincing evidence that the fence line on the southern side of [Nicoley's] property is the legal boundary line as it is long established and recognized by long recognition of abutting owners." In a drawing attached to the final judgment, the district court noted that, from the corner to a point 200 feet east of the corner, the boundary between the properties is the "legal boundary by deed and survey." However, it also noted that from that point to the eastern edge of Hancock's property, the "[f]ence = legal boundary by acquienscence [sic]." The final judgment stated that "[Hancock's] request that the fence line at the south side of [Nicoley's property] is the legal boundary, except for on the west two hundred feet of that fence line[,] is granted." The district court also stated that "[s]ince evidence presented to the [district inec]ourt was that the fence line is south of the survey boundary, . . . [Nicoley] shall have prepared a legally sufficient survey setting forth the description of the property lying between the fence and the south boundary of the northeast quarter [of Hancock's property] within sixty days." The judgment permitted Hancock thirty days to object to the survey. Finally, the district court stated,

> As to the west two hundred feet, the parties shall each be half responsible for the cost[s] of a survey to properly locate the boundary, and to erect a fence along the west two hundred feet. At the end of the two hundred feet there should be a ninety degree jog to the existing fence line.

{15} In summary, both the parties and the district court reversed direction multiple times throughout this protracted litigation. For instance, Hancock requested the adjudication of boundaries in her complaint, testified that the fence lines were the proper boundaries by acquiescence, and requested findings of fact that the fence lines marked the boundaries of her property. Later, she argued that the location of the fence lines was not at issue except at the disputed corner and that the district court should not decide the issue. Even though she requested findings of fact that the district court adopted, she now argues that the district court erred in doing so. Similarly, Nicoley moved for dismissal of the adjudication of boundaries claim at trial and requested a conclusion of law that Hancock had failed to prove that the fence lines were the boundary by acquiescence.

On appeal, he argues that the district court's conclusion to the contrary was correct and that the district court's dismissal of the claim—at his request—was incorrect. Finally, the district court first dismissed the adjudication of boundaries claim, then accepted both Hancock's requested finding of fact and conclusion of law as to the fence lines, and ultimately decided an issue it stated repeatedly it would not decide.

DISCUSSION

{16} Hancock appeals the district court's decision as to the boundary between the south parcel and Nicoley's land. She does not appeal the district court's decisions as to the easements claimed by either party.

{17} We conclude that the final judgment must be reversed and the matter remanded for several reasons. First, the district court erred in addressing the issue of the boundary between the properties beyond what was necessary to resolve the dispute over the corner after (1) ordering the boundary adjudication claim dismissed, (2) holding a hearing in which all agreed that it was not before the court, and (3) admonishing Hancock for raising it after the bench trial and stating that her pleadings would have to be amended before the court would address it. It is true that the district court's oral dismissal of Hancock's adjudication of boundaries claim was never memorialized in writing, and that, consequently, the district court could have changed its mind as to the dismissal at any time prior to judgment. *State v. Morris*, 1961-NMSC-120, ¶ 5, 69 N.M. 89, 364 P.2d 348 ("An oral ruling by the trial judge is not a final judgment. It is merely evidence of what the court had decided to do but he can change such ruling at any time before the entry of a final judgment."); *see* Rule 1-058 NMRA (providing for entry of orders following announcement of a district court's decisions). Nevertheless, as a practical matter, the parties were at least somewhat entitled to rely on the district court's repeated assertions at the bench trial that it would not address that issue, especially when they were reinforced through subsequent explicit statements that the issue would not be decided.

{18} Second, although it apparently determined that Hancock's nephew was a necessary party, the district court did not conduct a complete analysis of joinder under Rule 1-019 NMRA. Under Rule 1-019(A), "[a] person who is subject to service of process shall be joined as a party in the action if[] (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject of the action" and resolution of the action without him "may . . . impair or impede his ability to protect that interest[.]" If the district court determines that a party should be joined under Rule 1-019(A), it should order that party to be joined. *Srader v. Verant*, 1998-NMSC-025, ¶ 19, 125 N.M. 521, 964 P.2d 82 ("If joinder is not precluded by jurisdictional barriers, joinder is normally feasible, and the court orders joinder, thus ending the issue." (footnote omitted)); *see* Rule 1-019(A)(2)(b) ("If he has not been so joined, the court *shall* order that he be made a party.") (Emphasis added.) If the party cannot be joined, the district court next examines "whether 'in equity and good conscience' that party is indispensable to the litigation. If the party is indispensable, the court dismisses the case for nonjoinder." *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 39, 132 N.M. 207, 46 P.3d 668 (citation omitted); *see* Rule 1-019(B) (noting an action should be dismissed if the absent party is indispensable).

{19} Generally, in a boundary dispute,

> [t]he owners of the adjoining lands and all persons having a direct interest in the result of a proceeding, legal or equitable, to establish boundaries are . . . necessary or indispensable parties, for otherwise they are not bound by any determination as to the location of the boundaries, and title to the land between [the] plaintiff and [the] defendant and the determination of a common boundary line cannot be established otherwise.

11 C.J.S. *Boundaries* § 195 (2016) (footnotes omitted); *see State ex rel. King v. UU Bar Ranch Ltd. P'ship*, 2009-NMSC-010, ¶¶ 48-49, 145 N.M. 769, 205 P.3d 816 (noting in dicta the "indispensable[]party doctrine" and stating that "[a]s a matter of law, it would appear incontrovertible that the boundary line between the Ranch and the state lands could not have been reestablished without, at the very least, the presence in court of the state agencies which are the trustees of those very state lands"). However, the assessment of necessity and indispensability is "heavily influenced by the facts and circumstances of each case." *Gallegos*, 2002-NMSC-012, ¶ 42 (internal quotation marks and citation omitted). Here, it would appear from the district court's oral dismissal of the adjudication of boundaries claim that it concluded that Hancock's nephew was a necessary party, that he could not be joined, and that the claim could not "in equity and good conscience" go forward without him. *Id.* ¶ 39 (internal quotation marks and citation omitted). However, there is no evidence that the district court assessed whether the nephew could be joined, or whether the suit could proceed in his absence. *See Hall v. Reynolds*, 60 So. 3d 927, 931-32 (Ala. Civ. App. 2010) (holding that where heirs shared ownership of a property they were "at least necessary parties" under Rule 19(a) and remanding to the district court to determine whether the heirs could be joined, or if the action could proceed in their absence). Under these circumstances, the district court's judgment must be reversed and the matter remanded for determination of whether the nephew may be joined. *Hall*, 60 So. 3d at 931-32.

{20} Nicoley points to several cases addressing property disputes in which the courts have held that co-tenants are not necessary parties. *See, e.g.*, *Madrid v. Borrego*, 1950-NMSC-043, ¶ 6, 54 N.M. 276, 221 P.2d 1058; *De Bergere v. Chaves*, 1908-NMSC-006, ¶ 11, 14 N.M. 352, 93 P. 762. *De Bergere* is inapposite because it depends on law predating the adoption of Rule 1-019 and does not encompass the interest-based analysis contemplated by the rule. *See Shaw v. Shaw*, 603 So. 2d 287, 293 (Miss. 1992) (stating that the parties there erred in relying on pre-rule case law and failing to analyze joinder under Rule 19 of the Mississippi Rules of Civil Procedure); *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 10, 335 P.3d 1243 (stating that New Mexico adopted the federal rules of civil procedure in 1942). Similarly, although *Madrid* was filed after the adoption of the rules, its holding depends entirely on *De Bergere* and other early cases that did not address the impact of the rules of civil procedure. *Madrid*, 1950-NMSC-043, ¶ 6. Thus, the pertinence of its analysis to assessment of joinder under Rule 1-019 is suspect. *See Shaw*, 603 So. 2d at 293 (stating that "[a]lthough [a Mississippi case] was decided subsequent to the adoption of the Mississippi Rules of Civil Procedure, its failure to consider the implications of [MRCP] Rule 19 renders the validity of its non-joinder holding questionable").

{21} Third, the final judgment includes several inconsistencies that, given the length of time between the bench trial and judgment, as well as the shifts in direction of both the litigants and the court, cause

uncertainty as to the district court's intent. For instance, Hancock's complaint arose after Nicoley erected a fence at the corner that was in a different place than the fence that had been there for "sixty-five years." As we understand it, Hancock's theory at trial was that, even if the new fence was consistent with the surveyed boundary, the old fence location at the corner had been long agreed to by the parties and thus was the legal boundary by acquiescence. Given the district court's conclusion that Hancock had prevailed in her boundary by acquiescence argument, it is not clear to us how it arrived at the conclusion that the boundary at the corner was the surveyed boundary, but the rest of the boundary was the fence line. In other words, if Hancock prevailed in her acquiescence argument, why did the district court's order reflect the opposite of what she originally requested as to the corner? Finally, since the premise of the doctrine of acquiescence is that the agreed-to boundary is given legal effect despite the boundary set out in a deed or survey, it is unclear what purpose the district court intended additional surveys to serve. *See UU Bar Ranch Ltd. P'ship*, 2009-NMSC-010, ¶ 50 (stating that "[t]he doctrine [of acquiescence,] . . . holds that where parties agree, even implicitly upon a boundary, that boundary may be established as a matter of law *even if it is not accurate according to plats, surveys or other maps*" (emphasis added)). On remand, the district court should clarify its intention as to these issues.

CONCLUSION

{22} For the foregoing reasons, we reverse the judgment as it relates to whether the fence line is the legal boundary between the south parcel and Nicoley's property and remand for further proceedings consistent with this Opinion.

{23} IT IS SO ORDERED.

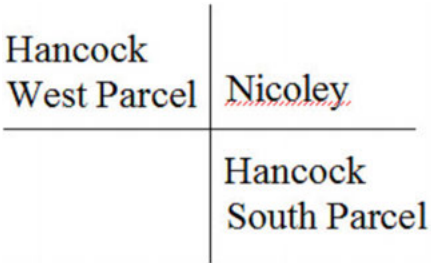
MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

J. MILES HANISEE, Judge

Attachment 1:



Certiorari Denied, September 7, 2016, No. S-1-SC-36025
Certiorari Denied, September 7, 2016, No. S-1-SC-36026

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-082

Nos. 33,280/33,279 (Consolidated) (filed July 5, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
STEVEN MAXWELL,
Defendant-Appellant,
and
MICHAEL MAXWELL,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
MARY L. MARLOWE SOMMER, District Judge

HECTOR H. BALDERAS
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TONYA NOONAN HERRING
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

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

Opinion

M. Monica Zamora, Judge

{1} Appellee's motion for rehearing is granted. The opinion filed in this case on June 20, 2016, is withdrawn and this Opinion is substituted in its place.

{2} In this consolidated appeal, Defendants Michael and Steven Maxwell were convicted of four counts each of fraud, contrary to NMSA 1978, Section 30-16-6 (2006); three counts each of securities fraud, contrary to NMSA 1978, Section 58-13B-30 (1986) (repealed 2009); and three counts each of transacting business as a broker-dealer without a license, contrary to NMSA 1978, Section 58-13B-3 (1986) (repealed 2009), under the New Mexico Securities Act of 1986, NMSA 1978, §§ 58-13B-1 to -57 (1986, as amended through 2004) (repealed 2009). Defendants challenge their convictions under the Securities Act, claiming that the convictions violate the prohibition against double jeopardy. Defendants also challenge several evidentiary rulings by the district court and argue that the evidence was insufficient to support their convictions. We affirm in part and reverse in part.

I. BACKGROUND

{3} Michael Maxwell met Robert and Carol Duncan (the Duncans) in 2006 when he began dating their granddaughter, Brianna Rotterdam. Brianna and Michael lived with the Duncans for a period of time while the two were saving up to purchase a home. Michael and his brother, Steven Maxwell (together Defendants, individually, Michael and Steven), discussed investment and business opportunities with the Duncans, and the four decided to do business together.

{4} In October 2007, the Duncans and Defendants signed articles of incorporation for an investment corporation named Ox Development, Inc. (Ox Development). The articles of incorporation reflect that the Duncans each contributed $135,000, and each was to have a 2.5 percent ownership interest in the company. Defendants were each supposed to contribute $600,000, and each would have a 47.5 percent ownership interest in the company. On October 26, 2007, Defendants helped the Duncans obtain a home equity loan on their house in the amount of $300,000. From the $300,000 loan, $30,000 went to interest on the loan. The Duncans understood that the remaining $270,000, which represented their combined contribution to Ox Development, would be saved for a real estate investment project in Santa Barbara, California.

{5} On five occasions between August 15, 2007 and May 9, 2008, the Duncans transferred funds to Defendants for investment purposes. According to the Duncans, each transfer was designated for a specific investment purpose. In total, Defendants received approximately $443,000 from the Duncans.

{6} By the end of May 2008 only $484.33 of the $448,558 transferred by the Duncans remained, and none of the investments or business opportunities presented to the Duncans had been realized. The Duncans became suspicious and reported to the Santa Fe County Sheriff's Office that they had been the victims of fraud. After an investigation, Defendants were indicted on five counts of fraud, three counts of securities fraud, three counts of transacting business as a broker-dealer without a license, two counts of selling or offering to sell unregistered securities, two counts of money laundering, one count of forgery, one count of racketeering, and one count of conspiracy to commit racketeering.

{7} Defendants' cases were consolidated prior to trial. At trial, a forensic accountant testified in detail about how the funds received from the Duncans were disbursed. The $448,558 was deposited into Defendants' own business accounts and was disbursed to Defendants in the form of checks or electronic transfers; taken out in cash withdrawals; used to pay some of Defendants' debt, rent, phone and utility bills; and spent on miscellaneous purchases including travel expenses, medical bills and purchases at stores including Dillard's, Wal-Mart, Smith's, gas stations, and convenience stores.

{8} Defendants testified that their plan was to start a development business with the Duncans and to pursue a number of investment opportunities. Defendants denied that each of the five sums of money they received from the Duncans was designated for one specific project. According to Defendants, they used the Duncans' investment to develop the company and to pursue various investment deals. Defendants testified that the Duncans understood that they would be funding the development of the business. However, Ox

Development, the joint venture between Defendants and the Duncans, was never funded. Instead, the Duncans' money was deposited into accounts owned solely by Defendants, and was not carefully managed or accounted for.

{9} The defense presented some evidence that a portion of the money was used toward investment projects with the Duncans. Michael testified that some of the money was used to purchase land in Edgewood, New Mexico, and some was used to pay a contractor who was going to begin building houses on that property. Defendants also testified that $100,000 was used to purchase e-trade accounts. However, the e-trade accounts were in Defendants' names. The rest of the money was used for developing/maintaining Defendants' business and in the pursuit of investment opportunities and business deals. Defendants were both convicted of four counts of fraud, three counts of securities fraud, and three counts of transacting business as a broker-dealer without a license. This appeal followed.

II. DISCUSSION

A. Evidentiary Issues

{10} Defendants claim that the district court erred by preventing Michael from giving testimony that would have explained his conduct and intent and from giving testimony to impeach Mr. Duncan. Defendants also argue that the district court improperly admitted propensity evidence. "We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse." *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72. "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." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted).

1. Exclusion of Testimony—Hearsay

{11} Defendants argue that the district court erred in prohibiting Michael from testifying regarding certain financial statements created by Michael showing payments made by Defendants to Mr. Duncan and introduced into evidence by the State. Defendants contend that Michael's intended testimony, that he prepared the statements at the Duncans' request, would have impeached Mr. Duncan's prior testimony that he did not know why Michael prepared the statements. The district court determined that the excluded testimony was hearsay because the testimony was being offered for the truth of the matter asserted.

{12} Rule 11-801(C) NMRA defines "hearsay" as "a statement that . . . the declarant does not make while testifying at the current trial or hearing, and . . . a party offers in evidence to prove the truth of the matter asserted in the statement." In this case, Michael attempted to testify that he prepared account statements at Mr. Duncan's request. The purposes behind the testimony were purportedly to establish why Michael prepared the statements and to impeach Mr. Duncan's testimony that he did not know why Michael prepared the statements. Defendants do not explain how Michael's reason for preparing the statements is relevant except as impeachment evidence offered to undermine Mr. Duncan's veracity—in other words, Michael did not seek to offer the testimony to prove that Mr. Duncan requested the statements, but rather to prove that he was not truthful in his testimony.

{13} Although Defendants' argument is that the testimony was *not* offered for the truth of the matter asserted, the district court understood the testimony as *being* offered for the truth of the matter asserted by the statement—i.e., that it was offered to prove that Mr. Duncan had, in fact, requested the statements or a verbal act. *See State v. Ruiz*, 2007-NMCA-014, ¶ 36, 141 N.M. 53, 150 P.3d 1003 ("[A] statement offered merely to prove that it was made, and not to prove truth, is characterized as a verbal act that is admissible irrespective of any limitations on hearsay testimony." (internal quotation marks omitted)). The district court's interpretation, that the testimony was being offered for the truth of the matter asserted does not appear to be unreasonable, untenable, or unjustified by reasons. Therefore, we conclude that it did not abuse its discretion. *See Rojo*, 1999-NMSC-001, ¶ 41; *cf. State v. Ramirez*, 1976-NMCA-101, ¶ 40, 89 N.M. 635, 556 P.2d 43 ("The [district] court is still the best judge whether evidence tendered as a public record or compiled in regular course meets the standard of trustworthiness and reliability[,] which will entitle the record to stand as evidence of issuable facts."), *holding limited on other grounds as stated in Sells v. State*, 1982-NMSC-125, ¶ 9, 98 N.M. 786, 653 P.2d 162.

{14} We believe the district court's explanation of its reasons for excluding the testimony "show[s] that it exercised its discretion and reached a result a judge reasonably might reach on the arguments and evidence. That is all we require to sustain a discretionary determination." *State v. Johnson*, 1997-NMSC-036, ¶ 40, 123 N.M. 640, 944 P.2d 869. We conclude that the district court did not abuse its discretion in excluding Michael's testimony as hearsay.

{15} Moreover, whether the statement was offered for the truth of the matter asserted or not, Defendants fail to explain how Mr. Duncan's recollection of whether he requested the account statements was relevant or would have impacted anything in the case. Even if the statement was non-hearsay, and even if Defendants had been able to prove that Mr. Duncan requested the account statement, and his prior testimony that he did not know why the statement was provided was incorrect, such a purported gap in Mr. Duncan's memory is not relevant to any element of any of the charges against Defendants. Defendants argue that the reason for Michael's proposed testimony was to show why he had prepared the statements. The reason behind the production of the account statement is also not relevant to any element of any of the charges brought against the Defendants. *See* Rule 11-401 NMRA ("Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence[.]").

{16} Defendants claim that the trial was a credibility contest between them and the Duncans. As a result, their case was adversely impacted by the absence of Michael's testimony and therefore were prejudiced by this exclusion. We disagree. Any conflicting testimony is to be resolved by the fact-finder, and the fact-finder is free to reject the defendant's version of events. *See State v. Foxen*, 2001-NMCA-061, ¶ 17, 130 N.M. 670, 29 P.3d 1071. "Error in the exclusion of evidence in a criminal trial is prejudicial and not harmless if there is a reasonable possibility that the excluded evidence might have affected the jury's verdict." *State v. Balderama*, 2004-NMSC-008, ¶ 41, 135 N.M. 329, 88 P.3d 845. Defendants are unable to show that Michael's testimony was important and critical to the case. *See Mathis v. State*, 1991-NMSC-091, ¶ 14, 112 N.M. 744, 819 P.2d 1302 (holding that "the focus in determining prejudice is on whether the missing evidence is important and critical to the case"). As discussed later, there was sufficient evidence to show that Defendants intentionally misrepresented to the

Duncans what they were doing with the Duncans' money. There is nothing in the record to convince us there is a reasonable possibility the district court's exclusion of Michael's testimony would have contributed to Defendants' convictions. We hold that Defendants were not prejudiced by the exclusion of Michael's testimony.

{17} As such, the district court's exclusion of the testimony would be, at most, harmless error. *See State v. Tollardo*, 2012-NMSC-008, ¶¶ 25-27, 43-44, 57, 275 P.3d 110 (explaining harmless error and stating that "[i]mproperly admitted evidence is not grounds for a new trial unless the error is determined to be harmful"). Accordingly, we conclude that the district court did not abuse its discretion in excluding Michael's testimony concerning the account statements. *See Sarracino*, 1998-NMSC-022, ¶ 20.

{18} Defendants also argue that the district court erred in prohibiting Michael from testifying regarding his reasoning behind keeping a certain payment secret. Defendants assert that Michael intended to testify that Mrs. Duncan requested that Michael make a $10,000 payment to her daughter without informing Mr. Duncan of the payment, in order to explain why Michael did not inform Mr. Duncan of the payment. The State objected to the testimony as hearsay, which the district court sustained.

{19} On appeal, Defendants contend that Mrs. Duncan's statement was not hearsay because the purported purpose of the testimony was to establish why Michael agreed not to tell Mr. Duncan about the secret payment. However, the proposed testimony explaining that Mrs. Duncan asked Defendant not to tell Mr. Duncan about the payment, offered to explain Michael's conduct and intent in disposing of the money without telling Mr. Duncan appears to have been offered for the truth of the matter asserted in the statement. *See* Rule 11-801(C). By Defendants' own argument, Michael was attempting to show why a payment was kept secret by introducing a statement explaining why the payment was kept secret. Defendants have not provided any explanation as to how such a statement was not offered for the truth of the matter asserted. As such, we conclude that the district court did not err in excluding the testimony as hearsay. *See id.*; *Sarracino*, 1998-NMSC-022, ¶ 20.

{20} Again, Defendants claim that because the credibility of the witnesses was an issue, Michael's testimony was required to show the inconsistency in Mrs. Duncan's testimony. Any credibility determinations are best left to the fact-finder. *See Foxen*, 2001-NMCA-061, ¶ 17. Defendants are unable to show how Michael's testimony about the $10,000 was important and critical to the case or that there was a reasonable possibility that its exclusion would have contributed to their convictions. *See Mathis*, 1991-NMSC-091, ¶ 14; *see also Balderama*, 2004-NMSC-008, ¶ 41. Again as discussed later, there was sufficient evidence to show that Defendants intentionally misrepresented to the Duncans what they were doing with the Duncans' money. We hold that Defendants were not prejudiced by the exclusion of Michael's testimony and the district court's exclusion of this testimony is harmless error. *See Tollardo*, 2012-NMSC-008, ¶¶ 25-27. Accordingly, we conclude that the district court did not abuse its discretion in excluding Michael's testimony concerning the $10,000 payment.

2. Admission of Testimony—Prejudicial Effect Versus Probative Value

{21} Defendants argue that the district court erred in allowing the State's witness, Lorie McLain, to testify about her prior business dealings with Michael because the prejudicial effect of her testimony outweighed the probative value. Again, the appellate courts "review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse." *Sarracino*, 1998-NMSC-022, ¶ 20. "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." *Rojo*, 1999-NMSC-001, ¶ 41 (internal quotation marks and citation omitted).

{22} Mr. Duncan testified that Defendants approached him about purchasing some land that was owned by Defendants' parents. Mr. Duncan agreed to fund the purchase of the property. Defendants were going to build houses on the property and they would share the profits. On August 15, 2007, Mr. Duncan gave Defendants $78,950 to purchase the investment property. Ms. Anne Layne, the State's forensic accounting expert testified that the $78,950 was used to open a new bank account in Defendants' names, and $17,500 was paid from that account to Ms. McLain. Ms. McLain then testified that she gave Michael $17,500 to help her acquire real estate, which he did not do, and that she was eventually able to get Michael to return the money to her.

{23} Defendants assert that the fact that money was transferred to Ms. McLain was already in evidence by the State's forensic accountant and that Ms. McLain's testimony only served to explain the background behind why Defendants transferred money to her. Therefore, Defendants argue the prejudicial impact of the evidence of Ms. McLain's failed business deal with Defendants outweighs the probative value of understanding why the Duncans' money was transferred to a third party rather than being invested.

{24} Rule 11-403 NMRA states that the "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Here, the probative value of the information provided by Ms. McLain was in providing an explanation as to how Defendants' transfer of the Duncans' funds to Ms. McLain was, in fact, fraudulent, because part of the funds were used to repay an unrelated, prior debt and were not invested as expected by the Duncans. Defendants have failed to show how such testimony introduced a danger of "unfair prejudice, confus[ion of] the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.* In particular, Defendants have not shown that the fact of the transfer to Ms. McLain to repay a prior debt confused any issues, misled the jury in any respect, created any undue delay, wasted any time, or needlessly presented cumulative evidence. "The purpose of Rule 11-403 is not to guard against any prejudice whatsoever, but only against the danger of *unfair* prejudice." *State v. Otto*, 2007-NMSC-012, ¶ 16, 141 N.M. 443, 157 P.3d 8 (alteration, internal quotation marks, and citation omitted). "Evidence is not unfairly prejudicial simply because it inculpates the defendant. Rather, prejudice is considered unfair when it goes only to character or propensity." *Id.* (emphasis, internal quotation marks, and citations omitted).

{25} To the extent Defendants are arguing that the testimony is unfairly prejudicial because the purported prior bad act showed conformity with an infirm character trait in violation of Rule 11-404(A)(1) NMRA, this argument is unavailing. There is a two-step process in determining whether there is an

exception to the general rule of exclusion of character or propensity evidence. *See State v. Jones*, 1995-NMCA-073, ¶ 5, 120 N.M. 185, 899 P.2d 1139. The first step is "an articulation or identification of the consequential fact to which the proffered evidence of other acts is directed[,]" and the second step involves balancing the probative value of the evidence and its prejudicial value. *Id.*

{26} Here, Ms. McLain's testimony provides an explanation regarding the expenditure of the Duncans' $78,950 investment in a manner that was not in alignment with the intended purpose. While Ms. McLain's testimony could show conformity with an infirm character trait, the testimony was not offered for that purpose. *See* Rule 11-404(A)(1), (B)(1). Rather, the testimony was offered to show how the Duncans' funds were used for a non-approved purpose—i.e., to show opportunity, plan, knowledge, or one of the other permitted uses set forth in Rule 11-404(B)(2). *See State v. Maples*, 2013-NMCA-052, ¶ 22, 300 P.3d 749 ("Behavior or acts are often behind descriptions of character, but describing acts is not the same thing as giving character evidence. In such circumstance, close attention to relevance may help resolve any potential problems." (alterations, omission, internal quotation marks, and citation omitted)); *cf. State v. Mercer*, 2005-NMCA-023, ¶ 7, 137 N.M. 36, 106 P.3d 1283 (reiterating that, in a prosecution for fraud, the state could introduce evidence of other instances of uncharged misconduct involving similar actions as relevant to the defendant's motive or intent to defraud). As to the second step, although the testimony may also show conformity with an infirm character trait, the potential for such a conclusion and the potential impact of such a conclusion is outweighed by the probative value that the explanation of the unapproved expenditure provides. *See* Rule 11-403.

{27} We conclude that Defendants have failed to show how Ms. McLain's testimony unfairly prejudiced Defendants' case, so as to rise to the level of substantially outweighing the probative value of the testimony. *See id.* Accordingly, we conclude that the district court did not abuse its discretion in admitting the testimony. *See Rojo*, 1999-NMSC-001, ¶ 48.

B. Prosecutorial Misconduct

{28} Defendants argue that the prosecutor engaged in misconduct by improperly eliciting propensity evidence from Ms. McLain and Brianna, and then referencing the propensity evidence in his closing argument. Defendants acknowledge that this argument was not preserved. Where an issue was not preserved at the district court level, this Court may nonetheless review for fundamental error or plain error. *See* Rule 12-216(B)(2) NMRA; Rule 11-103(D) NMRA. "The rule of fundamental error applies only if there has been a miscarriage of justice, if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been done." *State v. Dartez*,1998-NMCA-009, ¶ 21, 124 N.M. 455, 952 P.2d 450 (internal quotation marks and citation omitted). "Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *State v. Trujillo*, 2002-NMSC-005, ¶ 52, 131 N.M. 709, 42 P.3d 814 (internal quotation marks and citation omitted). "The rule of plain error applies to errors that affect substantial rights of the accused[.]" *Dartez*,1998-NMCA-009, ¶ 21. "Whether this Court reviews for fundamental error or plain error, it must be convinced that [the error] constituted an injustice that creates grave doubts concerning the validity of the verdict." *Id.* ¶ 22 (internal quotation marks and citation omitted).

{29} As we previously discussed, Ms. McLain's testimony was not improperly offered as propensity evidence. Thus, we cannot conclude that the prosecutor engaged in misconduct by eliciting the testimony. With regard to Brianna's testimony, Defendants argue that the prosecutor engaged in misconduct when he asked Brianna about a statement she made in a prior interview. The statement was made during an interview Brianna gave as part of the investigation into Defendants' business dealings with the Duncans. On cross examination, the prosecutor asked Brianna if she remembered being asked what Michael did for a living, and answering, "screw people." The question was asked as part of a line of questioning concerning several statements Brianna made during the interview. Defense counsel objected to Brianna's statements being read into the record without a sufficient foundation. The district court sustained the objection, on the grounds that the prosecutor was not impeaching the witness properly. The prosecutor adjusted the manner in which he asked Brianna about her statements during the interview. There were no further objections to the line of questioning.

{30} To the extent that Defendants argue that Brianna's testimony was admitted as improper character or propensity evidence, we are not persuaded. Defendants did not object to Brianna's statement on propensity grounds during the trial. Moreover, the State argues, and Defendants appear to concede that the prosecutor did not offer the statement as propensity evidence, but rather, to impeach Brianna who initially told investigators that Michael was in the business of "screw[ing] people" and then testified on his behalf at the trial. Offered for impeachment purposes, Brianna's testimony would not have been improper propensity evidence. *See State v. Lopez*, 2011-NMSC-035, ¶ 15, 150 N.M. 179, 258 P.3d 458 ("When impeaching with prior inconsistent statements not made under oath, it is the fact of the inconsistency that is admissible, not the substantive truth or falsity of the prior statement." (internal quotation marks and citation omitted)). And we cannot say that the prejudicial impact of such evidence outweighs its probative value as evidence that goes to Brianna's truthfulness or veracity.

{31} Defendants also contend that the prosecutor improperly referenced Brianna's statement during his closing argument by characterizing what happened with the Duncans as just another "screw job." Based on our review of the record, the prosecutor appropriately recounted to the jury the provisions of the Articles of Incorporation for Ox Development, referencing the disparity between the $270,000 contributed by the Duncans collectively, for a 5 percent interest, as opposed to the amount contributed by Defendants, which was supposed to be $1.2 million collectively but turned out to be zero dollars, for 95 percent interest in the company. The prosecutor argued, "to use the words of Brianna Rotterdam," the deal on its face was a "screw job." Accordingly, we conclude that no error occurred.

C. Cumulative Error

{32} Defendants argue that the exclusion of explanatory and impeachment evidence, the admission of prejudicial propensity evidence, and prosecutorial misconduct constituted cumulative error that deprived them of a fair trial. "The doctrine of cumulative error applies when multiple errors, which by themselves do not constitute reversible error, are so serious in the aggregate that they cumulatively deprive the defendant of a fair trial." *State v. Roybal*, 2002-NMSC-027, ¶ 33, 132 N.M. 657, 54 P.3d 61. Cumulative error "requires reversal of a defendant's conviction when the cumulative impact of errors[,] which

occurred at trial was so prejudicial that the defendant was deprived of a fair trial. This doctrine is to be strictly applied, and . . . cannot [be] invoke[d] if the record as a whole demonstrates that [the defendant] received a fair trial." *State v. Woodward*, 1995-NMSC-074, ¶ 59, 121 N.M. 1, 908 P.2d 231 (internal quotation marks and citation omitted), *abrogated by State v. Montoya*, 2014-NMSC-032, ¶ 15, 333 P.3d 935. Since the district court's evidentiary rulings were made within its sound discretion, we conclude that there is no cumulative error requiring reversal. *See State v. Smith*, 2016-NMSC-007, ¶ 72, 367 P.3d 420.

D. Sufficiency of the Evidence

1. Standard of Review

{33} Defendants claim that the State presented insufficient evidence to support their convictions. "In reviewing the sufficiency of the evidence, we must 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." *State v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.3d 409 (internal quotation marks and citation omitted). "In that light, the Court determines whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted). We do not "weigh the evidence and may not substitute [our] judgment for that of the fact[-]finder so long as there is sufficient evidence to support the verdict." *State v. Griffin*, 1993-NMSC-071, ¶ 17, 116 N.M. 689, 866 P.2d 1156 (internal quotation marks and citation omitted).

2. Jury Instructions

{34} Following are the jury instructions that were given, which guide our analysis except for the elements containing the dates, which we discuss in our analysis.

a. Fraud—Counts 1, 5, 8, and 9

{35} In order to find Defendants guilty of fraud in Counts 1, 5, and 8, the jury had to find that in the relevant time frame for each of the counts, Defendants, by any words and conduct, misrepresented a fact to the Duncans, intending to deceive or cheat them; because of the Duncans' reliance on Defendants' misrepresentations, Defendants obtained over $20,000; that the money belonged to someone other than Defendants; and that the money had a market value of over $20,000.

{36} In order to find Defendants guilty of fraud in Count 9 the jury had to find that, on May 9, 2008, Defendants, by any words and conduct, misrepresented a fact to the Duncans, intending to deceive or cheat them; that because of the Duncans' reliance on Defendants' misrepresentations, Defendants obtained over $2,500; that the money belonged to someone other than Defendants; and that the money had a market value of over $2,500.

b. Securities Fraud—Counts 3, 6, 10

{37} In order to find Defendants guilty of securities fraud as charged in Counts 3, 6, and 10, the jury had to find that in the relevant time frame for each of the counts, Defendants sold or offered to sell a security and that in connection with the offer or sale of the security, Defendants purposefully and directly or indirectly used a plan or scheme to deceive or cheat others.

c. Transacting Business as a Broker-Dealer Without a License—Counts 4, 7, and 11

{38} In order to find Defendants guilty of transacting business as a broker-dealer without a license, as charged in Counts 4, 7, and 11, the jury had to find that for the relevant time frame for each count, Defendants engaged in the business of effecting transactions in securities for the account of others, and that while doing so, Defendants were not licensed.

d. Definitions

{39} The jury was given the following definitions:

> A 'security' is any ownership right or right to an ownership position and includes any stock, interest in a limited liability company, investment contract, participation in any profit-sharing agreement, evidence of indebtedness and any interest or instrument commonly known as a security.
>
> 'Stock' is the ownership of a corporation represented by shares that are a claim on the corporation's earnings and assets.
>
> A 'limited liability company' or 'LLC' is an organization formed pursuant to the provisions of the New Mexico Limited Liability Company Act.
>
> An 'investment contract' means a contract: [(1) w]here an individual invests his money; [(2) i]n an undertaking or venture of two or more people or entities; [(3) w]ith an expectation of profit; [and (4) b]ased primarily on the efforts of others.

3. The Evidence at Trial

a. Transaction One

{40} Mr. Duncan testified that he had an agreement with Defendants regarding some investment property in Edgewood, New Mexico. Mr. Duncan agreed to purchase the land and Defendants agreed to have houses built on the land, and once the houses sold, Defendants and the Duncans would split the profits. Mr. Duncan testified that Defendants, together, presented this investment opportunity to him. Mrs. Duncan testified that Michael took the Duncans to see model homes that he wanted to build on the Edgewood land. On August 15, 2007, Defendants accompanied Mr. Duncan to Wells Fargo bank where he withdrew $78,950 in the form of a cashier's check.

{41} Anne Layne, the State's forensic accounting expert testified that the same day, Defendants used the cashier's check to open a new bank account in their names. The money in that account was disbursed as follows: $38,100 to Michael in the form of checks or electronic transfers; $17,500 to Lorie McLain; $10,000 in cash withdrawals; $9,650 to Steven in checks or electronic transfers; $2,712 in checks to apartment complexes for rent; $963 to various telephone companies; and $110 in bank fees. According to Ms. Layne, by the end of September 2007 the account contained $1,024.49. Between September 2007 and October 2009 when the account was closed, the account contained approximately $1,000. The Duncans never received the title to the land, and the project was never completed.

{42} In connection with this transaction, Defendants were charged and convicted of one count of fraud (Count 1). Based on the evidence presented, we conclude that a reasonable jury could conclude that between July 1, 2007 and August 15, 2007, by their words or actions, Defendants misrepresented facts to the Duncans, intending to deceive or cheat them, and that because of the Duncans' reliance on Defendants' misrepresentations, Defendants obtained more than $20,000.

b. Transaction Two

{43} In October 2007, the Duncans and Defendants signed the articles of incorporation for an investment corporation named "Ox Development, Inc." The articles of incorporation reflect that the Duncans each contributed $135,000, and each was to have a 2.5 percent ownership interest in the company. Defendants were each supposed to contribute $600,000, and each would have a 47.5 percent ownership interest in the company. On October 26, 2007, Defendants helped the Duncans obtain a

home equity loan on their house in the amount of $300,000. From the $300,000 loan, $30,000 went to interest on the loan. The Duncans understood that the remaining $270,000 would be used for a real estate investment project in Santa Barbara, California.

{44} The Duncans both testified that Defendants said they had control over some condominiums in Santa Barbara. Mr. Duncan testified that the plan was for the Duncans to partner with Defendants to demolish the existing structures and build new condominiums on the property. Mrs. Duncan testified that Defendants reviewed information with her and Mr. Duncan concerning the demographics and the housing market in Santa Barbara. According to Mrs. Duncan, Defendants were going to use the $270,000 for obtaining permits and licenses necessary to get the Santa Barbara deal going. Mrs. Duncan testified that Defendants told her and her husband that they could expect to make approximately $500,000 in profits after the condominiums were sold.

{45} On October 29, 2007, the Duncans transferred $270,000 to Defendants. However, Ox Development was never funded. The funds were deposited into an account owned solely by Defendants, and were not carefully managed or accounted for. Approximately five weeks later the account was closed with a zero balance. The funds from the account had been distributed as follows: $120,000 to Michael in the form of checks or electronic transfers; $109,000 to Steven in checks or electronic transfers; $59,178 in cash withdrawals; $30,000 to Leyba Construction; $11,042 in miscellaneous purchases from stores including Dillard's, Wal-Mart, Smith's, gas stations and convenience stores; and $1,000 to East Mountain Realty. The $270,000 was not invested in the Santa Barbara real estate project and the condominiums were never built.

{46} In connection with this transaction, Defendants were convicted of one count of securities fraud (Count 3), one count of transacting business as a broker-dealer without a license (Count 4), and one count of fraud (Count 5). As to Count 3, we conclude that a reasonable jury, based on the evidence presented, could find that between October 29, 2007 and July 1, 2008, Defendants sold or offered to sell a security and that in connection with the offer or sale of the security, Defendants purposefully used a plan or scheme to deceive or cheat the Duncans. As to Count 4, we conclude that a reasonable jury could find that between October 29, 2007 and July 1, 2008, Defendants engaged in the business of effecting transactions in securities for the account of others and that while doing so, Defendants were not licensed to do so. As to Count 5, we conclude that a reasonable jury could find that between September 15, 2007 and October 29, 2007, Defendants, by their words or actions, misrepresented facts to the Duncans, intending to deceive or cheat them, and that because of the Duncans' reliance on Defendants' misrepresentations, Defendants obtained more than $20,000.

c. Transaction Three

{47} Mr. Duncan testified that Michael convinced him that he could earn a greater return on his money if it were taken out of his savings account and invested in commodities. On January 18, 2008, Michael accompanied Mr. Duncan to the bank where Mr. Duncan withdrew all of the money in his savings account, totaling $50,257.81. The same day, $50,257.81 was deposited into an account in the name of Ox Investments, LLC (Ox Investments). Ox Investments, as opposed to Ox Development, which the Duncans purportedly invested in, was a company controlled solely by Defendants and Defendants were the only signers on that account. The account had been opened on January 16, 2008, with a one hundred dollar deposit.

{48} The money in the account was disbursed as follows: $8,000 to Michael in the form of checks or electronic transfers; $7,500 to a company called Green Lake Capital; $5,700 to Defendants' bookkeeper; $4,885 to Steven in the form of checks or electronic transfers; $4,744 in cash withdrawals; $4,351 to various telephone companies; $4,150 to Mr. Duncan; $3,221 spent at Wal-Mart; $2,971 spent at furniture stores; $2,892 for travel expenses including airfare, rental cars, and hotels; and $1,844 in miscellaneous purchases including grocery stores, gas stations, and convenience stores. Though Defendants paid the Duncans $5,850 and called it "dividends," there was no evidence that any of the $50,257.81 was invested in commodities.

{49} In connection with this transaction, Defendants were convicted of one count of securities fraud (Count 6), one count of transacting business as a broker-dealer without a license (Count 7), and one count of fraud (Count 8). As to Count 6, we conclude that a reasonable jury, based on the evidence presented, could find that between December 1, 2007 and January 18, 2008, Michael sold or offered to sell a security and that in connection with the offer or sale of the security, Michael purposefully used a plan or scheme to deceive or cheat the Duncans. As to Count 7, we conclude that a reasonable jury could find that between December 1, 2007 and January 18, 2008, Michael engaged in the business of effecting transactions in securities for the account of others and that while doing so, Michael was not licensed to do so. As to Count 8, we conclude that a reasonable jury could find that between December 1, 2007 and January 18, 2007, Michael, by words or actions, misrepresented facts to the Duncans, intending to deceive or cheat them, and that because of the Duncans' reliance on Michael's misrepresentations, Defendants obtained more than $20,000.

{50} However, we cannot say that the evidence presented, that Steven was a signer on the account into which the $50,257.81 was deposited and that Steven received $4,885 from the deposited funds, is sufficient to support a finding that Steven sold or offered to sell a security (Count 6); engaged in the business of effecting transactions in securities without a license (Count 7); or that Steven misrepresented facts to the Duncans, intending to deceive or cheat them (Count 8). As a result, we conclude that the evidence presented concerning the third transaction is not sufficient to support Steven's convictions on Counts 6, 7, and 8.

d. Transaction Four

{51} Mr. Duncan testified that Michael told him that if he agreed to loan Maloney's Tavern in Albuquerque, New Mexico $20,000, he would make $10,000 in interest in thirty days. On March 10, 2008, Mr. Duncan gave Michael a $20,000 cashier's check payable to Ox Investments. The cashier's check, signed by Steven, was deposited into Ox Investments' bank account and was distributed as follows: $2,459 covered the amount by which the account was overdrawn; $5,588 in cash withdrawals; $4,000 to legal representatives; $1,909 in miscellaneous purchases; $1,700 to Mr. Duncan; $1,643 to telephone companies; $1,500 to Steven; and $1,200 to Michael. There is no evidence that the $20,000 transferred to Defendants on March 10, 2008, was loaned to Maloney's Tavern. Mr. Duncan did not receive any money back from Defendants in connection with this transaction.

{52} In connection with this transaction, Defendants were convicted of one count of fraud (Count 9). We conclude that a reasonable jury could find that on March

10, 2008, Michael, by words or actions, misrepresented facts to Mr. Duncan; intending to deceive or cheat him, and that because of Mr. Duncan's reliance on Michael's misrepresentations, Defendants obtained more than $2,500.

{53} Based on the evidence presented, Michael was the one that had direct contact with Mr. Duncan with regard to this transaction. The evidence presented that Steven was a signer on the account into which the $20,000 was deposited, that Steven himself indorsed the $20,000 check, and that Steven received $1,500 from the deposited funds, is insufficient to support a finding that Steven misrepresented facts to Mr. Duncan, intending to deceive or cheat him. As a result, we conclude that the evidence presented concerning the fourth transaction is not sufficient to support Steven's conviction on Count 9.

e. Transaction Five

{54} Mrs. Duncan testified that she discussed her granddaughter's trust account with Michael and that Michael convinced her she could get a better return on the money if she allowed him to invest it for her. On May 9, 2008, Mrs. Duncan withdrew $19,351 out of her granddaughter's trust account. The money was deposited into the Ox Investments account. As noted earlier, when the $19,351 was deposited, the Ox Investments account was overdrawn by $83.47. The remainder of the deposit was disbursed as follows: $5,979 transferred to other accounts; $3,500 to Michael; $3,000 to Steven; $2,206 spent on miscellaneous purchases; $1,907 for medical expenses; $1,174 for utilities; $866 to telephone companies; and $718 for travel expenses. Ms. Duncan was not repaid any funds in connection with this transaction.

{55} In connection with this transaction, Defendants were convicted of one count of securities fraud (Count 10), and one count of transacting business as a broker-dealer without a license (Count 11). As to Count 10, we conclude that a reasonable jury could find that on or about May 9, 2008, Michael sold or offered to sell a security, and that in connection with the offer or sale of the security, Michael purposefully used a plan or scheme to deceive or cheat Mrs. Duncan. As to Count 11, we conclude that a reasonable jury could find that on or about May 9, 2008, Michael engaged in the business of effecting transactions in securities for the account of others and that while doing so Michael was not licensed.

{56} Again, we cannot conclude that the evidence that the $19,350 was deposited into the Ox Investments account on which Steven was a signer, and that Steven received $3,000 from the deposited funds, is sufficient to support a finding that Steven sold or offered to sell a security to Mrs. Duncan (Count 10), or that Steven engaged in the business of effecting transactions in securities without a license (Count 11). As a result, we conclude that the evidence presented concerning the fifth transaction is not sufficient to support Steven's convictions on Counts 10 and 11.

{57} To the extent that Defendants contend that their own testimony and the testimony of others could have supported a different result, "[t]he question is not whether substantial evidence would have supported an opposite result but whether such evidence supports the result reached." *State v. James*, 1989-NMCA-089, ¶ 11, 109 N.M. 278, 784 P.2d 1021; *see Griffin*, 1993-NMSC-071, ¶ 17 (stating that a reviewing court does not "weigh the evidence and may not substitute its judgment for that of the fact[-]finder so long as there is sufficient evidence to support the verdict." (internal quotation marks and citation omitted)).

E. Double Jeopardy

{58} Defendants argue that multiple convictions of securities fraud and transacting business as a broker-dealer without a license, violates the prohibition against double jeopardy. Defendants assert that Sections 58-13B-3 and -30 were not intended to punish what Defendants claim was a single course of conduct. A double jeopardy challenge is a constitutional "question of law, which we review de novo." *State v. Montoya*, 2013-NMSC-020, ¶ 22, 306 P.3d 426 (internal quotation marks and citation omitted). "Double jeopardy protects against multiple punishments for the same offense." *State v. Silvas*, 2015-NMSC-006, ¶ 8, 343 P.3d 616. Cases involving multiple punishments are classified as either double-description cases, "where the same conduct results in multiple convictions under different statutes" or unit-of-prosecution cases, "where a defendant challenges multiple convictions under the same statute." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747. Here, Defendants are challenging multiple convictions under both Sections 58-13B-3 and -30.

{59} The relevant inquiry in a unit of prosecution case "is whether the [L]egislature intended punishment for the entire course of conduct or for each discrete act." *Swafford v. State*, 1991-NMSC-043, ¶ 8, 112 N.M. 3, 810 P.2d 1223. To determine the unit of prosecution intended by the Legislature, we employ a two-part test. *See State v. Olsson*, 2014-NMSC-012, ¶ 18, 324 P.3d 1230. "First, courts must analyze the statute to determine whether the Legislature has defined the unit of prosecution and, if the statute spells out the unit of prosecution, then the court follows that language and the inquiry is complete." *Id.* If the unit of prosecution is not clear from the statute, courts must "determine whether a defendant's acts are separated by sufficient indicia of distinctness to justify multiple punishments." *State v. Gallegos*, 2011-NMSC-027, ¶ 31, 149 N.M. 704, 254 P.3d 655 (internal quotation marks and citation omitted).

1. Section 58-13B-30—Securities Fraud

{60} Defendants argue that the crime of securities fraud involves ongoing conduct for which a unit of prosecution is not strictly defined. We disagree. Section 58-13B-30 prohibits directly or indirectly "employ[ing] any device, scheme or artifice to defraud; . . . mak[ing] an untrue statement of a material fact or fail[ing] to state a necessary material fact where such an omission would be misleading; [and] . . . engag[ing] in an act, practice or course of business which operates or would operate as a fraud or deceit upon a person[, i]n connection with the offer to sell, sale, offer to purchase or purchase of *a security*[.]" (Emphasis added.) This Court has held that this "statutory language indicates a legislative intent that each offer to sell or sale of a security constitutes a separate unit of prosecution." *State v. Collins*, 2007-NMCA-106, ¶ 20, 142 N.M. 419, 166 P.3d 480.

{61} Here the securities fraud convictions stemmed from: (1) the second transaction, in which Defendants offered the Duncans an ownership interest in Ox Development in exchange for $270,000, and promised to invest their contribution in a real estate project in Santa Barbara, California; (2) the third transaction in which Michael Maxwell convinced Mr. Duncan to withdraw his entire savings in the amount of $50,257.81, to be invested in commodities; and (3) the fifth transaction in which Michael Maxwell promised to invest $19,351 from Mrs. Duncan's granddaughter's trust account so that it would yield a greater return. Each transaction constituted an offer to sell a different security. *See* § 58-13B-2(X) (defining "security" to include "a note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; any

limited partnership interest; any interest in a limited liability company; [or] investment contract"). Thus, the three convictions which stemmed from the three distinct offers to sell securities can be punished separately under Section 58-13B-30 and do not violate double jeopardy. *See Collins*, 2007-NMCA-106, ¶¶ 20-21.

2. Section 58-13B-3—Transacting Business as a Broker-Dealer Without a License

{62} With regard to transacting business as a broker-dealer without a license, Defendants argue that the plain meaning of the statutory language indicates that the Legislature intended to punish a course of conduct. Defendants argue that the language of the statute implies that a broker-dealer will transact business more than once, indicating the Legislature's intent to punish a person who transacts business but not an intent to punish that person for each transaction in which he is involved. Defendants even point to the title of the section, "Broker-dealer . . . licensing[,]" as an indication that the statute was intended to punish the unlicensed person and not an intent to punish for each unlicensed transaction.

{63} However, this Court rejected that interpretation of Section 58-13B-3. *See State v. Rivera*, 2009-NMCA-132, ¶¶ 26-30, 147 N.M. 406, 223 P.3d 951 (applying the *Herron-Barr* factors to determine whether the defendant's several acts of securities fraud and transacting business as a broker-dealer without a license were sufficiently distinct as to justify multiple punishments). Section 58-13B-3 makes it unlawful for a person to offer to sell or to sell any security in New Mexico unless: (a) the security is registered under the New Mexico Securities Act of 1986; (b) the security or transaction is exempt under that Act; or (c) the security is a federal covered security. In *Rivera*, this Court determined that the statutory language was not helpful in determining the unit of prosecution, and considered the indicia of distinctness of each transaction in order to determine whether multiple punishments were justified under the statute. 2009-NMCA-132, ¶¶ 30-33.

{64} In that case, we recognized that the purpose of the New Mexico securities laws is "to protect individuals from falling prey to unscrupulous, fraudulent securities-related practices." *Id.* ¶ 31; *see State v. Kirby*, 2003-NMCA-074, ¶¶ 23-24, 133 N.M. 782, 70 P.3d 772 (stating that the provisions of the Securities Act "are aimed at protecting investors against unfair, deceptive, and fraudulent practices in the sale of securities[,]" and that "[t]he Act was written with all encompassing strokes to protect the public, and to further the legitimate governmental purpose of protecting the public from the many means promoters may use to separate the unwary from their money" (internal quotation marks and citation omitted)). We also acknowledged that "persons who are unlicensed [may] often engage in more than one securities-related transaction, and whether they are licensed or not, such persons [may] often attempt to reach more than one investor-victim." *Rivera*, 2009-NMCA-132, ¶ 31. We concluded that "[t]he securities laws anticipate that there can be several transactions and victims." *Id.* "We see the purpose of the securities laws generally, and the purpose of the licensing of broker-dealers and the securities registration laws specifically, to protect all potential investors." *Id.*

{65} In *Rivera*, we considered the following factors in determining whether the six transactions bore sufficient indicia of distinctness to justify multiple punishments: "(1) temporal proximity of the acts; (2) location of the victim(s) during each act; (3) existence of an intervening event; (4) sequencing of acts; (5) [the] defendant's intent as evidenced by his conduct and utterances; and (6) number of victims." *Id.* ¶ 30 (internal quotation marks and citation omitted); *State v. Morro*, 1999-NMCA-118, ¶ 19, 127 N.M. 763, 987 P.2d 420 (same) (internal quotation marks and citation omitted); *see Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624; *State v. Barr*, 1999-NMCA-081, ¶ 16, 127 N.M. 504, 984 P.2d 185. In *Rivera*, we determined that, "each unlicensed transaction [was] distinct and separate in time, resulting in distinct and separate harm to different victims." 2009-NMCA-132, ¶ 32 (citing *State v. DeGraff*, 2006-NMSC-011, ¶ 33, 139 N.M. 211, 131 P.3d 61 and *Morro*, 1999-NMCA-118, ¶ 1). As a result, we concluded that the defendant's six convictions for transacting business as a broker-dealer without a license were sufficiently distinct to justify multiple punishments under Section 58-13B-3, and did not violate double jeopardy. *Rivera*, 2009-NMCA-132, ¶¶ 30-34.

{66} In the present case, the convictions under Section 58-13B-3 arose out of the same three transactions as the securities fraud convictions. In the second transaction, Defendants offered the Duncans an ownership interest in Ox Development in exchange for $270,000, and promised to invest the funds into the Santa Barbara real estate contract. In the third transaction, Michael convinced Mr. Duncan to transfer all $50,257.81 of his savings to Defendants, who would invest it in commodities. In the fifth transaction, Michael promised Mrs. Duncan that he would invest $19,351 from her granddaughter's trust account to yield a greater return. Each transaction took place on a different date. According to the Duncans, each transfer was to be used for a different investment or business opportunity. Additionally we note the distinct approach to the Duncans in each of the three transactions. For the second transaction, the Duncans were involved in planning and financing the Santa Barbara contract. Whereas the third transaction involved only Mr. Duncan and the fifth transaction involved only Mrs. Duncan.

{67} To the extent Defendants argue that their conduct is unitary because it involved a course of conduct with one set of victims, we disagree. Defendants may have fulfilled some sort of overall plan or scheme to obtain funds from the Duncans by deceiving them at different times concerning different schemes. However, this "does not somehow mesh or coagulate [their] actions into but [three] offenses by labeling an activity to carry out the scheme a course of conduct." *Rivera*, 2009-NMCA-132, ¶ 33 (internal quotation marks omitted). Thus, the double jeopardy proscription does not require the separate convictions to be merged into one for punishment purposes with respect to either Defendant's unlicensed status or the unregistered security status relating to each transaction. *See Collins*, 2007-NMCA-106, ¶¶ 21-22 (holding that the evidence supported separate convictions and punishments for sales of securities, namely, renewal notes to different victim-investors). We conclude that in this case, there are sufficient indicia of distinctness to justify punishments for each transaction under the New Mexico Securities Act. *See Rivera*, 2009-NMCA-132, ¶ 33.

III. CONCLUSION

{68} For the foregoing reasons we affirm all of Michael's convictions as well as Steven's convictions on Counts 1, 3, 4, and 5. We reverse Steven's convictions on Counts 6, 7, 8, 9, 10, and 11 for insufficient evidence.

{69} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
TIMOTHY L. GARCIA, Judge

Coming Soon: Statewide Survey of Attorneys

The State Bar of New Mexico is collaborating with the New Mexico Supreme Court Commission on Access to Justice and New Mexico Legal Aid to conduct a statewide survey of all New Mexico attorneys. The purpose of the survey is to quantify and recognize the pro bono work done by attorneys, as well as to understand the factors that encourage or discourage pro bono service. Please be on the lookout for the survey link, which will be sent electronically in January. The names of attorneys who complete the survey will be entered into a drawing for one of twenty $100 gift cards! Full participation is encouraged!

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Thank You to

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For its Generous Support of the Civil Legal Clinic!

The Second Judicial District Pro Bono Committee and the Volunteer Attorney Program would like to thank the attorneys of Sutin, Thayer & Browne for volunteering their time and expertise at the October 5, 2016 Civil Legal Clinic. The Clinic is held on the first Wednesday of every month at the Second Judicial District Courthouse in the 3rd floor conference room from 10 a.m. until 1 p.m. Twenty-one individuals received assistance at the October 5 clinic thanks to the dedication of six attorneys from Sutin, Thayer & Browne and two attorneys who assist with the clinic on a regular basis.

Sutin, Thayer & Browne:
Susan Hapka
Keith Mier
Justin Sawyer
Mariposa Padilla Sivage
Jacqueline K. Kafka
Andrew Baranowski
Jackie Ortiz

Clinic Attorneys:
Billy Burgett
Susan Page

Thank you for your help!

If you or your firm is interested in volunteering to host a clinic, please contact Aja Brooks at ajab@nmlegalaid.org or 505-814-5033.

The NMWBA extends a BIG THANK YOU to

Jennifer Bean

for graciously taking minutes at our 2016 Board meetings!

Holiday Advertising Schedule

Due to holiday closures, the following advertising submissions for the *Bar Bulletin* will apply:

Dec. 28, 2016:
Advertising submissions due Dec. 12, 2016

Jan. 4, 2017 issue:
Advertising submissions due Dec. 16, 2016

For more advertising information, contact: Marcia C. Ulibarri at 505-797-6058 or email mulibarri@nmbar.org

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Positions

Staff Attorney

Enlace Comunitario is a social justice organization located in Albuquerque. Enlace is a non-profit community based organization that provides direct services to Spanish-speaking victims of domestic violence and advocates for the rights of Latino immigrants and their children. Enlace Comunitario is seeking a full-time family law attorney. Under direction from the Legal Director, the Staff Attorney will provide legal representation in Orders of Protection Hearings, Dissolution of Marriage, Petitions to Establish Paternity, prepare legal research, give legal advice, provide legal and policy analysis of issues, develop Continuing Legal Education training and other duties as assigned. These duties may be performed for clients in Bernalillo, Sandoval or Valencia County District Courts. For a more detailed job description go to www.enlacenm.org/about/careers. If you are interested in applying, please email a cover letter, a resume and recent writing sample to jalvarado@enlacenm.org. If you have any questions, feel free to call at 505-246-8972.

Senior Trial Attorney/Deputy Trial Colfax County

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

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Walther Family Law PC is seeking an Associate Attorney for their busy family law practice. Family law experience preferred. We are looking for a highly organized professional who can work independently. Exceptional people skills are needed due to substantial client interaction. Must be able to multi-task in a fast paced environment. Excellent work environment, benefits and salary. Please provide resume and salary requirements to ninap@waltherfamilylaw.com.

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Doña Ana County is seeking an Assistant County Attorney who will perform internal counsel duties such as draft ordinances, review contracts, consult in matters of potential liability, attend public meeting and hearings on behalf of the Board of County Commissioners, County Manager, elected officials, department directors, and other appointed boards and commissions and defends and/or represents the County in limited litigation matters. The full job description and application procedures can be found at https://careers-donaanacounty.icims.com.

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Position Announcement
Assistant Federal Public Defender-Albuquerque
2017-02

The Federal Public Defender for the District of New Mexico is seeking a full time, experienced trial attorney for the main office in Albuquerque. Federal salary and benefits apply. Applicant must have three years minimum criminal law trial experience, be team-oriented, exhibit strong writing skills as well as a commitment to criminal defense for all individuals, including those who may be facing the death penalty. Spanish fluency preferred. Writing ability, federal court, and immigration law experience will be given preference. Membership in the New Mexico Bar is required within the first year of employment. The private practice of law is prohibited. Selected applicant will be subject to a background investigation. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C. 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. In one PDF document, please submit a statement of interest and detailed resume of experience, including trial and appellate work, with three references to: Stephen P. McCue, Federal Public Defender FDNM-HR@fd.org. Reference 2017-02 in the subject. Writing samples will be required only from those selected for interview. Applications must be received by Dec 23, 2016. Position will remain open until filled and is subject to the availability of funding. No phone calls please. Submissions not following this format will not be considered. Only those selected for interview will be contacted.

Chief Public Defender For State Of New Mexico

The Public Defender Commission of New Mexico is seeking an innovative, dynamic and experienced leader for the position of Chief Public Defender. The Public Defender Department was established as an independent state agency by constitutional amendment in 2012 making it independent of the Governor. The Commission provides oversight of the Public Defender Department and appoints the Chief. The Commission seeks a leader who will work with the Commission to improve the provision of legal services for indigent clients accused of crimes in New Mexico state courts. The Law Offices of the Public Defender (LOPD) provides legal representation to indigent persons pursuant to the Public Defender Act. The LOPD has 361 full-time employees, including 184 attorneys and 177 support staff. In addition, the Department also contracts with approximately 150 private attorneys to provide legal representation in conflict of interest cases and in areas of New Mexico that do not have a regional office. The headquarters of the Department is located in Santa Fe, the state capital of New Mexico, and the LOPD has regional offices in 11 cities in New Mexico. In addition to regional offices, the LOPD has four specialized units: capital crimes, mental health, habeas corpus, and appeals. District Public Defenders and Managing Attorneys manage the regional offices and the specialized units, and they report to the Chief Public Defender. The Chief Public Defender is responsible to the Public Defender Commission for the operation of the Department. It is the Chief's duty to (1) ister and carry out the provisions of the Public Defender Act, (2) exercise authority over and provide general supervision of employees of the Department, and (3) represent and advocate for the Department and its clients. The Chief interacts with members of the legislature, the legal profession, and the judiciary. The salary will be commensurate with experience and qualifications. The successful candidate must be willing to begin work on July 1, 2017. MINIMUM (STATUTORY) QUALIFICATIONS: An attorney licensed to practice law in New Mexico or who will be so licensed within one year of appointment; An attorney whose practice of law has been active for at least five years immediately preceding the date of appointment; An attorney whose practice of law has included a minimum of five years' experience in defense of persons accused of crime; An attorney who has clearly demonstrated management or executive experience. DESIRED QUALIFICATIONS: Passion and enthusiasm for representation of adults and juveniles in the criminal justice system. Experience in defending indigent criminal defendants. Capacity to inspire and lead attorneys and staff to work together in representation of indigent clients. Record of proven fiscal and managerial skills in successfully managing budgets and personnel; Demonstrated capacity for leadership and vision; Knowledge and experience with the legislative process, including the budget process; Demonstrated capacity to work effectively with the judiciary, the bar, legislators and government officials; Demonstrated understanding of the complex cultural makeup of the New Mexico indigent population, including sensitivity to its needs and ability to work with it; Experience in successfully developing innovative and creative solutions to problems; Experience and sensitivity to criminal justice issues related to the mentally ill; Knowledge of and experience and sensitivity to justice issues related to juvenile justice; Experience and sensitivity to justice issues related to substance abuse. A complete application consists of (1) a letter that expresses interest in and qualifications for the position, (2) a curriculum vitae, and (3) the names, addresses and contact information of five professional references. The New Mexico Public Defender Commission actively encourages applications from members of under-represented groups. For information regarding the confidentiality of inquiries and applications, call or write to the address listed below. Applications should be submitted by email attachment on or before January 11, 2017, to: The Public Defender Commission of New Mexico; c/o Cheryl Burbank; UNM School of Law MSC11-6070; 1 University of New Mexico; Albuquerque, NM 87131-0001; Phone: 505-277-0609; Email: burbank@law.unm.edu

Assistant Attorney General, Albuquerque
Full time
Job Reference # 00030138

The New Mexico Office of the Attorney General, Medicaid Fraud and Elder Abuse Division an Equal Employment Opportunity (EEO) employer is seeking applicants for an "At Will" (not classified) Assistant Attorney General position. An "At Will" position means any state office job or position of employment which is exempt from the service and the Personnel Act," Section 10- 9-4 NMSA 1978, the employee serves at the pleasure of the New Mexico Attorney General. You will need to submit your resume using the specifically identified Job Reference ID number on the OAG website. The following experience, qualifications and skills are preferred: 3-5 years of experience, preferably divided between both civil and criminal litigation. The ideal applicant would possess experience in complicated criminal white collar litigation, and be competent in the area of civil litigation; Experience reviewing significant volumes of discovery/documents, including medical information, billing data, financial documents, etc., preferred; Strong research and writing skills; Can be independent in handling a caseload but accept supervision; Trial experience; Team player who views a public sector law practice as an opportunity to make a positive contribution to the people of the State of New Mexico; NM bar admission is required. Salary is commensurate with experience. Resume, writing sample and three professional references must be received at the Office of the Attorney General by 5:00 p.m. on December 21, 2016. Applicants selected for an interview must notify the Attorney General's Office of the need for a reasonable accommodation due to a Disability. Please send resumes to: The Office of the Attorney General; Attn: Patricia Padrino Tucker; E-mail: ptucker@nmag.gov ; 111 Lomas Blvd. NW, Suite 300, Albuquerque, NM 87102

New Mexico Association of Counties Litigation Attorney

Non-profit local governmental association with offices in Santa Fe and Albuquerque is seeking experienced in-house litigation attorney for legal bureau in Albuquerque. Successful candidate shall have at least six years of litigation experience. Experience representing local government preferred. Will be responsible for defense of civil rights matters and for providing counsel to county members on employment and other legal issues. Some travel required. Excellent benefits package and working environment. Email resume, writing sample and references by December 23, 2016 to smayes@nmcounties.org

Attorneys Needed

PT/FT attorneys needed. Email resume ac@lightninglegal.biz

New Mexico Administrative Hearings Office, Administrative Law Judge Advanced, Las Cruces

The New Mexico Administrative Hearings Office (AHO) seeks applications for its Administrative Law Judge-A position in its Las Cruces Santa Fe Hearing Office. This hearing officer will conduct administrative license revocation hearings under the Implied Consent Act, the Motor Vehicle Code, the Tax Administration Act, the Property Tax Code, and other hearings as assigned by the Chief Hearing Officer under the Administrative Hearings Office Act. The preferred candidate will possess strong organizational, analytical, writing skills, disciplined, and reliable, as well as experience in administrative law, familiarity with criminal law and D.W.I. law concepts. Regular in-state travel is required. This classified position requires a law degree from an accredited law school and a license as an attorney by the Supreme Court of New Mexico or the qualifications to apply for a limited practice license, which requires licensure in good standing in another state and sitting for the next eligible New Mexico State Bar exam. As an AHO attorney, the applicant must be current with all tax reporting and payment requirements and have a valid driver's license. The position is pay band 80 with an hourly salary range of $21.53/hr. to $37.46/hr. ($44,782/yr. to $77,917/yr.) For more information and to submit your application please review the posting on the State Personnel website, https://www.governmentjobs.com/careers/newmexico , position number 2000 and Job #2016-04486.

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The 13th Judicial District Attorney's Office is accepting resumes for an experienced Attorney to fill the position of Senior Trial Attorney in the Valencia (Belen), Office. This position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence, as well as the ability to handle a full-time complex felony caseload. Admission to the New Mexico State Bar and a minimum of seven years as a practicing attorney are also required. Salary commensurate with experience. Send resumes to Reyna Aragon, District Office Manager, P.O. Box 1750, Bernalillo, NM 87004 or via E-mail to RAragon@da.state.nm.us Deadline for submission: Open until filled.

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Conklin, Woodcock & Ziegler, P.C., a medium-sized civil defense firm in Albuquerque, is seeking a litigation paralegal with experience in: summarizing medical documents, civil rules, document organization and management, electronic databases and software, and trial preparation. We are looking for a motivated, skilled, detail-oriented and organized individual. Will consider contract paralegals as well as those seeking full-time employment. Competitive compensation. Please email resumes to jobs@conklinfirm.com.

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The New Mexico Office of the Attorney General, Medicaid Fraud and Elder Abuse Division, an Equal Employment Opportunity (EEO) employer is seeking applicants for an "At Will" (not classified) Paralegal position. An "At Will" position means any state office job or position of employment which is exempt from the service and the Personnel Act," Section 10- 9-4 NMSA 1978, the employee serves at the pleasure of the New Mexico Attorney General. You will need to submit your resume using the specifically identified Job Reference ID number on the OAG website. Legal research, document preparation and correspondence; Experience with electronic filing in state and federal court for civil cases and with non-electronic filing for criminal cases; Practical knowledge of court rules and procedures in criminal and civil court with the ability to apply the same when filing legal documents; Experience with organizing voluminous documents and preparing discovery; Excellent grammar and writing skills; Ability to communicate and correspond with courts, outside legal counsel, and the public in a professional manner; Ability to multitask and prioritize assignments while complying with specific court mandated and internal deadlines; Knowledge and experience with calendaring legal deadlines. Salary is commensurate with experience. Resume, writing sample and three professional references must be received at the Office of the Attorney General by 5:00 p.m. on December 21, 2016. Applicants selected for an interview must notify the Attorney General's Office of the need for a reasonable accommodation due to a Disability. Please send resumes to: The Office of the Attorney General; Attn: Patricia Padrino Tucker; E-mail: ptucker@nmag.gov – 505-222-9079; 111 Lomas Blvd. NW, Suite 300, Albuquerque, NM 87102

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Walther Family Law PC is seeking an experienced paralegal for their busy family law practice. Family law experience preferred. We are looking for a highly organized professional who can work independently. Exceptional people skills are needed due to substantial client interaction. Must be able to multi-task in a fast paced environment. Excellent work environment, benefits and salary. Please provide resume to ninap@waltherfamilylaw.com.

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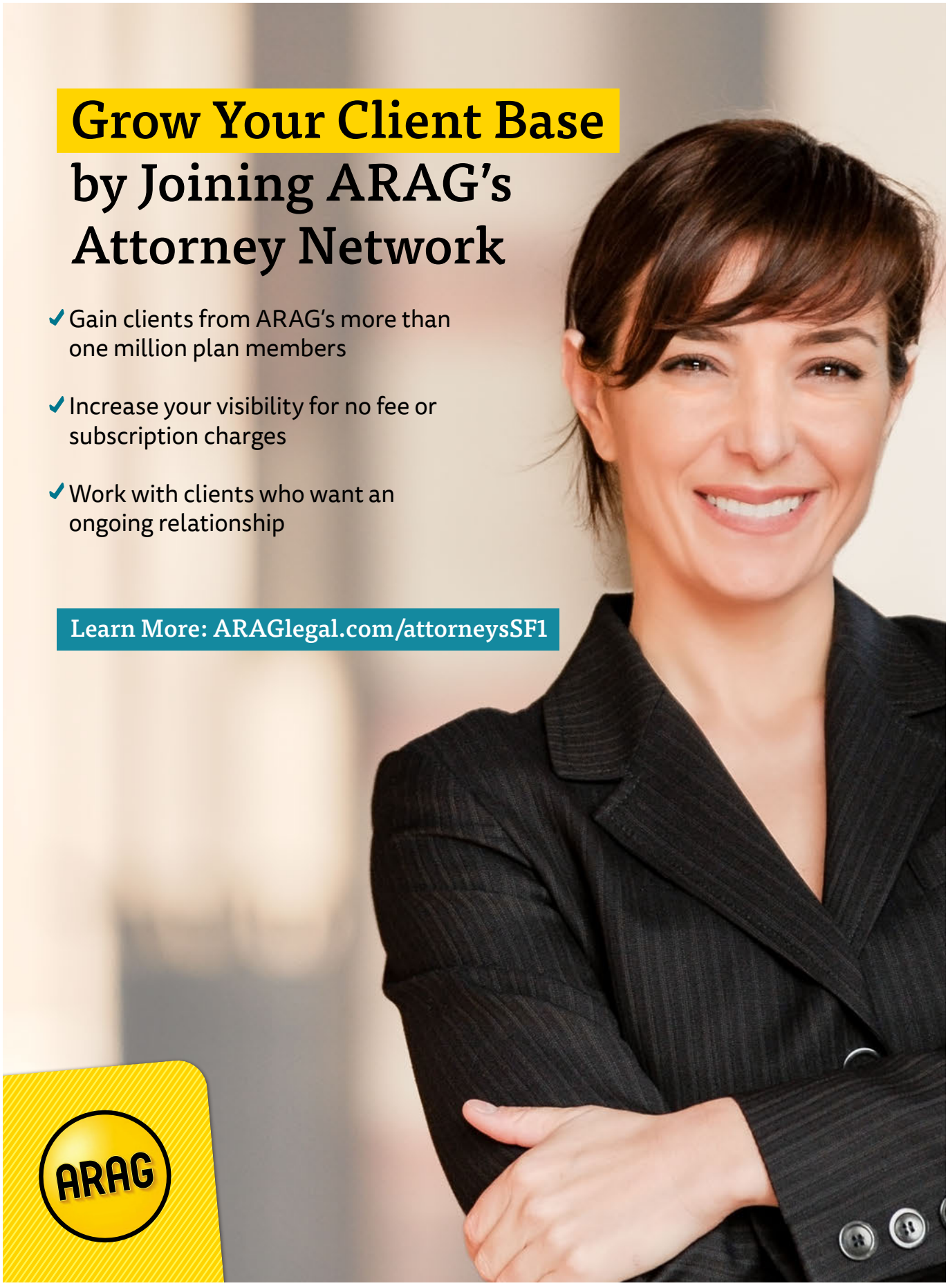
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