BAR BULLETIN

Official Publication of the State Bar of New Mexico

December 21, 2016 • Volume 55, No. 51

Hanley Cows, by Joan McMahon (see page 3)

Lea County Museum Art Gallery

Inside This Issue

The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin,* PO Box 92860, Albuquerque, NM 87199-2860.

505-797-6000 • 800-876-6227 • Fax: 505-828-3765
email: address@nmbar.org • www.nmbar.org

December 21, 2016, Vol. 55, No. 51

Table of Contents

Meetings

December

23
Immigration Law Section BOD
Noon, teleconference

27
Intellectual Property Law Section BOD
Noon, Lewis Roca Rothgerber Christie, Albuquerque

Workshops and Legal Clinics

December

21
Family Law Clinic
10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque, 1-877-266-9861

Cover Artist: Joan McMahon seeks to capture the joy she experiences in sharing her life with an extended family of animal members. Her watercolors radiate the inner light of her subject animals. McMahon decided that her artwork should "pay it forward" for the animals that inspire it. With the sales of her art McMahon donates to animal rescue and welfare organizations. More of her work can be viewed at www.joansart.com.

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.

Court of Appeals

Applicants for Vacancy

Seven applications were received in the Judicial Selection Office as of 5 p.m., Dec. 7, for the Judicial Vacancy in the New Mexico Court of Appeals due to the retirement of Hon. Roderick Kennedy effective Dec. 1. The New Mexico Court of Appeals Judicial Nominating Commission will meet at 9 a.m. on Dec. 22, at the Supreme Court Building in Santa Fe to evaluate the applicants for this position. The Commission meeting is open to the public and those who want to make a public comment should be present at the opening of the meeting. The applicants in alphabetical order are: **Kristina Bogardus**, **Henry Bohnhoff**, **Stephan French**, **Daniel Gallegos Jr.**, **Emil Kiehne**, **Kerry Kiernan** and **Jacqueline R. Medina**

Professionalism Tip

With respect to other judges:

I will be courteous, respectful and civil in my opinions.

First Judicial District Court

New Policy for Lighters and Matches

Effective Jan. 1, 2017, cigarette lighters and/or matches will not be allowed in the courthouse. They should be left in the car or they will be confiscated.

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 days from Jan. 4, 2017, to excuse Judge Leos.

13th Judicial District Court

New Clerk's Office Hours

The 13th Judicial District Court has new clerk's office hours. Beginning Jan. 3, 2017, the clerk's office in Cibola, Sandoval and Valencia counties will be open to the public from 9 a.m.-noon and 1 p.m.-5 p.m., Monday to Friday.

Bernalillo County Metropolitan Court

Notices 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 were 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.

Chief Judge Alaniz announced the mass reassignment of cases in Division III as a result of the recent election of Judge-Elect Renée Torres. Pursuant to Rule 23-109 NMRA, Chief Judge Alaniz announced that effective Dec. 30, all criminal court cases previously assigned to Judge R. John Duran will be reassigned to Judge-elect Torres. Parties who have not yet exercised a peremptory excusal, pursuant to Supreme Court Rule 7-106 NMRA, will have 10 business days from Dec. 30 to excuse Judge-elect Torres.

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.

Federal Bar Dues for the District of New Mexico

Attorney federal bar dues ($25) will be collected for calendar year 2017. Delinquent payments for prior years must still be made in order to maintain good standing. For information on making payments and checking on bar status, visit www.nmd.uscourts.gov/admissions.

State Bar News

Attorney Support Groups

- 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#.
- Jan. 16, 2017, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)

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

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.

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 informa-

continued on page 7

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. 21 for the **Jan. 4, 2016, issue**. Submit content to notices@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 9, 2016

Published Opinions

No. 34321	2nd Dist Bernalillo CR-12-3905, STATE v M GALLEGOS-DELGADO (reverse and remand)	12/7/2016

Unpublished Opinions

No. 35741	2nd Jud Dist Bernalillo CR-15-2612, STATE v B GURULE (dismiss)	12/5/2016
No. 35631	11th Jud Dist San Juan CR-15-324, STATE v K YAZZIE (affirm)	12/6/2016
No. 35394	4th Jud Dist Guadalupe CV-14-13, B MCMULLIN v E BRAVO (affirm)	12/7/2016
No. 34224	1st Jud Dist Santa Fe CV-09-1525, JP MORGAN v L BUSI (affirm)	12/7/2016
No. 35667	12th Jud Dist Otero CR-13-457, STATE v E TELLES (affirm in part, dismiss in part)	12/7/2016
No. 34223	1st Jud Dist Rio Arriba CV-11-22, BAC HOME v P WILSON (dismiss)	12/8/2016
No. 35317	12th Jud Dist Otero CR-13-431, STATE v N LATHAN (affirm)	12/8/2016
No. 35629	5th Jud Dist Lea CR-15-611, STATE v Z GONZALES (affirm)	12/8/2016

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

From the Lawyers Professional Liability and Insurance Committee

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

3. Coverage for disciplinary matters in an amount of at least $5,000 and including coverage for events occurring pre-specification of charges.

Disciplinary coverage is like automatic windows and power locks—A bell and whistle you want to get when buying legal malpractice insurance.

Most insurance companies writing legal malpractice insurance in New Mexico offer a form of *disciplinary coverage*. It is separate and different from the coverage the policy offers for defense and indemnity for legal malpractice claims and can be described as *reimbursement coverage*. It comes in different variations, but generally it is capped coverage ($2,500, $5,000, $10,000) and the insured lawyer can select his/her own lawyer to represent them, they pay their lawyer and submit the lawyer's bill and evidence of payment and the company will reimburse up to the cap under the disciplinary coverage. The defense retention or deductible seldom applies to disciplinary coverage.

It is that simple, but there are a couple caveats:

1. Most policies, whether you opt for disciplinary coverage or not, require the insured to notify the company of any disciplinary complaints, so if you are like many lawyers who think, "if I don't tell the company, my rates won't go up," think again. First, you have to report and, second, by reporting you may trigger coverage under your policy should a legal malpractice claim flow from the disciplinary complaint.

2. Disciplinary coverages can differ. Some coverages only provide reimbursement after specification of charges have been filed. In this lawyer's opinion, this is short sighted on the company's part because a large majority of complaints are dismissed before formal charges are filed. Too often, lawyers who represent themselves responding to the complaint will unwittingly turn a meritless complaint into formal charges. Undoing the damage after specification of charges are filed is often not possible.

3. A less short-sighted variation is the disciplinary coverage which provides reimbursement only if no discipline results from the complaint. More directly, if the disciplinary complaint is dismissed, the company will reimburse the insured lawyer for legal fees. In this writer's opinion, this variation is acceptable. If the disciplinary complaint has merit, the insured lawyer will probably benefit from having independent counsel. Even if the insured lawyer ends up having to pay for disciplinary representation, odds are, having counsel will probably make a bad situation better.

4. Disciplinary coverage is an *added extra* which will not increase your premium dramatically but *is* worth it.

continued from page 5

tion 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 Jan. 15, 2017

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–Thursday	9 a.m.–6 p.m.
Closure	
Dec. 23–Jan. 2, 2017	

Other News

Center for Civic Values

Gene Franchini High School Mock Trial Competition Needs Judges

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

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.

STATE BAR of NEW MEXICO

Thank you for your service!

The success of our section activity is a reflection of our volunteers' dedication and enthusiasm on an ongoing basis. Thank you for contributing your expertise, leadership and time to the State Bar of New Mexico!

Animal Law – **Guy Dicharry**
Appellate Practice – **Ed Ricco**
Bankruptcy Law – **Ed Mazel**
Business Law – **Brian Haverly**
Children's Law – **Deborah Gray**
Criminal Law – **Julpa Davé**
Elder Law- **Patricia Galindo**
Employment and Labor Law – **Victor Montoya**
Family Law – **Dorene Kuffer**
Health Law – **Jill Vogel**
Immigration Law – **Horatio Moreno-Campos**
Indian Law – **James Burson**
Intellectual Property Law – **Jeffrey Albright**
Natural Resources, Energy and Environmental Law – **Sally Paez**
Prosecutors – **Kenneth Fladager**
Public Law – **Sean Cunniff**
Real Property Trust and Estate – **LeeAnn Werbelow**
Real Property Division – **Suzannne Odom**
Trust and Estate Division – **Johanna Pickel**
Solo and Small Firm – **Daniel Tallon**
Taxation – **Bobbie Collins**
Trial Practice – **Rosa Lima**

Welcome new section leaders!

State Bar staff looks forward to working with you in 2017.

Animal Law – **Brian Smith**
Appellate Practice – **Timothy Atler**
Bankruptcy Law – **Manuel Lucero**
Business Law – **Charles Seibert**
Children's Law – **Allison Pieroni**
Criminal Law – **Jon Hill**
Elder Law- **Patricia Galindo**
Employment and Labor Law – **Marshall Ray**
Family Law – **Martha Kaser**
Health Law – **Brad Howard**
Immigration Law – **Horatio Moreno-Campos**
Indian Law – **Delilah Tenorio**
Intellectual Property Law – **Talia Kosh**
Natural Resources, Energy and Environmental Law – **Deana Bennett**
Prosecutors – **John Sugg**
Public Law– **Cydney Beadles**
Real Property Trust and Estate – **Sara Traub**
Solo and Small Firm – **Charles Gurd**
Taxation – **Bobbie Collins**
Trial Practice – **Alexia Constantaras**

For more information about practice sections visit **www.nmbar.org/sections.**

Join a State Bar Practice Section

Benefits of Membership include:

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

Join now and benefit from membership through Dec. 31, 2017.

To join visit www.nmbar.org/sections or complete the form below. Check the section(s) you wish to join.

Section	2017 Dues
❑ Animal Law	$15
❑ Appellate Practice	$15
❑ Bankruptcy Law	$25
❑ Business Law	$15
❑ Children's Law	$20
❑ Criminal Law	$20
❑ Elder Law	$15
❑ Employment and Labor Law	$20
❑ Family Law	$20
❑ Health Law	$20
❑ Immigration Law	$20

Section	2017 Dues
❑ Indian Law	$20
❑ Intellectual Property Law	$20
❑ Natural Resources, Energy and Environmental Law	$20
❑ Prosecutors	$15
❑ Public Law	$20
❑ Real Property, Trust and Estate	$15
❑ Solo and Small Firm	$15
❑ Taxation	$20
❑ Trial Practice	$10

Payment Options

❑ Check enclosed ❑ Visa ❑ Discover ❑ Master Card ❑ American Express

Credit Card # _____ Exp. Date _____ CVV# _____

Signature _____

Name _____ State Bar ID# _____

Address _____

City _____ State _____ Zip _____

Phone _____ Email _____

Mail to State Bar of New Mexico, Accounting Department, PO Box 92860, Albuquerque, NM 87199-2860

STATE BAR of NEW MEXICO

Legal Education

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

21 **Effective Use of Trial Technology (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
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 (2016)**
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 (2015)**
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 (2016 Annual Meeting)**
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 **2017 Legislative Preview**
2.0 G
Webcast/Live Seminar, Albuquerque
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

January 2017

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

26 **Drafting Special Needs Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Just Between Us: Drafting Effective Confidentiality & Non-disclosure Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

February 2017

7 **2017 Ethics Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **2017 Ethics Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Estate Planning for Digital Assets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Use of Trust Protectors in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Ethics in Billing and Collecting Fees**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

28 **Estate Planning for Retirement Assets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

March 2017

1 **Trusts and Distributions: All About Non-Pro-Rata Distributions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

2 **Management and Information Control Issues in Closely Held Companies: Strategies, Conflicts and Drafting Consideration**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Planning to Prevent Trust, Estate and Will Contests**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Lawyer Ethics and Investigations for and of Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Drafting Demand Letters**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **BDITs: Beneficiary Defective Inheritor's Trusts—Reducing Taxes, Retaining Control**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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 Withdrawal

Effective December 6, 2016:
Amy Cardwell
200 Jefferson, Suite 200
Memphis, TX 38103

Effective December 6, 2016:
Bruce Robert Kohl
201 Camino del Norte
Santa Fe, NM 87501

Effective December 6, 2016:
Hon. Bruce G. Macdonald
405 W. Congress Street, #3180
Tucson, AZ 85701

Effective December 6, 2016:
Edwin E. Macy
26 Camino a Las Estrellas
Placitas, NM 87042

Effective December 6, 2016:
Connie R. Martin Patterson
5 Kiva Court
Sandia Park, NM 87047

Clerk's Certificate of Change to Inactive Status

Effective December 1, 2016:
Ryan T. Porter
City of Roswell
PO Box 1838
415 N. Richardson Avenue (88201)
Roswell, NM 88202
575-637-6285
575-624-6820 (fax)
r.porter@roswell-nm.gov

Effective December 1, 2016:
Gbenoba Nwabueze Idah
4371 E. 49th Street
Vernon, CA 90058
gbenobaidah@gmail.com

Clerk's Certificate of Admission

On December 6, 2016, 2016:
Peter Nathaniel Martin
1103 Bishops Lodge Road
Santa Fe, NM 87501
808-280-3791
866-776-6645 (fax)
peter@mauilandlaw.com

On December 6, 2016:
Mariah McKay
DNA-People's Legal Services, Inc.
709 N. Butler Avenue
Farmington, NM 87401
505-325-8886
mmckay@dnalegalservices.org

On December 6, 2016, 2016:
Mark Rechner
Vincent Serafino Geary
Waddell Jenevein, PC
1601 Elm Street, Suite 4100
Dallas, TX 75201
214-979-7400
214-979-7402 (fax)
mrechner@vinlaw.com

On December 6, 2016, 2016:
Thomas M. Sellers
Vincent Serafino Geary
Waddell Jenevein, PC
1601 Elm Street, Suite 4100
Dallas, TX 75201
214-979-7400
214-979-7402 (fax)
tsellers@vinlaw.com

In Memoriam

As of November 24, 2016:
Marion K. Mortensen
PO Box 11103
Salt Lake City, UT 84147

As of February 10, 2016:
Paul M. Splett
PO Box 1508
Santa Fe, NM 87504

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 21, 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
14 2207	Aggravated assault on a peace officer; attempted battery with intent to commit a violent felony; essential elements
14 2209	Aggravated assault on a peace officer; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14 3106	Possession of a dangerous drug
14 4503	Driving with a blood or breath alcohol concentration of eight one hundredths (.08) or more; essential elements
14 4506	Aggravated driving with alcohol concentration of (.16) or more; essential elements
14 5120	Ignorance or mistake of fact

Rules Governing Admission to the Bar

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

Rules of Professional Conduct

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

Rules Governing Discipline

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

Rules Governing the Client Protection Fund

17A-005	Composition and officers of the commission

Rules Governing the Unauthorized Practice of Law

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

Rules Governing the Recording of Judicial Proceedings

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

Supreme Court General Rules

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

Rules Governing the New Mexico Bar

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

Recompiled and Amended Local Rules for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, and Thirteenth Judicial District Courts

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

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-083

No. 33,775 (filed July 12, 2016)

JASON B. DAMON and MICHELLE T. DAMON,
Plaintiffs-Appellants,
v.
VISTA DEL NORTE DEVELOPMENT, LLC,
Defendant-Appellee,
and
BRIAN MCGILL, JANELLE MCGILL, CARRIE TRAUB,
COLDWELL BANKER LEGACY STILLBROOKE HOMES, INC.,
STRUCSURE HOME WARRANTY, LLC,
Defendants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
NAN G. NASH, District Judge

STEVEN TAL YOUNG
TAL YOUNG, P.C.
Albuquerque, New Mexico
for Appellants

DANIEL W. LEWIS
JENNY L. JONES
ALLEN, SHEPHERD, LEWIS & SYRA, P.A.
Albuquerque, New Mexico
for Appellees

Opinion

Michael E. Vigil, Chief Judge

{1} This case comes before us after summary judgment was entered in favor of Defendant Vista del Norte Development, LLC (Vista) on the basis that the complaint brought by Jason and Michelle Damon (Plaintiffs) is barred by the ten-year statute of repose that limits liability for defective or unsafe conditions on a construction project to ten years after substantial completion of the project. NMSA 1978, § 37-1-27 (1967). We affirm.

I. BACKGROUND

{2} City law required Vista to enter into an Agreement to Construct Public Subdivision Improvements with the City of Albuquerque (the City) in order to develop a subdivision within the City to be called The Estates at Vista del Norte. The agreement was made on December 22, 2000, and it required Vista to install and complete "to the satisfaction of the City" specified infrastructure improvements in the proposed subdivision on or before March 22, 2002. The required improvements consisted of paving, sidewalk installation, waterlines, sanitary sewer lines, storm drains, dirt work, and engineering for all of the work.

{3} On May 1, 2001, Vista and Stillbrooke Homes, Inc. (Stillbrooke) entered into a purchase agreement in which Stillbrooke agreed to purchase the subdivision from Vista and build homes on the lots within the subdivision. The agreement includes Lot 17, the lot on which the house at issue in this case was built.

{4} On February 26, 2002, the City issued to Vista its Certificate of Completion and Acceptance, which certified that Vista had constructed the infrastructure improvements in compliance with the December 22, 2000, Agreement to Construct Public Subdivision Improvements. On July 25, 2003, Vista conveyed Lot 17 in the subdivision to Stillbrooke through a special warranty deed. Stillbrooke built a home on Lot 17 and sold the home to Defendants Brian and Janelle McGill in February 2004. On or about June 11, 2006, Plaintiffs purchased the home from the McGills.

{5} On December 7, 2012, Plaintiffs filed suit against several individuals and entities seeking relief in different causes of action based on their discovery, after their purchase of the home, that it "began to exhibit signs of structural failure." Pertinent to Vista, the complaint alleges that Vista developed the subdivision, and that structural engineering studies reveal that "the home suffers from improper subsurface preparation[.]" Specifically, the complaint alleges that "Vista had developed the subdivision on the site of what was once utilized as an aggregate [pit]" and that there is "documented distress to the above-grade/visible portions of the home as a result of excessive post-construction movement of the post-tensioned structural slab." In addition, the complaint alleges that "water is infiltrating the soils beneath and around the residence from surface [or] near-surface sources, causing soil settlement, and leading to the cosmetic and functionality issues such that load bearing elements such as foundations and loa[d]-bearing walls have been affected." Plaintiffs also allege that because of Vista's improper site selection, improper soil compaction, and improper surface preparation of the site, the home suffers from structural instability and ongoing settlement issues that will ultimately result in failure of the foundation and structural failure.

{6} Vista filed a motion for summary judgment contending that Plaintiffs' claims are barred by the ten-year statute of repose in Section 37-1-27. Under Section 37-1-27, the ten-year bar begins to run from the date of "substantial completion" of a physical improvement to real property. As we discuss in greater detail below, the statute describes three ways for "substantial completion" to occur, and the ten years begins to run from the date that occurs last. Vista contended that "substantial completion" occurred when it completed its work on the site and the City issued its Certificate of Completion and Acceptance to Vista on February 26, 2002. Plaintiffs' response countered that "substantial completion" occurred when the home was occupied by the McGills in 2004. The district court agreed with Vista, and because the complaint was filed on December 7, 2012, which was more than ten years after February 26, 2002, when the City issued Vista the Certificate of Completion and Acceptance, it granted summary judgment in favor of Vista on all claims made by Plaintiffs against Vista. Plaintiffs appeal.

II. DISCUSSION

A. Standard of Review and Principles of Statutory Construction

{7} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Little v. Jacobs*, 2014-NMCA-105, ¶ 6, 336 P.3d

398 (internal quotation marks and citation omitted). On appeal, "[w]e review the district court's grant of summary judgment de novo." *Brown v. Kellogg*, 2015-NMCA-006, ¶ 5, 340 P.3d 1274, *cert. denied* 2014-NMCERT-011, 339 P.3d 841.

{8} Plaintiffs' argument on appeal requires us to construe Section 37-1-27. This presents us with a question of law, which is also subject to our de novo review. *Deutsche Bank Nat. Trust Co. v. Maclaurin*, 2015-NMCA-061, ¶ 5, 350 P.3d 1201. "When construing statutes, our charge is to determine and give effect to the Legislature's intent." *Little*, 2014-NMCA-105, ¶ 7 (internal quotation marks and citation omitted). In determining legislative intent, "we look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Diamond v. Diamond*, 2012-NMSC-022, ¶ 25, 283 P.3d 260 (internal quotation marks and citation omitted). "Where the language of a statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Id.* (internal quotation marks and citation omitted). "Finally, the practical implications, as well as the statute's object and purpose are considered." *Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512, 226 P.3d 611.

B. Analysis

{9} Section 37-1-27 is a statute of repose. As such, its purpose is "to put an end to prospective liability for wrongful acts that, after the passage of a period of time, have yet to give rise to a justiciable claim." *Garcia ex rel. Garcia v. La Farge*, 1995-NMSC-019, ¶ 14, 119 N.M. 532, 893 P.2d 428. A statutory triggering event determines when the statute of repose begins to run, and the time runs "without regard to when the underlying cause of action accrues and without regard to the discovery of injury or damages." *Id.* Such a statute "terminates the right to any action after a specific time has elapsed, even though no injury has yet manifested itself." *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 50, 121 N.M. 821, 918 P.2d 1321 (discussing the medical malpractice statute of repose). Section 37-1-27 states:

> No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of a physical improvement to real property, nor any action for contribution or indemnity for damages so sustained, against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity, shall be brought after ten years from the date of substantial completion of such improvement; provided this limitation shall not apply to any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith.

Thus, the triggering event under Section 37-1-27 is the date of substantial completion of a physical improvement to real property.

{10} This statute of repose was "enacted to provide a measure of protection against claims arising years after substantial completion of construction projects." *Coleman v. United Eng'rs & Constructors, Inc.*, 1994-NMSC-074, ¶ 10, 118 N.M. 47, 878 P.2d 996 (internal quotation marks and citation omitted). The Legislature determined such protection was a necessity "in the wake of judicial decisions exposing those involved in the construction industry to greater liability." *Id.* Prior to its enactment, licensed contractors were exposed to liability when the cause of action accrued, which generally did not happen until an injury occurred. *See Little*, 2014-NMCA-105, ¶ 11. Contractors were therefore exposed to potential liability long after they surrendered control of the construction project, because an injury could occur many years after the project was completed. *See id.* The Legislature's response was to limit potential liability to ten years after substantial completion of the project. *See id.*

{11} We first determine whether Vista constructed a "physical improvement to real property" under Section 37-1-27. We have previously defined an "improvement" under Section 37-1-27 as "the enhancement or augmentation of value or quality: a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Mora-San Miguel Elec. Coop., Inc. v. Hicks & Ragland Consulting & Eng'g Co.*, 1979-NMCA-082, ¶ 4, 93 N.M. 175, 598 P.2d 218 (internal quotation marks and citation omitted). In keeping with this definition, we concluded that construction of a power line is a physical improvement that falls within the intent of Section 37-1-27, because "a given parcel of land which has electrical service available is more valuable than a comparable parcel without such service." *Id.* In *Delgadillo v. City of Socorro*, 1986-NMSC-054, ¶¶ 7- 8, 104 N.M. 476, 723 P.2d 245, our Supreme Court agreed with the definition of "improvement" we provided in *Mora-San Miguel*, and added that "[i]n applying the definition of improvement, courts also consider whether the improvement adds to the value of the property for the purpose of its intended use." *Delgadillo*, 1986-NMSC-054, ¶ 8 (relying on *Van Den Hul v. Baltic Farmers Elevator Co.*, 716 F.2d 504, 508 (8th Cir. 1983)). Our Supreme Court then held that the installation of new gas lines and routing existing gas lines to facilitate the construction of a new highway in a city was a "physical improvement to real property" because it was for the intended purpose of providing gas service, and "[a] parcel of land that has service available is more valuable than a comparable parcel without such service." *Id.* ¶¶ 8-9.

{12} In keeping with *Mora-San Miguel* and *Delgadillo*, we conclude as a matter of law that the infrastructure improvements Vista constructed to develop The Estates at Vista del Norte subdivision constitute "physical improvements to real property" under Section 37-1-27. The paving, sidewalk installation, sanitary sewer lines, storm drains, dirt work, and engineering performed by Vista improved the real estate, were permanent in nature, and required the expenditure of labor and money. Importantly, the improvements significantly enhanced the use and value of the property for its intended use as a subdivision. The land was more valuable with the infrastructure improvements constructed by Vista than it was without them.

{13} We now turn to determining when construction of these infrastructure improvements was substantially completed, because Section 37-1-27 bars a cause of action brought "after ten years from the date of substantial completion of such improvement[.]" Section 37-1-27 defines the "date of substantial completion" to mean: (1) "the date when construction is sufficiently completed so that the owner can occupy or use the improvement for the purpose for which it was intended"; (2)

"the date on which the owner does so occupy or use the improvement"; or (3) "the date established by the contractor as the date of substantial completion, whichever date occurs last."

{14} Plaintiffs argue that the date of "substantial completion" is 2004 under the second alternative, when the McGills purchased the home, because that is when the home was "occupied" and used for the purposes for which it was intended. On the other hand, Vista contends that the date of "substantial completion" is February 26, 2002, when the City issued Vista the Certificate of Completion and Acceptance under the first alternative, because that is when Vista was able to "use" the improvements for their intended purpose: sell the lots to builders.

{15} Plaintiffs' argument overlooks the fact that there may be many different "physical improvements" made to a parcel of real property by many different persons or entities. By way of example, a subdivision may require the installation of paved streets, gutters, sidewalks, curbs, water service, gas service, and electrical service, among others. Nothing about Section 37-1-27 requires that all such improvements be installed by the same person or entity or at the same time. In fact, Section 37-1-27 refers to "any person performing or furnishing the construction or the design, planning, supervision, inspection, or administration of construction of such improvement to real property," which recognizes that there may be many ways and different persons who may make a "physical improvement" to real property that falls under its protection. Here, the only "physical improvements" Vista made to the property were the infrastructure improvements. The house is a "physical improvement" that is separate and apart from the infrastructure improvements, and it is not a "physical improvement" that Vista constructed. So, when the house was "occupied" is not relevant to determining whether Section 37-1-27 bars Plaintiffs' lawsuit against Vista.

{16} Vista's argument is more persuasive. In order to develop the subdivision, Vista was legally required to enter into an agreement with the City to install and construct specified infrastructure improvements "to the satisfaction of the City." Vista entered into an agreement and made the infrastructure improvements specified in the agreement. The City subsequently certified that the work was constructed in compliance with the agreement, and accepted the work on February 26, 2002. While the record before us does not demonstrate when the infrastructure improvements specific to Lot 17 were completed, the City's certificate sets forth the latest date on which those improvements were substantially completed, because the certificate would not have been issued if those improvements had failed to comply with the City's requirements. We therefore conclude that the City's issuance of its certificate in this case is sufficient to serve as prima facie evidence of substantial completion of the infrastructure improvements. *See Rosso v. Hallmark Homes of Minneapolis, Inc.*, 843 N.W.2d 798, 802 (Minn. Ct. App. 2014) ("While a certificate of occupancy may serve as prima facie evidence of substantial completion because a certificate of occupancy would never be issued before a structure's construction were completed, it is not a necessary condition that has to occur before substantial completion of a home is achieved[.]" (emphasis omitted)). The City issued its certificate to Vista on February 26, 2002, and Plaintiffs' complaint against Vista was filed on December 7, 2012, more than ten years later. Plaintiffs' claims against Vista are therefore extinguished by Section 37-1-27. *See Cummings*, 1996-NMSC-035, ¶ 50 (explaining that a statute of repose "terminates" a cause of action upon the passage of the prescribed period of time).

{17} Although the conclusion we reach is based upon our interpretation of Section 37-1-27, in their briefing, both Plaintiffs and Vista discuss the potential application of *Jacobo v. City of Albuquerque*, 2005-NMCA-105, 138 N.M. 184, 118 P.3d 189, to the facts of this case. *Jacobo* involved interpretation of our statute of repose under circumstances in which the defendants were the builders and continuous owners of the improved property. *Id.* ¶ 12 ("[W]e hold that Section 37-1-27 does not protect owners of property who built the property against claims arising from unsafe conditions of that property[.]"). In the present case, Vista was not a continuous owner, having sold Lot 17 to Stillbrooke on July 25, 2003. *Jacobo* is thus inapplicable to this case.

III. CONCLUSION

{18} The order of the district court granting summary judgment to Vista is affirmed.

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

WE CONCUR:
JAMES J. WECHSLER, Judge
M. MONICA ZAMORA, Judge

Certiorari Denied, September 12, 2016, No. S-1-SC-36038

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-084

No. 34,033 (filed July 14, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DAVID HOWL,
Defendant-Appellant.

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

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico
ELIZABETH ASHTON
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

BENNETT J. BAUR
Chief Public Defender
KIMBERLY CHAVEZ COOK
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

James J. Wechsler, Judge

{1} Defendant David Howl was convicted in a jury trial of possession of a controlled substance, contrary to NMSA 1978, Section 30-31-23 (2011); possession of drug paraphernalia, contrary to NMSA 1978, Section 30-31-25.1(A) (2001); failure to maintain traffic lane, contrary to NMSA 1978, Section 66-7-317 (1978); and no proof of insurance, contrary to NMSA 1978, Section 66-5-229(C) (1998).

{2} Defendant argues on appeal that (1) insufficient evidence supported his convictions for possession of a controlled substance and possession of drug paraphernalia, (2) the district court's exclusion of certain testimony violated his constitutional right to present a defense, (3) evidence was improperly admitted, and (4) ineffective assistance of counsel prejudiced his defense. In its answer brief, the State argues that Defendant's failure to make a prima facie case of ineffective assistance of counsel requires that Defendant request relief in a habeas corpus proceeding.

{3} Defendant has made a prima facie case of ineffective assistance of counsel based upon his trial counsel's failure to move to suppress inculpatory evidence. Therefore, we remand for a hearing on Defendant's ineffective assistance of counsel claim and any further proceedings necessitated by the district court's determination on that issue. Because Defendant has made a prima facie case of ineffective assistance of counsel, we decline to accept the State's habeas corpus argument. In the interest of judicial economy, we also conclude that, should the result of Defendant's ineffective assistance of counsel hearing be unfavorable to him, (1) sufficient evidence supports Defendant's convictions for possession of a controlled substance and possession of drug paraphernalia and (2) neither of Defendant's evidentiary arguments requires reversal.

{4} Defendant further argues that a clerical error in the district court's amended judgment, sentence, and order determining habitual offender status (sentencing order) resulted in exposure to a longer sentence than that imposed at Defendant's sentencing hearing. We disagree and deny Defendant's request for resentencing.

BACKGROUND

{5} At approximately midnight on February 3, 2012, Defendant was driving his pickup truck east on 14th Street in Clovis, New Mexico. He was accompanied by a female passenger. At the same time, New Mexico State Police Officer Noe Alvarado was on patrol in Clovis and observed Defendant's vehicle cross the center line near the intersection of 14th Street and Hinkle Street. Officer Alvarado initiated a traffic stop and requested that Defendant provide his driver's license and vehicle information. When Defendant only produced his driver's license, Officer Alvarado requested that Defendant step out of the vehicle. Officer Alvarado and Defendant walked to the front of the patrol vehicle. Officer Alvarado conducted a warrant check, which came back negative. Officer Alvarado then walked back to Defendant's vehicle and requested that the passenger look for the insurance and registration documents for the vehicle. The passenger complied by opening the center console. When she did so, Officer Alvarado observed a glass pipe similar to those used to ingest methamphetamine. Officer Alvarado requested that the passenger exit the vehicle and, following a brief discussion, allowed her to depart. Officer Alvarado placed Defendant under arrest for possession of drug paraphernalia. Officer Alvarado then removed a pack of cigarettes from Defendant's shirt pocket. While handling the cigarettes, Officer Alvarado noticed a clear plastic bag containing a crystallized substance. Subsequent laboratory testing revealed that the substance was methamphetamine.

{6} Defendant's jury trial was conducted on March 27, 2014. Defendant's trial counsel did not file a motion to suppress the paraphernalia or drugs seized by Officer Alvarado or object to the admission of this evidence. Defendant's trial counsel instead moved for a directed verdict as to the possession of drug paraphernalia charge, arguing that the State failed to make a prima facie case that Defendant possessed the pipe. Defendant's trial counsel also argued that, because the discovery of the methamphetamine resulted from a post-arrest search, the possession of a controlled substance charge should be dismissed. The district court denied these motions.

{7} Against the advice of counsel, Defendant testified on his own behalf. In doing so, Defendant hoped to relay certain information to the jury including that (1) his passenger was in control of his cigarettes, soda, and cell phone while he was driving; (2) he submitted a clean urine sample at the Curry County Adult Detention Center after his arrest; and (3) he is physically unable to use the pipe at issue. Defendant's trial counsel initially declined to engage

Defendant in these areas based upon her belief that doing so would subject Defendant to expansive questioning by the State. While in recess and outside the presence of the jury, a discussion took place during which the district court considered Defendant's ability, under the rules of evidence, to offer additional testimony on the three topics. The district court allowed Defendant to resume his testimony but refused to allow Defendant to discuss his urinalysis results, stating, "I won't allow anything about . . . what prior convictions you've had[.]"

{8} Defendant was convicted of all charges. This appeal resulted.

INEFFECTIVE ASSISTANCE OF COUNSEL

{9} A criminal defendant's right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. *State v. Mosley*, 2014-NMCA-094, ¶ 18, 335 P.3d 244. Defendant argues that his trial counsel's failure to move to suppress the pipe and methamphetamine on the grounds that Officer Alvarado conducted an illegal search constituted ineffective assistance of counsel. We review Defendant's claim of ineffective assistance of counsel de novo. *State v. Dylan J.*, 2009-NMCA-027, ¶ 33, 145 N.M. 719, 204 P.3d 44.

{10} A defendant is entitled to an evidentiary hearing on his or her ineffective assistance claim "only when the record on appeal establishes a prima facie case of ineffective assistance of counsel." *State v. Herrera*, 2001-NMCA-073, ¶ 35, 131 N.M. 22, 33 P.3d 22. A defendant makes a prima facie case of ineffective assistance of counsel by showing "(1) that defense counsel's performance fell below the standard of a reasonably competent attorney, and (2) that due to the deficient performance, the defense was prejudiced." *Mosley*, 2014-NMCA-094, ¶ 19 (alteration, internal quotation marks, and citation omitted). We refer to the prongs of this test as "the reasonableness prong and the prejudice prong." *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 17, 130 N.M. 179, 21 P.3d 1032.

The Reasonableness Prong

{11} When a defendant's ineffective assistance of counsel claim is based upon trial counsel's failure to move to suppress evidence, he or she "must establish that the facts support the motion to suppress and that a reasonably competent attorney could not have decided that such a motion was unwarranted." *Mosley*, 2014-NMCA-094, ¶ 20 (internal quotation marks and citation omitted).

{12} Defendant argues that, once Officer Alvarado removed him from the vehicle, additional efforts to locate the insurance and registration documents within the vehicle constituted an illegal search. This legal argument requires analysis under our search and seizure jurisprudence.

{13} As discussed above, after initiating a traffic stop, Officer Alvarado requested that Defendant provide his driver's license, registration, and proof of insurance. When Defendant only provided his driver's licence, Officer Alvarado requested that Defendant exit the vehicle. After several minutes, Officer Alvarado returned to Defendant's vehicle and requested that the passenger look for the insurance and registration documents for the vehicle. The passenger then opened the center console, revealing the methamphetamine pipe inside. Defendant was not under arrest at the time when Officer Alvarado returned to Defendant's vehicle.

{14} The State argues on appeal that Officer Alvarado's conduct did not constitute a search because drivers do not have a reasonable expectation of privacy in insurance and registration documents. *See State v. Reynolds*, 1995-NMSC-008, ¶ 12, 119 N.M. 383, 890 P.2d 1315 ("[I]ndividuals have no legitimate subjective expectation of privacy in their license, registration, or insurance documents when they are operating a motor vehicle and an officer requests to see such documents."). The State's argument expands *Reynolds* beyond its intended meaning in that, regardless of a law enforcement officer's right to *request* insurance and registration documents, the owner of a vehicle has a reasonable expectation of privacy within the interior of the vehicle. *See New York v. Class*, 475 U.S. 106, 114-15 (1986) ("[A] car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police."); *State v. Van Dang*, 2005-NMSC-033, ¶ 7, 138 N.M. 408, 120 P.3d 830 ("Generally, one who owns, controls, or lawfully possesses property has a legitimate expectation of privacy."). Given this reasonable expectation of privacy, Defendant's failure to produce the insurance and registration documents for the vehicle did not entitle Officer Alvarado to search the closed center console of the vehicle for such paperwork without a warrant.

{15} In *State v. Rowell*, our Supreme Court reaffirmed New Mexico's general rule that, "absent a valid exception to the warrant requirement . . . a warrant is required for a search of an automobile under Article II, Section 10 of the New Mexico Constitution." 2008-NMSC-041, ¶ 1, 144 N.M. 371, 188 P.3d 95. These exceptions include searches incident to arrest, exigent circumstances, hot pursuit, consent, inventory searches, open field, and plain view. *State v. Weidner*, 2007-NMCA-063, ¶ 6, 141 N.M. 582, 158 P.3d 1025. The term "exigent circumstances" is defined as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." *Id.* (internal quotation marks and citation omitted). Applying the facts of the case, it is clear that exceptions for search incident to arrest, hot pursuit, consent, inventory searches, and open field are inapplicable.

{16} The State argues that exigent circumstances justified Officer Alvarado's seizure of the pipe once it came into plain view. *See Rowell*, 2008-NMSC-041, ¶ 29 (affirming "the notion that the Constitution [does not] prohibit[] the officer from choosing to secure the evidence immediately, given the realistic danger that someone might remove the car or the drug evidence in the interim"). This result does not logically follow from the facts before us.

{17} In *Rowell*, an officer conducted a traffic stop for speeding in a high school parking lot. *Id.* ¶ 2. While interacting with the defendant, the officer observed a bag of marijuana inside the defendant's shirt pocket. *Id.* The officer reached into the vehicle, removed the marijuana, and placed the defendant under arrest. *Id.* On direct appeal, this Court held that the officer's seizure of the marijuana was justified by exigent circumstances given that "the marijuana was in plain view and . . . [i]t was objectively clear that [the d]efendant could drive away with the marijuana." *State v. Rowell*, 2007-NMCA-075, ¶ 10, 141 N.M. 783, 161 P.3d 280, *overruled on other grounds by Rowell*, 2008-NMSC-041, ¶ 36. The distinguishing feature of *Rowell*, however, is that the marijuana that triggered both the seizure and the defendant's arrest was in plain view during the traffic stop.

{18} In this case, the contraband was not in plain view until Officer Alvarado requested that the passenger open the center console and look for the insurance and registration documents for the vehicle.

The plain view doctrine does not justify a seizure of contraband if the item at issue came into plain view only after an illegal search. *See State v. Warsaw*, 1998-NMCA-044, ¶ 20, 125 N.M. 8, 956 P.2d 139 ("The plain view doctrine refers to a seizure of evidence discovered during an intrusion that has a prior justification.").

{19} Nothing in the evidence indicates that Officer Alvarado believed that Defendant's passenger had authority to consent to a search of the vehicle. *See State v. Cline*, 1998-NMCA-154, ¶ 17, 126 N.M. 77, 966 P.2d 785 (holding that actual authority to consent to a search must be given by "someone who is clothed with common authority or possesses some other sufficient relationship concerning the premises in question" (internal quotation marks and citation omitted)); *see also State v. Celusniak*, 2004-NMCA-070, ¶ 20, 135 N.M. 728, 93 P.3d 10 ("Under the New Mexico Constitution, there is no doctrine of 'apparent authority' that allows a person without actual authority to consent to the search of personal or real property."). As such, Officer Alvarado's request that the passenger do so constituted a warrantless search. *See United States v. Poe*, 556 F.3d 1113, 1123 (10th Cir. 2009) ("[I]n some cases a search by a private citizen may be transformed into a governmental search implicating the Fourth Amendment if the government coerces, dominates or directs the actions of a private person conducting the search or seizure." (internal quotation marks and citation omitted)). Because no warrant exception justified the search, the evidence recovered was subject to suppression at trial.

{20} After recovering the methamphetamine pipe, Officer Alvarado placed Defendant under arrest. Officer Alvarado then discovered the methamphetamine located in Defendant's pack of cigarettes pursuant to a search incident to arrest. Accepting the above analysis as valid, the "fruit of the poisonous tree" doctrine would subject this evidence to suppression at trial. *See State v. Monteleone*, 2005-NMCA-129, ¶ 16, 138 N.M. 544, 123 P.3d 777 ("The fruit of the poisonous tree doctrine bars the admission of legally obtained evidence derived from past police illegalities." (alteration, internal quotation marks, and citation omitted)).

{21} At the close of the State's case, Defendant's trial counsel moved for directed verdicts on Defendant's possession of a controlled substance and possession of drug paraphernalia charges. Defendant's trial counsel argued generally that the case presents "a set of facts that does not lend itself to allow all of these charges to go in front of the jury[,]" and specifically that "if [the passenger] had not opened that console, we would not be here today, because that pipe wouldn't have been discovered." In the same vein, Defendant's trial counsel subsequently argued that "but for then, the discovery of that pipe, [Defendant] would not have been placed under arrest. And but for then, the discovery of that pipe, and [Defendant's] subsequent arrest, then this other item that we have before us . . . would not be in evidence in this case. There would be no case. We would not be here[.]" Given these arguments, the directed verdict motions made on Defendant's behalf appear to be nothing more than belated efforts to suppress the evidence against Defendant. As justification for her decision not to move to suppress the evidence against Defendant, Defendant's trial counsel stated "This is a situation where you don't know exactly what the testimony is going to be, and you don't know what the evidence is going to show, or the weight of it, until you actually hear the testimony at trial." We are unconvinced. *See* Rule 5-503(C) NMRA (providing for "discovery regarding any matter, not privileged, which is relevant to the offense charged" in criminal cases).

{22} A motion to suppress and a motion for a directed verdict are not functionally equivalent. *Compare* Rule 5-212(B) NMRA ("A person aggrieved by a confession, admission or other evidence may move to suppress such evidence."), *with* Rule 5-607(K) NMRA ("[O]ut of the presence of the jury, the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made[.]"). A directed verdict is appropriate if there is no legally sufficient evidentiary basis for a reasonable jury to rule in favor of the non-moving party. *See State v. Baca*, 2015-NMSC-021, ¶ 31, 352 P.3d 1151 ("A directed verdict, technically appropriate only in cases tried by a jury, requires a court to decide at the conclusion of the state's case whether the direct or circumstantial evidence admitted at trial, together with all reasonable inferences to be drawn therefrom, will sustain a finding of guilt beyond a reasonable doubt." (internal quotation marks and citation omitted)). Because Defendant's trial counsel failed to move to suppress, or even to object to the admission of, the evidence against Defendant, the admitted evidence weighs against Defendant's motion for a directed verdict. Defendant was charged with possession of drug paraphernalia and possession of methamphetamine. The admitted evidence included a methamphetamine pipe recovered from Defendant's vehicle and methamphetamine recovered from Defendant's person. This evidence is sufficient to overcome motions for directed verdicts as to either charge. *See id.* (discussing considerations in granting or denying a motion for a directed verdict).

{23} We thus believe that a reasonably competent attorney would have moved to suppress the evidence against Defendant under established principles of our search and seizure jurisprudence. *See Rowell*, 2008-NMSC-041, ¶ 1 (holding that, absent a valid exception, a warrant is required to search an automobile). A motion for a directed verdict was not a strategically viable mechanism under the circumstances, and we can discern no rationally-based reason that Defendant's trial counsel would forgo an effort to suppress the evidence at issue. Defendant has thus satisfied the reasonableness prong of our ineffective assistance of counsel analysis.

The Prejudice Prong

{24} The State does not contest the prejudicial effect of the admitted evidence on appeal. *See State v. Garnenez*, 2015-NMCA-022, ¶ 15, 344 P.3d 1054 ("We will not address arguments on appeal that were not raised in the [briefing] and have not been properly developed for review."). In the absence of argument to the contrary, we note that a trial counsel's failure to offer a meritorious motion to suppress key evidence may cause prejudice to the defendant. *Mosley*, 2014-NMCA-094, ¶ 30. In cases involving a jury finding of guilt, we consider whether "trial counsel's unreasonable performance calls into doubt the reliability of the trial results." *Patterson*, 2001-NMSC-013, ¶ 18 (internal quotation marks and citation omitted).

{25} Defendant's convictions are inextricably linked to the admission of the paraphernalia and methamphetamine into evidence. Had this evidence been suppressed, a legitimate question would exist as to whether the State could have proven the charges against Defendant beyond a reasonable doubt. *See State v. Munoz*, 1998-NMSC-041, ¶ 9, 126 N.M. 371, 970 P.2d 143 ("In a criminal prosecution the [s]tate has the burden of proving each element of the offense charged beyond a reasonable doubt." (internal quotation marks and citation omitted)); *State v. Gutierrez*,

2005-NMCA-015, ¶ 23, 136 N.M. 779, 105 P.3d 332 ("The remedy for the illegal search is suppressing all the fruits of the search, including the testimony concerning its discovery."). Defendant has thus satisfied the prejudice prong of our ineffective assistance of counsel analysis.

Habeas Corpus Proceeding

{26} The State, quoting *Herrera*, argues that the proper mechanism for Defendant to pursue his ineffective assistance of counsel claim is through habeas corpus proceedings. 2001-NMCA-073, ¶ 37 ("When the record on appeal does not establish a prima facie case of ineffective assistance of counsel, this Court has expressed its preference for resolution of the issue in habeas corpus proceedings over remand for an evidentiary hearing."). The purpose of habeas corpus proceedings is "to protect a person from being erroneously deprived of his or her rights." *Campos v. Bravo*, 2007-NMSC-021, ¶ 5, 141 N.M. 801, 161 P.3d 846. However, when, as here, the record is sufficient to establish a prima facie case of ineffective assistance of counsel, the appropriate remedy is a remand to the district court for an evidentiary hearing on the defendant's claim. *See, e.g.*, *Mosley*, 2014-NMCA-094, ¶ 2 (holding that the defendant made a prima facie case of ineffective assistance of counsel and remanding for additional proceedings).

ADDITIONAL ISSUES

{27} As noted above, our analyses of Defendant's arguments related to the sufficiency of the evidence and evidentiary rulings are applicable only upon a determination by the district court that Defendant did not, as a matter of law, receive ineffective assistance in this matter.

Sufficiency of the Evidence

{28} Defendant argues that the State failed to prove possession of a controlled substance or drug paraphernalia as required under Section 30-31-23 and Section 30-31-25.1 respectively. Defendant's argument lacks legal support given the facts of his case.

{29} In reviewing the sufficiency of the evidence to support a conviction, our appellate courts "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. Our analysis on appeal considers all the evidence admitted by the district court. *State v. Post*, 1989-NMCA-090, ¶ 22, 109 N.M. 177, 783 P.2d 487.

{30} Defendant was subject to conviction under Section 30-31-23 upon proof beyond a reasonable doubt that (1) Defendant possessed methamphetamine and (2) Defendant knew the substance was methamphetamine. UJI 14-3102 NMRA. Officer Alvarado discovered methamphetamine in a pack of cigarettes removed from Defendant's shirt pocket. Defendant testified that, just prior to exiting the vehicle, his passenger handed him the pack of cigarettes, which he accepted without inspection. While Defendant's testimony could support an acquittal, it "does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

{31} Defendant was subject to conviction under Section 30-31-25.1(A) upon proof beyond a reasonable doubt that (1) Defendant possessed a pipe and (2) the pipe was used, or intended to be used, to ingest methamphetamine. *See State v. Lopez*, 2009-NMCA-127, ¶ 33, 147 N.M. 364, 223 P.3d 361 (describing the elements associated with the crime of possession of drug paraphernalia). Constructive possession is sufficient to support a conviction. *See State v. Phillips*, 2000-NMCA-028, ¶ 8, 128 N.M. 777, 999 P.2d 421 ("Constructive possession exists when the accused has knowledge of drugs or paraphernalia and exercises control over them."). However, "the mere presence of the contraband is not enough to support an inference of constructive possession" if the accused did not have exclusive control over the area searched. *Id.* When exclusive control is at issue, additional circumstances, including the conduct of the accused, are required. *Id.* Officer Alvarado removed Defendant from the vehicle but allowed his passenger to remain. Under these circumstances, Defendant did not have exclusive control over the area where the paraphernalia was discovered. Nevertheless, Defendant was the owner of the vehicle and methamphetamine was discovered on his person. *See State v. Lopez*, 2009-NMCA-044, ¶ 27, 146 N.M. 98, 206 P.3d 1003 (holding that ownership of a vehicle can provide a link between the owner and contraband discovered within); *State v. Garcia*, 2005-NMSC-017, ¶¶ 15-22, 138 N.M. 1, 116 P.3d 72 (holding that constructive possession of a firearm discovered in a vehicle was established when the defendant was sitting on an ammunition clip that fit the firearm). From these two additional circumstances, a reasonable jury could infer that Defendant had knowledge of and control over the drug paraphernalia discovered in his vehicle. Sufficient evidence supports Defendant's convictions under Section 30-31-23 and Section 30-31-25.1(A).

Defendant's Evidentiary Arguments

A. Exclusion of Defendant's Proposed Testimony

{32} Defendant alleges that, in accordance with the terms of his probation, he submitted a urine sample after his arrival at the Curry County Adult Detention Center. Defendant further alleges that this sample was negative for controlled substances. On appeal, Defendant argues that testimony related to his negative urinalysis results could create a reasonable doubt as to his possession of drugs or drug paraphernalia and that the district court's exclusion of this testimony violated his constitutional right to present a defense. *See March v. State*, 1987-NMSC-020, ¶ 11, 105 N.M. 453, 734 P.2d 231 (holding that a defendant's right to a fair trial includes the right to prepare and present a defense). It appears that the district court's ruling was predicated upon its application of Rule 11-404(B)(1) NMRA. We do not discuss the appropriateness of this ruling. Rather, we uphold the district court's ruling if it is right for any reason. *See State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692, 181 P.3d 684 ("Under the right for any reason doctrine, we may affirm the district court's order on grounds not relied upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below." (internal quotation marks and citation omitted)).

{33} The State argues that the "right for any reason" doctrine applies because Defendant's proposed testimony related to his urinalysis results is subject to the rule against hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Rule 11-801(C) NMRA. "An out-of-court statement is inadmissible unless it is specifically excluded as non-hearsay under Rule 11-801(D) or falls within a recognized exception in the rules of evidence, or is otherwise made admissible by rule or statute." *State v. McClaugherty*, 2003-NMSC-006, ¶ 17, 133 N.M. 459, 64 P.3d 486 (citation omitted), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110. The State asserts that Defendant's proposed testimony violated the rule against hearsay because (1) Defendant's awareness of his test results originated with an out-of-court statement

and (2) the statement was intended to prove the truth of the matter asserted—that he tested negative for controlled substances following his arrest.

{34} In his reply brief, Defendant does not argue that any hearsay exception permits the admission of his proposed testimony. *See* Rule 11-803 NMRA (describing types of statements that are exceptions to the rule against hearsay). Nor does Defendant argue that his proposed testimony constitutes non-hearsay. *See* Rule 11-801(D) (describing types of statements that are not hearsay). Instead, Defendant argues that our application of the "right for any reason" doctrine would be unfair because the district court's determination foreclosed all opportunity for Defendant to properly introduce his urinalysis results. *See Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 ("This Court may affirm a district court ruling on a ground not relied upon by the district court, but will not do so if reliance on the new ground would be unfair to appellant." (alteration, internal quotation marks, and citation omitted)). Defendant's right to prepare and present a defense is nevertheless limited by the rules of evidence. *See State v. Rosales*, 2004-NMSC-022, ¶ 7, 136 N.M. 25, 94 P.3d 768 ("[A] defendant's interest in presenting evidence may at times bow to accommodate other legitimate interests in the criminal trial process. Specifically, state rules of evidence do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." (internal quotation marks and citations omitted)).

{35} During the discussion that resulted in the district court's exclusion of Defendant's proposed testimony, Defendant made several statements to the effect that the jury *needed to hear* about his urinalysis results.[1] No mention was made of any supporting documents or witnesses through which to admit Defendant's proposed testimony in a manner consistent with the rules of evidence. Given that the record clearly indicates Defendant's intention to *orally testify* that (1) he underwent urinalysis after his arrest and (2) the results were negative for controlled substances, our application of a hearsay analysis is not unfair to Defendant. We therefore uphold the district court's exclusion of Defendant's proposed testimony under Rule 11-801(C).

B. Improper Admission of Laboratory Results

{36} Defendant also argues on appeal that the district court improperly admitted laboratory results at trial. But Defendant failed to object to this admission at trial, and he does not argue fundamental error on appeal. "In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon." *State v. Walters*, 2007-NMSC-050, ¶ 18, 142 N.M. 644, 168 P.3d 1068 (internal quotation marks and citation omitted). In the absence of preservation, we decline to address Defendant's argument on appeal. *See Wolfley v. Real Estate Comm'n*, 1983-NMSC-064, ¶ 5, 100 N.M. 187, 668 P.2d 303 ("[O]bjections will not be considered when raised for the first time on appeal.").

JUDGMENT AND SENTENCING

{37} At his June 24, 2014 sentencing hearing, Defendant was sentenced to six and one-half years incarceration, with the final two and one-half years suspended. This sentence was formalized in the district court's sentencing order, which was entered on August 5, 2014 and provided, in pertinent part,

> IT IS THEREFORE ORDERED that the defendant be committed to the Department of Corrections for a term of five and one half (5 1/2) years, such term includes a four (4) year enhancement pursuant to the Habitual Offender Act as to Count [One] and three hundred and sixty-four (364) days as to Count [Two]. Further Count [Two] shall run CONSECUTIVE to Count [One].

Defendant argues on appeal that the district court's sentencing order caused the four-year enhancement to be served consecutively to the one-year sentence for Count Two, causing exposure to additional incarceration not imposed by the district court. This argument is inconsistent with our reading of the sentencing order.

{38} In chronological order, the district court's sentencing order (1) sentenced Defendant to one and one-half years for Count One, (2) attached a four year enhancement to Count One, and (3) sentenced Defendant to one year for Count Two, to run consecutively to Count One. The sentencing order then suspended two and one-half years incarceration in favor of two and one-half years of supervised probation. Defendant is subject to a total of four years incarceration. The sentencing order is not ambiguous and does not expose Defendant to unintended incarceration. Defendant's request for resentencing is denied.

CONCLUSION

{39} We affirm the district court's rulings excluding evidence concerning Defendant's urinalysis after his arrest. We also affirm the admission of the laboratory results of testing performed on the substance seized from him. We conclude that there was sufficient evidence submitted to support his convictions. However, the admission of certain inculpatory evidence against Defendant is subject to the district court's consideration of Defendant's motion for dismissal or suppression based upon ineffective assistance of counsel prior to and at trial. If the district court determines that the State cannot overcome the prima facie finding of ineffectiveness detailed above, the district court shall vacate its sentence and dismiss the matter with prejudice.

{40} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
M. MONICA ZAMORA, Judge

[1]Statements by Defendant that both indicate his intention to orally testify about his urinalysis and support a hearsay analysis by this Court include: (1) "I wasn't allowed to testify your honor. . . . I wasn't allowed to say the facts[.]"; (2) "I have some facts I need to disclose in the open court and I want the jury to hear[.]"; and (3) "The clean urinalysis, I want the jury to hear[.]"

Certiorari Granted, September 23, 2016, No. S-1-SC-36062

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-085

No. 33,691 (filed July 27, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JESUS M. CASTRO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
FERNANDO R. MACIAS, District Judge

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico
KENNETH H. STALTER
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

MARGARET STRICKLAND
MCGRAW & STRICKLAND, LLC
Las Cruces, NM
for Appellant

Opinion

Timothy L. Garcia, Judge

{1} This case presents a unique appellate circumstance where Defendant's assertion of a constitutional violation of his right to a speedy trial is interrelated and potentially dependent upon his constitutional claim of ineffective assistance of counsel. Defendant appeals the district court's denial of his post-conviction motion to dismiss the indictment on speedy trial grounds, as well as his motion for a new trial challenging the effectiveness of his counsel under the Sixth Amendment. Because Defendant has established a prima facie factual basis to support a hearing regarding whether his trial counsel was ineffective by failing to sufficiently assert and preserve his right to a speedy trial under the Sixth Amendment, we reverse the denial of Defendant's post-trial motion for reconsideration and remand this case back to the district court for an evidentiary hearing.

BACKGROUND

{2} On February 9, 2009, the State charged Defendant by criminal complaint in Doña Ana County Magistrate Court with two counts of criminal sexual penetration in the third degree, in violation of NMSA 1978, Section 30-9-11(F) (2009). Defendant was arraigned and released on conditions after providing a secured bond of $20,000. On February 19, 2009, attorney Jonathan H. Huerta entered his appearance on Defendant's behalf. On May 28, 2009, Defendant was identically charged by indictment in Doña Ana County district court. The State dismissed its complaint in magistrate court the next day.

{3} Defendant was arraigned in district court on June 15, 2009, and was ordered to adhere to the same conditions of release and maintain the same bond amount set by the magistrate court. On August 4, 2009, prior to the December 1, 2009, trial setting previously ordered by the district court, the State filed a "motion to determine counsel" because no attorney had entered an appearance on Defendant's behalf in district court.

{4} On November 23, 2009, Defendant's same attorney, Mr. Huerta, formally entered his appearance on Defendant's behalf in district court. That same day, the State filed a motion to continue the trial setting, noting Mr. Huerta's failure to file an entry of appearance until November 23, 2009, and the State's case agent's unavailability due to a pre-planned vacation. Additionally, the State reminded the district court that Defendant was not being held in custody pending trial. Defendant did not oppose the State's request, and two days later filed his own motion to continue. In it, Defendant stated that his attorney, Mr. Huerta, had only recently become aware of the court's trial setting, and that a "key" character witness would not be able to attend the scheduled trial. The district court granted both motions to continue and reset the trial for January 21, 2010.

{5} That same day, November 23, 2009, the State filed a petition to extend Rule 5-604 NMRA's six-month deadline for conducting a trial (the six month rule was withdrawn after our Supreme Court's ruling in *State v. Savedra*, 2010-NMSC-025, 148 N.M. 301, 236 P.3d 20). Defendant did not oppose the motion, which the district court granted in an order extending the deadline for holding a trial to June 15, 2010. A week later, the district court entered an order moving the trial from January 21, 2010, to April 7, 2010.

{6} As scheduled, Defendant was tried before a jury on April 7, 2010, but the trial resulted in a hung jury. After declaring a mistrial, the district court entered an order setting a second trial on September 29, 2010.

{7} On September 10, 2010, Defendant's attorney filed a motion to withdraw as counsel or in the alternative to have Defendant declared indigent, and offered to accept the district court's appointment to represent Defendant as a contracted public defender. At the time, Defendant had only paid $4,000 of the agreed-to $11,000 retainer for representation by Mr. Huerta in the first trial. Defendant's attorney hoped "that the county may assist [Defendant] in defraying the costs of providing for a legal defense."

{8} On September 27, 2010, the district court held a hearing on Defendant's attorney's motion to withdraw. Afterward, the district court orally denied the motion, citing the court's standing policy of refusing to entertain motions to withdraw and permitting only motions to substitute. The next day, the State filed a motion to continue the September 29 trial setting. As grounds, the State mentioned the court's denial of Mr. Huerta's motion to withdraw, and announced the unavailability of its own DNA analyst. Defendant did not oppose the State's motion and it was granted by the district court. Trial was reset for November 30, 2010.

{9} November 30, 2010, came and went. Due to a scheduling error, there was neither a trial nor any order by the district court setting a new trial date. The district

court docket lacks entries between November 30, 2010, and February 17, 2011, when the State filed a notice of substitution of counsel. Nor is there anything in the record that suggests an explanation for this period of delay. The first mention within the record regarding the delay appears in the district court's June 27, 2013, order denying Defendant's motion to dismiss on speedy trial grounds, in which the district court found that the November trial date had been vacated, but explained that the court simply neglected to set another trial date. In the same order, the district court also faulted the State for failing to request a new trial setting.

{10} The record next reveals that on February 22, 2012, the district court set a new trial for July 11, 2012, nearly twenty months after the previous trial setting. On May 30, 2012, Defendant's attorney filed a renewed motion to withdraw and a separate request seeking a hearing on the motion to withdraw. As grounds, Defendant's attorney reiterated Defendant's failure to pay the full $11,000 retainer for the first trial. Also, Defendant's attorney raised for the first time Defendant's "fail[ure] to keep in contact with the undersigned attorney[,] hindering the attorney's ability to prepare for trial."

{11} On June 19, 2012, the district court held a hearing on Mr. Huerta's renewed motion to withdraw. Although Defendant attended the hearing in person, Defendant's attorney failed to appear. The district court denied the motion, citing Defendant's attorney's absence and again noting the district court's policy of refusing to entertain motions to withdraw without substitute counsel having already entered an appearance. The district court encouraged Defendant to apply to the public defender's office for a substitute attorney.

{12} On July 11, 2012, the day of trial, the district court called Defendant's case but did not select a jury or hold a trial. Instead, a different judge sitting in for the assigned district judge heard further argument concerning Mr. Huerta's motion to withdraw. Mr. Huerta reiterated his desire to withdraw from representing Defendant and also stated that he had been unable to contact Defendant, who was also present at the hearing. The district court then admonished Defendant to stay in contact with his attorney, noting that regular contact with his attorney was part of Defendant's conditions of release. The substitute judge also stated that he would relay the case's status to the original trial judge, and that he was "pretty sure [the original judge] is gonna set this case relatively quickly in his calendar" because the case was already "relatively old."

{13} On September 25, 2012, the district court set another hearing for October 17, 2012, on Mr. Huerta's motion to withdraw. On the same day, the district court also set a new trial date for December 5, 2012.

{14} Neither Defendant, nor his attorney, appeared at the new October 17 hearing. The district court saw no indication in the file that the September 25, 2012, notice was sent to Defendant, but nonetheless issued a bench warrant for Defendant's arrest because it "believed" that Defendant must have been notified.

{15} The district court held a status conference on October 18, 2012, and both Defendant and his attorney appeared. The court again orally denied Mr. Huerta's motion to withdraw. The court also withdrew the warrant for Defendant's arrest after Defendant explained why he did not appear at the previous day's hearing.

{16} Defendant's second trial proceeded as scheduled on December 5, 2012. The jury acquitted Defendant of the first count in the indictment and convicted him on the second count. Afterward, Defendant obtained substitute counsel and on April 19, 2013, filed a motion to extend the time to file a motion for a new trial. On April 24, 2013, Defendant filed a motion to dismiss on speedy trial grounds.

{17} On June 27, 2013, the district court denied Defendant's motion to dismiss. The district court found that the three year, ten-month delay from the date Defendant was arrested (February 6, 2009) and the second trial (December 5, 2012) triggered a speedy trial analysis, but that Defendant's constitutional right to a speedy trial was not violated after applying the four-factor analysis set out in *Barker v. Wingo*, 407 U.S. 514 (1972).

{18} On July 31, 2013, Defendant filed a motion to reconsider the denial of his motion to dismiss, attaching a supporting affidavit signed by Defendant. The district court denied Defendant's motion to reconsider on August 1, 2013. On April 14, 2014, the district court sentenced Defendant. This appeal timely followed.

DISCUSSION

{19} Defendant raises several arguments on appeal. We focus on the argument that requires this Court to address a potentially overlapping interrelationship between two separate protections under the Sixth Amendment, the right to a speedy trial and the right to effective assistance of counsel. Specifically, we address ineffective assistance of counsel as it relates to Mr. Huerta's action to preserve Defendant's assertion of his right to a speedy trial, and whether Mr. Huerta's complete failure to ever assert Defendant's right to a speedy trial would collaterally impact the *Barker* analysis in this case. *See* U.S. Const. amend. VI. We begin our analysis by addressing the four speedy trial factors under *Barker*, without consideration of whether Mr. Huerta's representation impacts the speedy trial determination by the district court. We then address the ineffective assistance of counsel claim regarding Mr. Huerta's representation and how it could affect the ultimate speedy trial outcome in this case.

A. Defendant's Right to a Speedy Trial

{20} "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial[.]" U.S. Const. amend. VI. We analyze whether Defendant's right to a speedy trial was violated by applying the four *Barker* factors: "(1) the length of delay [between arrest and trial], (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) the actual prejudice to the defendant that, on balance, determines whether a defendant's right to a speedy trial has been violated." *State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499, 212 P.3d 387 (internal quotation marks and citation omitted).

{21} The *Barker* factors "are interrelated and must be evaluated in light of other relevant circumstances in the particular case. No one factor constitutes either a necessary or sufficient condition to finding a deprivation of the right to a speedy trial." *State v. Johnson*, 2007-NMCA-107, ¶ 5, 142 N.M. 377, 165 P.3d 1153 (internal quotation marks and citation omitted). When an appellate court reviews a district court's denial of a motion to dismiss on speedy trial grounds, it must defer to the district court's factual findings. *Id.* But the appellate court must "independently evaluate the four *Barker* factors to ensure that the constitutional right has not been violated." *Id.*

1. The Extraordinary Length of Delay and its Implications

{22} The length of delay separating a defendant's arrest and trial is both a threshold determinant of the need for a speedy trial analysis in the first instance and substantive evidence of whether a defendant's speedy trial right was violated in the second. *State v. Stock*, 2006-NMCA-140, ¶ 13, 140 N.M. 676, 147 P.3d 885. As

to the initial threshold determination, the passage of time between arrest and trial that is necessary to trigger further scrutiny depends on the complexity of the case. *Garza*, 2009-NMSC-038, ¶ 48. For simple cases, one year of delay requires further analysis. *Id.* For cases of intermediate complexity, the period is fifteen months. *Id.* For complex cases, eighteen months of delay is required. *Id.* Here, the district court did not assess whether this case was simple, intermediate, or complex because the length of delay was quite substantial—three years, ten months—from arrest to conviction. Our Supreme Court now recognizes that "[i]n evaluating the first *Barker* factor," a very long delay is considered "extreme [or] extraordinary." *See State v. Serros*, 2016-NMSC-008, ¶ 24, 366 P.3d 1121 (involving a delay of over fifty-one months). In its answer brief, the State concedes that irrespective of the case's complexity, the delay in this case triggers a full speedy trial analysis.

{23} In reality, such an extraordinary delay "colors the rest of the speedy trial analysis" and "weighs heavily in favor of a defendant's speedy trial claim, bearing in mind that no single factor is dispositive of whether a violation has occurred." *Id.* ¶ 26 (resolving and "clarify[ing] that the parties' fault in causing the delay is irrelevant to the analysis of the first *Barker* factor"). Under *Serros*, when the length of the delay weighs heavily in the defendant's favor, there is a presumption that his speedy trial rights have been violated. *Id.* ¶ 27. Once this presumption is established, the district court must analyze the remaining *Barker* factors "to determine whether they tip the balance back in favor of the societal interest in bringing [the d]efendant to trial." *Serros*, 2016-NMSC-008, ¶ 28 (alteration, internal quotation marks, and citation omitted).

{24} We agree that the extreme length of the delay in this case weighs heavily in Defendant's favor under the first *Barker* factor. But it can also overlap into related issues such as ineffective assistance of counsel or whether the State and defense counsel neglected to bring a case to trial for so long that it also weighs in Defendant's favor and against the State when addressing other *Barker* factors. *Serros*, 2016-NMSC-008, ¶¶ 30, 36-38, 41-43 (holding the state must also be accountable for its failure to bring a case to trial under the second *Barker* factor—the reasons for delay—when the length of delay is extraordinary). In light of our Supreme Court's recent decision in *Serros*, Defendant's ineffective assistance of counsel claim becomes interrelated and must be addressed to determine how counsel's ineffectiveness or neglect affects the remaining three *Barker* factors. *Serros*, 2016-NMSC-008, ¶¶ 30, 36-38, 41-43. We recognize that the district court decided Defendant's speedy trial claim before it had the benefit of applying the recent *Serros* decision and acknowledge that it could affect the ultimate outcome in this case.

2. The Reasons for the Delay Weigh Heavily Against the State

{25} " 'Closely related to length of delay is the reason the government assigns to justify the delay.' " *Garza*, 2009-NMSC-038, ¶ 25 (quoting *Barker*, 407 U.S. at 531).

> We previously have recognized three types of delay that may be attributed to the [s]tate and weighed against it at varying levels. First, a deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. Second, negligent administrative delay should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. As the length of delay increases, negligent or administrative delay weighs more heavily against the [s]tate. And third, appropriate delay, justified for a valid reason, such as a missing witness, is neutral and does not weigh against the [s]tate.

Serros, 2016-NMSC-008, ¶ 29 (alterations, internal quotation marks, and citations omitted).

{26} In *Serros*, our Supreme Court adopted this Court's reasoning in *Stock*, 2006-NMCA-140, ¶ 22, to hold that while generally "a defendant must be held accountable for the actions of his or her attorneys, . . . it may be appropriate to shift the focus to the [s]tate's efforts to bring the case to trial, at least when the record demonstrates that the defendant did not affirmatively cause or consent to the delay." *Serros*, 2016-NMSC-008, ¶¶ 36, 38 (internal quotation marks and citation omitted). The *Serros* court attached particular importance to these considerations when the defendant had been incarcerated prior to trial. *Id.* ¶ 38.

{27} Although Defendant asserts that his attorney may be at fault for the delays that the district court attributed to Defendant, it is unnecessary to consider whether the district court erroneously assigned these delays to Defendant because the State now concedes that its "negligence caused approximately two-fifths of the delay" and that this factor should accordingly "weigh heavily in [Defendant's] favor." Although we are not required to accept a party's concession, *see State v. Palmer*, 1998-NMCA-052, ¶ 12, 125 N.M. 86, 957 P.2d 71, our own review of the facts associated with the delay in this case supports the State's concession. Accordingly, we conclude that the reasons for the delays in this case now weigh heavily in favor of Defendant's interest in a speedy trial and further diminish society's interest in bringing Defendant to trial nearly four years after his arrest. We accept the State's concession and weigh this second *Barker* factor heavily in Defendant's favor.

3. Defense Counsel's Failure to Timely Assert the Right to a Speedy Trial

{28} Initially, we recognize that Mr. Huerta never asserted Defendant's right to a speedy trial, pro forma or otherwise. In *Barker*, the United States Supreme Court rejected "the rule that a defendant who fails to demand a speedy trial forever waives his right." 407 U.S. at 528. Rather, "the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." *Id.* As the *Barker* court noted, a defendant's assertion of his right to a speedy trial is in some ways interwoven with the other factors involved in the speedy trial analysis, because "[t]he strength of [the defendant's] efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that [the defendant] experiences." *Id.* at 531. For this reason, a defendant's failure to timely assert his or her right to a speedy trial is tangentially related to the fourth *Barker* factor: whether the defendant suffered prejudice as a result of the delays in bringing the case against the defendant to trial. *Stock*, 2006-NMCA-140, ¶ 32.

{29} Under this factor of the *Barker* analysis, we look to both the timing and the manner of the defendant's assertion of the speedy trial right. *Garza*, 2009-NMSC-038, ¶ 32. "An early assertion of the speedy trial right indicates the defendant's desire to have the charges resolved rather than gambling that the passage of

time will operate to hinder prosecution." *Zurla v. State*, 1990-NMSC-011, ¶ 19, 109 N.M. 640, 789 P.2d 588, *modified on other grounds by Garza*, 2009-NMSC-038, ¶¶ 21-22. Conversely, "the closer to trial an assertion is made, the less weight it is given." *State v. Moreno*, 2010-NMCA-044, ¶ 33, 148 N.M. 253, 233 P.3d 782.

{30} Defendant concedes that the district court correctly found that Mr. Huerta never filed a pro forma speedy trial demand or any other written demand for a speedy trial. Defendant's first and only invocation of his right to a speedy trial came several months after he was convicted and obtained new counsel. The district court consequently weighed this *Barker* factor against the Defendant. Defendant argues that his failure to assert his speedy trial right until after he was convicted by a jury should be weighed neutrally because Defendant's failure to assert his right stems not from a knowing relinquishment of right to a speedy trial but resulted from Mr. Huerta's incompetent and ineffective representation regarding his speedy trial right.

{31} Defendant requests that this Court analogize his counsel's failures to those in *Stock*, where the delay in reaching a speedy trial was precipitated by counsel's "neglect." 2006-NMCA-140, ¶¶ 30, 32. In the present case, however, Defendant focused his argument solely on counsel's ineffectiveness. Defendant points to several factors in the present case that support the general notion of ineffective representation, one of those factors being the fact that Mr. Huerta spent the majority of his post-hung-jury efforts only asking to withdraw as Defendant's counsel and focusing on the unpaid portion of his retainer from the first trial. Similar to counsel's neglectful actions in *Stock*, Defendant attempts to draw similarities with Mr. Huerta's failure to assert and preserve the right to a speedy trial in the present case. *See id.* ¶ 30. Despite counsel's same failure to assert the defendant's right to a speedy trial in *Stock*, this Court decided to assign little weight to this third *Barker* factor under the particular facts presented in *Stock*. *See* 2006-NMCA-140, ¶¶ 30-33.

{32} We began by explaining in *Stock*,

> [t]he Supreme Court [in *Barker*] articulated two policy considerations that inform the analysis of a defendant's assertion of the right. First, the Court implied that delay sometimes inures to a defendant's benefit, and thus a defendant should not be permitted to purposefully sit by during lengthy delays and then ambush the court and the state with a claim that his or her speedy trial rights have been violated. . . . Second, the Court stated that a defendant's assertion of the right was relevant because it was also an indicator of prejudice—a defendant would be less likely to sit by during lengthy delays if he or she was suffering due to the wait or genuinely thought that the delay would be harmful to his or her case.

2006-NMCA-140, ¶ 32. However, the defendant in *Stock* had the intellectual capacity of a twelve-year-old. *Id.* ¶ 30. The *Stock* defendant was held in custody for several years until the district court found that his speedy trial right was violated and ordered him released. *Id.* ¶ 7. In other words, we determined that there was no plausible reason the defendant would not have asserted his right to a speedy trial had he been capable of doing so.

{33} In *Serros*, the defendant's three court-appointed attorneys each filed pro forma speedy trial demands. 2016-NMSC-008, ¶ 77. *Serros* noted that while pro forma speedy trial demands are not entitled to much weight under the third *Barker* factor, they are nonetheless sufficient to weigh the factor slightly in the defendant's favor. *Serros*, 2016-NMSC-008, ¶ 77. *Serros* also affirmed the district court's conclusion regarding the defendant's assertion of his speedy trial right based upon statements that he made to his attorneys (and not the court). *Id.* ¶¶ 77-83. The Supreme Court determined that these circumstances were sufficient to weigh the third *Barker* factor in the *Serros* defendant's favor despite his numerous attorneys' acquiescence to all of the state's motions to continue trial on his behalf. *Serros*, 2016-NMSC-008, ¶¶ 81-83.

{34} Without more specific evidence regarding the reasons for Mr. Huerta's actions and his failures to act in the present case, we are unable to conclude that this case is controlled by our decision in *Stock*. Defendant's case is also factually different regarding certain individualized considerations recognized in *Stock*. In the present case, Defendant was released pending trial and there is no evidence that Defendant was of diminished capacity. As such, it is not yet possible to conclude from the record before us whether Mr. Huerta's failures to act were the cause of Defendant's failure to assert his right to a speedy trial. *Serros* may also be distinguished at this time because we only know that Mr. Huerta never filed any speedy trial demands, pro forma or otherwise. Other than a dispute over legal fees, it is not sufficiently clear from Defendant's affidavit why Mr. Huerta failed to preserve Defendant's right to a speedy trial or promptly move the retrial forward. Given the fact that Defendant's first trial resulted in a mistrial, the inferential evidence in the record explaining Mr. Huerta's failure to act consists primarily of the unpaid portion of Mr. Huerta's retainer fee and the resulting desire to withdraw from the case. We remain mindful that in *Serros*, a defendant's failure to assert his right to a speedy trial before conviction raises legitimate concerns regarding "whether a defendant was denied needed access to a speedy trial over his objection or whether the issue was raised on appeal as an afterthought." 2016-NMSC-008, ¶ 76 (alterations, internal quotation marks, and citation omitted). Given Defendant's failure to take independent action to directly assert or express his speedy trial right on the record, we conclude that the complete failure to do so prior to his conviction would, without more, require this Court to weigh the third *Barker* factor either neutrally or in favor of the State.

4. The District Court's Findings Regarding the Prejudice Factor

{35} The United States Supreme Court in *Barker* explained the "actual prejudice" prong of the constitutional speedy trial analysis as follows:

> Prejudice . . . should be assessed in the light of the interests of [the] defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.

407 U.S. at 532; *see also State v. Maddox*, 2008-NMSC-062, ¶ 32, 145 N.M. 242, 195 P.3d 1254, *abrogated on other grounds by Garza*, 2009-NMSC-038, ¶¶ 46-47.

i. The District Court's Determination That Defendant Did Not Suffer From Oppressive Pretrial Confinement

{36} After the district court denied Defendant's motion to dismiss on speedy trial grounds, Defendant submitted a motion to reconsider, attaching Defendant's sworn

affidavit. The district court denied the motion to reconsider, finding that Defendant's affidavit did not establish that he had suffered oppressive pretrial incarceration because he was on pretrial release throughout the pendency of his case and "under only typical restraints on his liberty that may be imposed on any accused person." Defendant contends that this finding was erroneous because the district court's bail conditions forced Defendant to move to New Mexico and prohibited him from returning to El Paso for any other reason besides work. Lastly, Defendant's affidavit stated that he suffered further prejudice as a result of the district court's order modifying Defendant's conditions of release to prohibit Defendant from traveling to Texas except for work or to visit his attorney.

{37} To be sure, a defendant need not be actually confined in order to establish prejudice under this factor; even if the defendant is released prior to trial, oppressive conditions of release can establish prejudice. *Spearman*, 2012-NMSC-023, ¶ 37, 283 P.3d 272. Defendant's affidavit states that:

> [he has] also not been free for almost one year. While [he has] not been in jail, [he] cannot travel freely. *After [his] second trial* in December of 2012, the judge ordered that [he could] only go to El Paso for work reasons. Before this case, [he] lived with [his] family in El Paso. [Their] church is there, and everyone else from Chaparral goes to El Paso to go shopping, or go to a movie theater, or out to a restaurant. [He] cannot do those things with [his] family.
>
> During this case . . . [he] moved to Chaparral *for work*. As part of [his] job, [he is] on call every other week. [His] children go to school in Chaparral, but [he] cannot do the church projects and fundraising that [they] used to do with [their] church in El Paso. [He] also work[s] on cars in [his] spare time. There is one auto parts store in Chaparral, but when it does not have equipment [he] cannot go to El Paso to find auto parts. Sometimes a friend or family member is willing to go to El Paso for [him]. Other times, [he has] to wait until the Chaparral store can get what [he] need[s].
>
> [He is] afraid to go to El Paso even for work. Whenever [he] can, [he] ask[s] someone else to go in [his] place because [he is] afraid that [he] will be arrested and not released.

(Emphasis added.) But Defendant's affidavit did not establish that his conditions of confinement were sufficiently oppressive so as to solely weigh the fourth *Barker* factor in Defendant's favor. Our review of the record indicates that Defendant was allowed to travel to Texas to meet with his attorney and prepare his case. Although his conditions of release and the move to Chaparral did impose some specific changes and hardship that may have caused pretrial stress and anxiety for Defendant and his family, we conclude that the district court did not err in finding that Defendant's conditions of release were not equivalent to being confined in jail.

ii. Defendant's Other Assertions of Specific Prejudice Resulting From Anxiety and Stress

{38} In his affidavit, Defendant also stated that he suffered the following additional anxiety and stress as a result of the extended pretrial delay in this case: (1) he felt "worried and degraded" between his arrest and the second trial; (2) he was "ashamed . . . [that] the public knows about the charges against [him]"; (3) he was "unable to ignore" news stories about rapes, assaults, and kidnappings in the news media, and he wonder[ed] whether the suspects in those stories were falsely accused; (4) although his employer was "very supportive[,]" the quality of Defendant's work ha[d] suffered, and he worrie[d] that he [would] lose his job; (5) he ha[d] not told his stepchildren about the charges, and "[keeping] them in the dark" about the charges ha[d] "bother[ed]" Defendant "a great deal."; (6) the stress of the charges "ha[d] taken a toll on [Defendant's] marriage[,]" and Defendant's wife was unable to forgive Defendant for his unfaithfulness (they [were] considering a divorce); (7) he [was] too ashamed about the case to tell his brothers and sisters about it; (8) he had gained weight, did not sleep as well as a result of the charges, the second trial had made these symptoms more severe; and (9) he feared that he would be deported as a result of his conviction.

{39} The district court rejected several of Defendant's contentions. First, regarding any prejudice related to Defendant's employment, the district court concluded that "Defendant . . . remained employed with the same job throughout the pendency of this case. Thus, he ha[d] not suffered loss of employment or loss of income due to the delay." Second, the district court found that "[Defendant] ha[d] not shown that his anxiety over his case or the disruptions to his life have been beyond what any accused person might suffer. . . . [T]he discord in his marriage can be attributed to the admitted fact that he was 'unfaithful' to his wife, not because of the delay in this case."

{40} Several factors or contentions that Defendant raised regarding pretrial anxiety and stress were not specifically addressed by the district court. First, the district court did not address the non-typical anxiety and stress arising from the need to move Defendant's family to Chaparral in order to keep his existing job and avoid losing this established employment. In addition, the district court did not factor in the long-term prejudicial effect that generalized anxiety and stress have when it lingers for nearly four years. *See Stock*, 2006-NMCA-140, ¶ 44 (recognizing that even prejudice that is only mildly persuasive will "intensif[y] over time" and still weigh in a "[d]efendant's favor overall because of the extreme length of the delay"). This Court has recognized that unacceptably long periods of anxiety and stress that a defendant suffers due to delays in trial should be considered in determining whether the fourth *Barker* factor—prejudice—will eventually weigh in a defendant's favor. *See State v. Lujan*, 2015-NMCA-032, ¶ 20, 345 P.3d 1103. We also acknowledge that a defendant need not assert prejudice that is categorically different from the type of prejudice suffered by any accused person in order to demonstrate that he was unduly prejudiced by excessive pretrial delay. *Spearman*, 2012-NMSC-023, ¶¶ 37-38. "[This] means that at some point the delay simply becomes intolerable." *Serros*, 2016-NMSC-008, ¶ 98.

{41} *Stock* also recognized that under the proper factual circumstances, a defendant who did fail to adequately assert his right to a speedy trial and only establishes slight prejudice can still have his speedy trial rights violated when an unacceptably long period of delay—three and one-half years—has occurred. 2006-NMCA-140, ¶¶ 18, 30, 44-45. Even if the long delay in this case only creates a slight level of prejudice in favor of Defendant, it may be determinative to overall analysis of the four *Barker* factors. *See Stock*, 2006-NMCA-140, ¶ 44.

{42} Defendant's affidavit primarily identifies the types of prejudice that were not

the types of severe prejudice that would weigh more heavily in his favor when there is a delay in bringing a case to trial. *See State v. Steinmetz*, 2014-NMCA-070, ¶¶ 63-65, 327 P.3d 1145 (supporting a determination of slight prejudice in a defendant's favor that arose from his conditions of release and other general anxiety factors that existed over a long period of delay). Except for the forced relocation to Chaparral to maintain employment, Defendant's other assertions of prejudice primarily relate to his indictment or the other typical types of stress and anxiety that might be suffered by an accused who is awaiting trial. *See Maddox*, 2008-NMSC-062, ¶ 33 (stating that "some degree of oppression and anxiety is inherent for every defendant who is jailed while awaiting trial" (alterations, internal quotation marks, and citation omitted)).

{43} Rather than reject the district court's finding that Defendant did not establish prejudice under the fourth *Barker* factor, we would prefer that the district court evaluate the prejudice factor anew, under the guidance this Court provided by *Stock*. 2006-NMCA-140, ¶¶ 40-44. Accordingly, the prejudice factor should be reevaluated and Defendant's relocation to Chaparral should now be considered along with the other stress and anxiety factors that continued for a very long period of time.

B. Establishing the Claim of Ineffective Assistance of Counsel

{44} "Criminal defendants are entitled to reasonably effective assistance of counsel under the Sixth Amendment of the United States Constitution." *State v. Crocco*, 2014-NMSC-016, ¶ 12, 327 P.3d 1068 (internal quotation marks and citation omitted). "The standard for effective assistance of counsel is whether defense counsel exercised the skill, judgment, and diligence of a reasonably competent defense attorney." *State v. Herrera*, 2001-NMCA-073, ¶ 36, 131 N.M. 22, 33 P.3d 22 (internal quotation marks and citation omitted). A defendant must show that his attorney erred and that this error prejudiced the defendant in order to prevail on a claim of ineffective assistance of counsel. *State v. Arrendondo*, 2012-NMSC-013, ¶ 38, 278 P.3d 517. The "prejudice" element of an ineffective assistance of counsel claim is not satisfied when the defendant proves that a particular act or omission by his counsel was prejudicial to his defense; instead, the defendant must show a "reasonable probability" that but for the attorney's objectively unreasonable conduct, the result of the proceedings would have been different. *State v. Brazeal*, 1990-NMCA-010, ¶ 23, 109 N.M. 752, 790 P.2d 1033.

{45} "When an ineffective assistance claim is first raised on direct appeal, we evaluate the facts that are part of the record." *Crocco*, 2014-NMSC-016, ¶ 14 (internal quotation marks and citation omitted). "If facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition, although an appellate court may remand a case for an evidentiary hearing if the defendant makes a prima facie case of ineffective assistance." *Id.* (internal quotation marks and citation omitted). In order to establish a successful claim of ineffective assistance of counsel, a defendant is required to "first demonstrate error on the part of counsel, and then show that the error resulted in prejudice." *State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289. A prima facie case of ineffective assistance of counsel is made on appeal where: "(1) it appears from the record that counsel acted unreasonably; (2) the appellate court cannot think of a plausible, rational strategy or tactic to explain counsel's conduct; and (3) the actions of counsel are prejudicial." *Herrera*, 2001-NMCA-073, ¶ 36 (internal quotation marks and citation omitted). Because it is dispositive to our analysis, we first address whether Defendant has made a prima facie case of ineffective assistance of counsel that would justify a remand to the district court for an evidentiary hearing.

{46} Defendant asserts that his attorney was constitutionally ineffective and acted unreasonably because Mr. Huerta (1) failed to ever file or assert Defendant's right to a speedy trial at any time, pro forma or otherwise; (2) made no objection to the admission of the victim's out-of-court statements through the testimony of various witnesses for the State and did not impeach the victim and other witnesses with evidence that would tend to undermine the victim's credibility; (3) did not request an interpreter for Defendant, whose first language is Spanish; (4) left the courtroom while the State's DNA evidence expert testified; and (5) did not adequately prepare for the first trial. Because we determine that the evidence in the record is sufficient to establish a prima facie case of ineffective assistance or counsel regarding the failure of Mr. Huerta to assert Defendant's right to a speedy trial, we shall remand this matter to the district court for an evidentiary hearing on Defendant's claims of ineffective assistance of counsel.

1. Whether it Appears From the Record that Mr. Huerta Acted Unreasonably

{47} It is undisputed that Mr. Huerta never asserted Defendant's right to a speedy trial, pro forma or otherwise. The right to a speedy trial was only asserted after Defendant obtained substitute counsel and filed a post-trial motion to dismiss on speedy trial grounds. Whether Defendant specifically intended to obtain a speedy trial and not acquiesce with his counsel's agreement to postpone trial is less certain but was addressed by Defendant's affidavit.

{48} In his affidavit, Defendant stated: (1) "[he did] not remember ever being mailed anything, including notices for court hearings, by Mr. Huerta[;]" (2) "[he] did not receive copies of any motions filed in [the] case[, only] received mailed notices of hearings from the [c]ourt, . . . [he] came to the hearings but [he] did not know what they were about, and . . . [he] trusted [Mr. Huerta] to tell [him] if they were anything important or if [he] needed to do anything to help [his] case[;]" (3) "Mr. Huerta never discussed filing motions to continue the trial, trial delays, or [Mr. Huerta's] strategy for [his] trial with [him;]" (4) [b]ecause [he] had never been in this position before, [he] simply trusted [his] lawyer and assumed that what was happening was normal[;]" (5) "[t]he only discussions [he could] recall were when Mr. Huerta would call [him] to ask for more money . . . [a]fter the first trial, Mr. Huerta no longer called to inform [him] of hearings[, t]he only discussions we had were about further payment [of his fees;]" (6) "[t]he only notice [he] received of Mr. Huerta's . . . motions to withdraw as counsel were the [c]ourt's notices of hearings on them [and Mr. Huerta told him] it was just simple steps that we ha[d] to take[;]" (7) "Mr. Huerta did not discuss the second trial delay with [him and he] still believed that what was happening was the normal process[;]" (8) "[t]hroughout the case, [he] thought that what was happening was normal[, he] trusted [his] lawyer, Mr. Huerta, and [he] did not want to make [Mr. Huerta] angry by asking questions because [his] freedom and [his] life were in [Mr. Huerta's] hands[;]" and (9) "[he] want[ed] to put it behind [him] and return to a normal life." The totality of these statements, made under oath, reasonably convey that Defendant desired to have a speedy trial within the "normal process"

of our court system and that he did not acquiesce with any of Mr. Huerta's actions to postpone trial. It would be reasonable to view Defendant's statements—though perhaps somewhat vague in specificity—as evidence that he desired to assert and preserve his right to a speedy and normal trial process. *See Serros*, 2016-NMSC-008, ¶ 81. In addition, it is clear from the record that the majority of Mr. Huerta's actions and court filings, after the first trial ended in a hung jury, were focused on his desire to withdraw because of a dispute over the payment of his legal fees for the first trial. Nothing in the record indicates that it was reasonable or necessary for Mr. Huerta to disregard Defendant's constitutional right to a speedy trial or fail to assert that right for nearly four years in this case. As a result, sufficient prima facie evidence exists to establish that Mr. Huerta failed to act reasonably when he totally neglected to assert Defendant's right to a speedy trial. *See State v. Leon*, 2013-NMCA-011, ¶ 20, 292 P.3d 493 (recognizing a presumption of counsel's ineffectiveness when constitutional rights are implicated and counsel fails to preserve a defendant's right to appeal).

2. Whether This Court Can Think of a Plausible, Rational Strategy or Tactic to Explain Mr. Huerta's Conduct

{49} We must determine whether a plausible, rational strategy or tactic would exist to explain Mr. Huerta's failure to ever assert Defendant's right to a speedy trial during nearly four years of representation. *See Herrera*, 2001-NMCA-073, ¶ 36. Irrespective of the limited communication between an attorney and his or her client, asserting and preserving the initial right to a speedy trial is a perfunctory or pro forma practice undertaken by the criminal defense bar. *See Moreno*, 2010-NMCA-044, ¶ 33 (describing the initial filing of a demand for speedy trial around the time of a defendant's arraignment as a pro forma or perfunctory assertion that normally carries minimal weight). It is difficult to explain Mr. Huerta's total failure to assert Defendant's right to a speedy trial, even if all that was filed was a pro forma demand during the early stages of the prosecution. *See State v. Montoya*, 2015-NMCA-056, ¶ 24, 348 P.3d 1057 (noting that even an initial pro forma request for a speedy trial may not be considered insignificant depending upon the "light of the overall circumstances in [the] case"). We understand from Defendant's affidavit that Mr. Huerta also practiced in El Paso, Texas and expressed that "Texas law is very different than New Mexico law, and that he knew more about Texas law." Whether practicing primarily in Texas effected Mr. Huerta's failure to assert Defendant's speedy trial rights is not clear. However, because Defendant assumed and wanted his case to proceed to trial under the "normal process[,]" none of these circumstances provide a plausible, rational strategic or tactical explanation for Mr. Huerta's failure to assert Defendant's right to a speedy trial.

{50} The issue of Defendant's right to a speedy trial became even more significant once the first trial ended in a mistrial in April 2010, fourteen months after the original criminal charges were filed. At this point, retrial was scheduled to occur no sooner than September 29, 2010, nineteen months after the original criminal charges were filed. In reality, Defendant's retrial was continually delayed and did not occur until December 5, 2012, forty-six months after the original criminal charges were filed. The State was assigned and now accepts the majority of the responsibility for this long period of delay. Despite the mounting implications to Defendant's right to a speedy trial, Mr. Huerta failed to assert Defendant's speedy trial right through written pleadings or at any of the hearings scheduled by the district court. In addition, the State did not address or attempt to identify any plausible, rational strategy or tactic that would explain Mr. Huerta's failure to ever assert Defendant's right to a speedy trial. It is apparent from the record that Mr. Huerta focused on his withdrawal from the case, getting paid his previous retainer in full, and avoiding further representation at a second trial. Again, the failure to protect a defendant's constitutional rights will create the presumption of ineffective assistance of counsel when counsel's action is critical to the preservation of the right itself. *See Leon*, 2013-NMCA-011, ¶ 20. Our Supreme Court has recognized various situations where no rational strategy appears to exist to explain the conduct or actions of defense counsel. *See State v. Paredez*, 2004-NMSC-036, ¶ 22, 136 N.M. 533, 101 P.3d 799; *State v. Roybal*, 2002-NMSC-027, ¶ 24, 132 N.M. 657, 54 P.3d 61. Based upon the record before us, Mr. Huerta's failure to act regarding the assertion and preservation of Defendant's right to a speedy trial appears to have no rational or strategic basis. As a result, we conclude that this second requirement for a prima facie showing of ineffective assistance of counsel has now been established.

3. Whether the Actions of Mr. Huerta Were Prejudicial to Defendant

{51} In determining whether the failures of Mr. Huerta were prejudicial to Defendant, we must also address whether an effective attorney's assertion and preservation of the right to a speedy trial would have ultimately benefitted Defendant and his speedy trial claim. *See Brazeal*, 1990-NMCA-010, ¶ 23 (recognizing that to establish prejudice, a defendant must show a reasonable probability that the results of the proceedings would have been different). It appears reasonable that if Mr. Huerta had asserted Defendant's right to a speedy trial and not acquiesced to the State's delays, his speedy trial claim had merit and a reasonable probability of success. *See Serros*, 2016-NMSC-008, ¶ 86 (recognizing that "if the length of delay and the reasons for the delay weigh heavily in [the] defendant's favor and [the] defendant has asserted his right and not acquiesced to the delay, then the defendant need not show prejudice for a court to conclude that the defendant's right has been violated" (internal quotation marks and citation omitted)). As a result, a prima facie showing of prejudice was reasonably established to exist. Mr. Huerta's ineffective assistance of counsel, if established, would be the missing link that prevented Defendant from succeeding to prevail on his speedy trial claim. *See id.* ¶ 36.

{52} As our Supreme Court recognized in *Serros*, "as the delay mounts in bringing a defendant to trial, the [s]tate's obligation to alert the district court becomes increasingly pressing[,] . . .[a]ccordingly, we do not deem it unfair to [also] impose upon the prosecution the burden of monitoring the progress of the case and, at some point, alerting the [district] court of potential speedy trial consequences." *Id.* ¶¶ 95-96. Because "[t]he [s]tate must ensure that justice is done[,] . . . it's [unfortunately] the duty of the [s]tate to work both sides of the street sometimes." *Id.* ¶¶ 97-98 (internal quotation marks and citation omitted). Because the State did not do so in this case and because *Serros* has put the district courts on notice that there can be a distinction "between [a d]efendant agreeing to the [s]tate's requests to [delay] trial and [a d]efendant's attorney's agreeing to such requests[,]" an evidentiary hearing is needed to properly establish the effectiveness of Mr. Huerta's actions as Defendant's trial counsel. *Id.* ¶ 79 (emphasis omitted). The viability of Defendant's Sixth Amendment speedy trial claim must now be fully

developed on remand. Because we are remanding Defendant's ineffective assistance of counsel claim regarding the assertion of the right to a speedy trial back to the district court for an evidentiary hearing, we also leave Defendant's remaining assertions of ineffective assistance of counsel for consideration by the district court on remand.

CONCLUSION

{53} The district court's denial of Defendant's post-trial motion to dismiss on speedy trial grounds is remanded back to the district court for an evidentiary hearing. First, the district court shall hold an evidentiary hearing to determine whether Defendant's counsel, Mr. Huerta, provided ineffective assistance of counsel, especially with regard to his failure to assert Defendant's right to a speedy trial. If the district court determines that Mr. Huerta was constitutionally ineffective in failing to assert Defendant's right to a speedy trial, then the district court must also address whether Defendant's Sixth Amendment right to a speedy trial was ultimately violated after considering our decision in *Stock*, our Supreme Court's recent decision in *Serros*, and the reevaluation of the fourth *Barker* factor regarding prejudice. If necessary, the district court shall also take evidence and consider the remaining factual assertions of ineffective assistance of counsel identified herein. We hold that Defendant's remaining claims of error are premature at this time, dismiss this appeal, and leave all of Defendant's claims of error ripe for any subsequent appeal.

{54} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
J.MILES HANISEE, Judge (dissenting).

HANISEE, Judge (dissenting).

{55} The majority states that "[t]his case presents a unique appellate circumstance where Defendant's assertion of a constitutional violation of his right to a speedy trial is interrelated and potentially dependent upon his constitutional claim of ineffective assistance of counsel." Majority Op. ¶ 1. But there are five formal[1] and at least ten unpublished[2] decisions by this Court and our Supreme Court where the defendant raised both a speedy trial claim and an ineffective assistance of counsel claim based on counsel's alleged negligence in failing to demand a speedy trial. Not one of these cases determines a prima facie case of ineffective assistance of counsel to exist based on an attorney's negligent failure to demand a speedy trial, as the majority does here. Majority Op. ¶ 49. As I explain below, I do not think this is coincidence: allowing a defendant to rebrand a speedy trial claim as a prima facie claim for ineffective assistance of counsel undermines the purpose and doctrinal coherence of our speedy trial caselaw.

{56} The majority concludes that Defendant's attorney's "failure to assert Defendant's right to a speedy trial" renders his performance prima facie ineffective in this case, Majority Op. ¶ 49, despite Defendant's release pending trial and the absence of any evidence in the record that Defendant's attorney was instructed to timely bring Defendant's case to trial. By equating the absence of a demand with a failure to make a demand, the majority undermines the purpose behind *Barker*'s third factor:

> permit[ting] . . . [the court] to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client . . . [and] to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection.

Barker, 407 U.S. at 529.

{57} *Stock* and *Serros* evaluate allegations that defense counsel negligently failed to demand a speedy trial under *Barker*'s third factor. In *Stock*, we found that the defendant's lengthy pretrial confinement combined with his intellectual disability justified "giv[ing] less weight to Defendant's failure to assert his speedy trial rights." *Stock*, 2006-NMCA-140, ¶¶ 30-31. In *Serros*, our Supreme Court upheld the trial court's decision to weigh the third *Barker* factor in the defendant's favor where there was evidence to support a distinction "between [the *d*]*efendant* agreeing to the State's requests to extend the time for commencing his trial and [the *d*]*efendant's attorneys* agreeing to such requests." *Serros*, 2016-NMSC-008, ¶ 79. In other words, our Supreme Court found that the third *Barker* factor could be weighed in the defendant's favor where there was evidence the defendant himself did not acquiesce in delays, even if his or her attorneys did. *Id.* ¶¶ 78-79. Because Defendant was not incarcerated and there is no evidence that he is either mentally incapable of demanding a speedy trial or definitively wished to proceed to trial, this case does not fall within the ambit of cases like *Stock* and *Serros*.

{58} The majority's analysis also depends on an assumption of fact that is not supported by the record: that had Defendant's attorney demanded a trial, a second trial would not have taken place sooner. Or another: that defense strategy did not include a preference for a delayed second trial setting. When the "outcome" of a proceeding is a conviction, a claim of ineffective assistance of counsel can be evaluated from the fixed standpoint of a *fait accompli*: the jury's guilty verdict or the defendant's decision to accept a plea offer. But when the "outcome" is the denial of a motion to dismiss for a speedy trial violation, the result of an appeal can change depending on whether the claim is characterized as involving the defendant's right to speedy trial or effective assistance of counsel. A speedy trial claim where there is no prejudice and no demand fails

[1]*See Serros*, 2016-NMSC-008, ¶¶ 46-67; *State v. Smith*, 2016-NMSC-007, ¶¶ 61-64, 367 P.3d 420; *State v. Fierro*, 2012-NMCA-054, ¶ 65, 278 P.3d 541; *State v. Graham*, 2003-NMCA-127, ¶¶ 33-34, 134 N.M. 613, 81 P.3d 556, *reversed on other grounds*, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285; *State v. Cooper*, 1998-NMCA-180, ¶ 27, 126 N.M. 500, 972 P.2d 1.

[2]*See State v. Menchaca*, No. 33,290, dec. ¶¶ 28-29 (N.M. Sup. Ct. Nov. 7, 2013) (non-precedential); *State v. McDaniel*, No. 31,501, mem. op. ¶¶ 72-78 (N.M. Ct. App. Oct. 1, 2015) (non-precedential); *State v. Alderete*, No. 34,222, mem. op. ¶ 10 (N.M. Ct. App. June 1, 2015) (non-precedential); *State v. Chavez*, No. 34,155, mem. op. ¶¶ 8-12 (N.M. Ct. App. June 16, 2015) (non-precedential); *State v. Zamora*, No. 32,935, mem. op. ¶ 2 (N.M. Ct. App. Jan. 6, 2014) (non-precedential); *State v. Guerra*, No. 29,954, mem. op. at *2-3 (N.M. Ct. App. March 22, 2012) (non-precedential); *State v. Jenkins*, No. 29,026, mem. op. at *8 (N.M. Ct. App. March 23, 2011) (non-precedential); *State v. Huband*, No. 28,569, mem. op. at *5-6 (N.M. Ct. App. Feb. 17, 2010) (non-precedential); *State v. Riggs*, No. 29,520, mem. op. at *2-3 (N.M. Ct. App. Jan. 11, 2010) (non-precedential); *State v. Morgan*, No. 29,478, mem. op. at *2 (N.M. Ct. App. Oct. 6, 2009) (non-precedential).

under our speedy trial cases and a conviction is affirmed. *Garza*, 2009-NMSC-038, ¶ 39. But under the majority's approach, a record with no evidence of a speedy trial demand and no district court finding of actual prejudice, a case may still satisfy the prima facie factors for a viable ineffective assistance of counsel claim based solely on the length of time between arrest and conviction.[3]

{59} There are good reasons behind the third *Barker* factor and our Supreme Court's preference that ineffective assistance of counsel claims be presented and resolved in collateral proceedings. *Bernal*, 2006-NMSC-050, ¶ 33. A habeas petitioner then has the benefit of a different attorney who can offer a measured and objective assessment of the petitioner's previous attorney's performance. *See* Rule 5-802(G)(1) NMRA (providing for initial review and appointment of counsel for nonfrivolous habeas corpus petitions). As well, the petitioner's previous attorney can be called to testify as a witness about whether the defendant sought a speedy trial or willingly acquiesced in delay, without the danger of compromising the attorney-client relationship that may otherwise persist during litigation regarding whether a defendant's speedy trial right was violated. The majority's holding clouds our already-complex speedy trial analysis and undermines the preference that ineffective assistance of counsel claims be decided in collateral proceedings. For these reasons, I respectfully dissent.

J. MILES HANISEE, Judge

[3]The majority does not affirm or reverse the district court's finding that Defendant failed to show particularized prejudice under the fourth *Barker* factor. Instead, it instructs the district court to consider whether Defendant might have suffered prejudice "from the need to move [his] family to Chaparral in order to keep his existing job and avoid losing this established employment[,]" or the "long-term prejudicial effect that generalized anxiety and stress have when it lingers for nearly four years." Majority Op. ¶ 40. On the first basis, I think Defendant's affidavit is sufficiently clear to uphold the district court's finding that he did not suffer prejudice as a result of the delays in this case: he admits that he moved to Chapparral "for work" nearly two years after his arrest. As to the second ground, I can perceive no difference between a finding of prejudice based on "generalized anxiety and stress . . . [that] lingers for nearly four years" and a per-se prejudice rule based solely on the length of the delay. Such a bright-line rule may be sensible as a matter of policy, but it is not an accurate statement of the law we must apply. *See Serros*, 2016-NMSC-008, ¶ 26 (stating that "no single [*Barker*] factor is dispositive of whether a [speedy trial] violation has occurred").

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!

Volunteer Attorney Program
A Program of New Mexico Legal Aid
Justice for Families Project

Thank You to

The Young Lawyers Division

for its Generous Support of the Civil Legal Clinic!

The First Judicial District Court Access to Justice Committee and the Volunteer Attorney Program would like to thank the attorneys of the Young Lawyers Division for volunteering their time and expertise at its October 7, 2016 Civil Legal Clinic in Santa Fe. The 2016 Santa Fe Civil Legal Clinics take place the first Friday of every other month at the First Judicial District Courthouse in the 1st Floor Jury Room from 10 a.m. until 1 p.m. Fifteen individuals received assistance at the October 7 clinic thanks to the dedication of five attorneys from the Young Lawyers Division and one Santa Fe attorney. Thank you:

Mark Cox
Marilyn Hebert
Jordan Kessler
Julia Broggi
Charlie Baser
Rebecca Mnuk

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

Thank You!

Beat the Holiday Rush!

Holiday Advertising Schedule

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

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

Classified

Positions

Associate Attorney
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.

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

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

Flex-Time Associate
Davis & Gilchrist, PC, an AV-rated boutique litigation and trial law firm focused on healthcare fraud and abuse, whistleblower, employment, and legal malpractice cases is seeking a flex-time associate to help with brief writing, discovery, depositions, and trials. We are looking for someone with solid research and writing skills, ability to go with the flow, and a sense of humor, who wants to work on interesting and not-so-interesting cases in a relaxed-yet-uptight working environment. Send resume, proposed flex-time schedule, and compensation proposal to lawfirm@davisgilchristlaw.com.

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

Senior Trial Attorney

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.

Associate Attorney

Associate attorney wanted for fast paced, well established, litigation defense firm. Great opportunity to grow and share your talent. Inquiries kept confidential. Please send us your resume, a writing sample and references to Civerolo, Gralow & Hill, P.A., via e-mail to kayserk@civerolo.com or fax to 505-764-6099.

Full-Time Law Clerk

United States District Court, District of New Mexico, Albuquerque, Full-time Law Clerk, assigned to Judge Browning, $59,256 to $84,458 DOQ. See full announcement and application instructions at www.nmd.uscourts.gov. Successful applicants subject to FBI & fingerprint checks. EEO employer.

Litigation Secretary

Rosales Law Group, P.C. is seeking a strong litigation secretary to join our Albuquerque office. Eligible candidates will have the following qualifications: Both State, Federal & Appellate court experience, including knowledge of CM/ECF e-filing procedures; 5+ years of litigation experience; Heavy law and motion practice, with knowledge of trial preparation helpful; Proficiency in Microsoft Word, Excel and Outlook; Skills will include being organized, reliable, good attention to detail, and ability to work under short deadlines; Initiative and willingness to be a team player are important assets for this extremely busy and high profile desk. Salary commensurate with experience. Please send cover letter and resume either by e-mail to DavidRosales@NewMexicoCounsel.com , or by fax to (505) 465-7035, ATTN: David Ray Rosales, Managing Partner.

Legal Assistant/Paralegal
Albuquerque law firm focused on civil catastrophic injury litigation seeking a full-time paralegal/legal assistant to join our team. Legal experience preferred. Candidate should have strong organizational skills and a positive attitude. Send resume to DavidRosales@NewMexicoCounsel.com

Legal Assistant/Paralegal
Seeking an experienced legal assistant/paralegal for a full time job at a law firm in Las Cruces, New Mexico. Successful candidates should be able to work under pressure with multiple deadlines, possess good communication and organizational skills, and be able to work with others as a team. Accuracy, attention to detail, strong computer skills, and the ability to learn quickly are necessary in this position. Prior legal assistant or paralegal experience of no less than two years required. Specific qualifications include working knowledge of MS Office, typing speed of at least 65 wpm, and ability to work with legal technology such as e-filing in federal courts with CM/ECF and in state courts utilizing New Mexico's Odyssey/Tyler Technology, and transcription software, as well as basic knowledge of the federal and state Rules of Civil Procedure and local court rules. Benefits include health insurance and a 401(k) plan. Please submit your resume, cover letter, and references to bb@hmm-law.com.

Paralegal
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.

Paralegal
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.

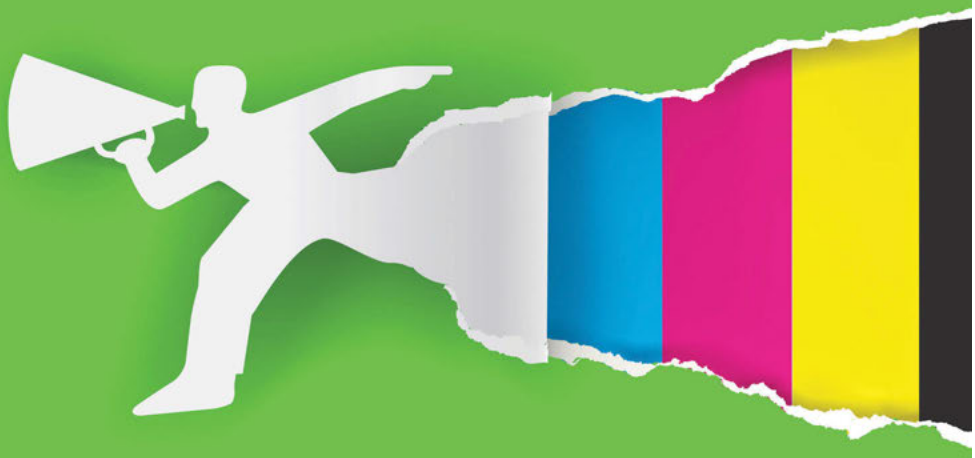
Legal Assistant
Allen, Shepherd, Lewis & Syra, P.A. is seeking a Legal Assistant. Duties include administrative tasks related to legal cases. Must have a high school diploma with three or more years of directly related experience working in a defense, civil litigation law firm or similar law practice. Associates degree and/or certificate related to legal administration work is preferred. Must be proficient in Microsoft Office, computerized databases, related software and the ability to learn new, complex programs. Experience with TimeMatters is a plus. Must have an understanding of legal documents and knowledge of court processes, including the ability to draft documents and follow them through the process. Seeking a highly skilled, professional, thoughtful, organized and motivated individual with attention to detail who can work in a demanding role. If you believe you are qualified and have an interest, please send resume, cover letter to hr@allenlawnm.com.

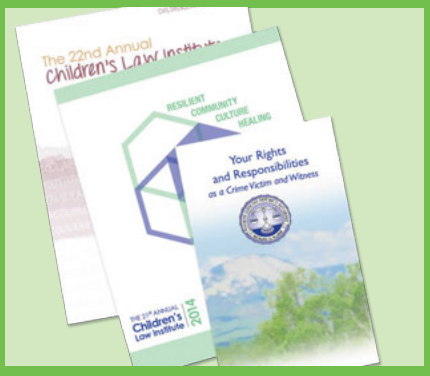
Miscellaneous

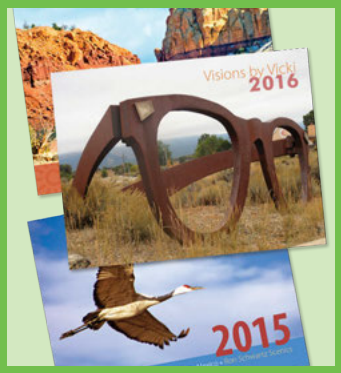
Copier for Sublease
Xerox 5855A runs as copier, fax, printer, scanner and is completely programmable with accounting use tracking. Lease expires Feb 2019. In excellent condition – available immediately! Contact aporr@branchlawfirm.com or 505-243-3500 ext. 4173 for details.

Digital Print Center

Quality, **full-color** printing. Local service with fast turnaround.







Business Cards • Letterhead • Envelopes • Booklets

Brochures • Calendars • Greeting Cards • Invitations • and much more!

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

*Ask about **YOUR** member discount!*

STATE BAR of NEW MEXICO
DIGITAL PRINT CENTER

SANDOVAL | FIRM

LIFE MEMBER
MULTI-MILLION DOLLAR ADVOCATES FORUM

HAPPY HOLIDAYS

from Sandoval Firm!

Rick Sandoval, Esq.
(505) 795-7790
www.sandovalfirm.com
rick@sandovalfirm.com

WANT TO MAKE MORE MONEY NEXT YEAR? MAKE BETTER CO-COUNSEL AGREEMENTS!

Rick Sandoval, Esq.'s multi-million dollar settlements have been verified by the Multi-Million Dollar Advocates Forum. He has been a qualified member since 2010 and has re-qualified TWICE in the last six months.