BAR BULLETIN
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August 2, 2017 • Volume 56, No. 31

The Last Remaining, by Kat Livengood (see page 3)

Dark Bird Studio, Santa Fe

Inside This Issue

Thank you for a great

CLE *at* Sea 2017!

On behalf of State Bar President Scotty Holloman, the State Bar thanks member **Clare Freeman** for presenting the majority of this 12-hour program and also for coordinating all of the logistics on the trip.

What a dedicated volunteer!

Mistral Research and Writing, L.L.C.

STATE BAR of NEW MEXICO

STATE BAR of NEW MEXICO

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4
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11
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16
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10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

23
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6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

About Cover Image and Artist: Photographer Kat Livengood lives and works in the high desert of Santa Fe. When she's not at her Canyon Road studio, she's traveling all over the west with her partner, artist Kelly Moore, looking for wild horses and capturing images of wildlife and southwestern landscapes. Livengood is known for sensitively conveying spirit and soul in her work. To view more of her work, visit www.katlivengood.com.

Notices

Court News

First Judicial District Court

Notice of Division II Pro Tem Assignment

The First Judicial District, Division II announces that Sarah M. Singleton has been appointed by the Chief Justice as judge pro tem for cases assigned to Division II, which assignment will last from Judge Singleton's retirement until a new judge takes office or Nov. 29, 2017, whichever comes first. During this time, Judge Singleton will continue to review proposed orders and motions that are submitted and will generally preside over Division II. Continue to send motion packages, proposed orders and correspondence concerning Division II cases to sfeddiv2proposedtxt@nmcourts.gov. The Division II telephone number will remain 505-455-8160.

Seventh Judicial District Court

Reassignment of Cases Due to Judge Sweazea's Retirement

Due to the retirement of Judge Kevin R. Sweazea, Judge Shannon Murdock is assigned to the cases previously assigned to Judge Sweazea. Pursuant to NMRA 1-088.1, parties who have not yet exercised a peremptory excusal will have until Aug. 23 to excuse the successor judge.

U.S. District Court, District of New Mexico

Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of part-time U.S. Magistrate Judge B. Paul Briones is due to expire on March 20, 2018. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new four-year term. The duties of a magistrate judge in this Court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the Court and should be addressed as follows: U.S. District Court, CONFIDENTIAL—ATTN: Magistrate Judge Merit Selection Panel, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102. Comments must be received by Sept. 5.

Retirement of Judge William P. Lynch

Judge William P. Lynch will retire this fall after 22 years of service as a state district judge and federal magistrate judge. Join members of the Court at noon, Aug. 18, in the Hondo Courtroom, on the fourth floor of the U.S. Courthouse, 333 Lomas Blvd. NW, to celebrate his retirement.

Professionalism Tip

With respect to the courts and other tribunals:

When hearings or depositions are cancelled, I will notify opposing counsel, necessary parties, and the court (or other tribunal) as early as possible.

State Bar News

Attorney Support Groups

- Aug. 7, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Aug. 14, 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#.
- Aug. 21, 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 Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert, 505-242-6845.

Committee on Women and the Legal Profession

Professional Clothing Closet

Does your closet need spring cleaning? The Committee on Women seeks gently used, dark colored, dry cleaned professional clothing donations for their professional clothing closet. Individuals who want to donate to the closet may drop off donations at the West Law Firm, 40 First Plaza NW, Suite 735 in Albuquerque, during business hours or to Committee Co-chair Laura Castille at Cuddy & McCarthy, LLP, 7770 Jefferson NE, Suite 102 in Albuquerque. Individuals who want to look for a suit can stop by the West Law Firm during business hours or call 505-243-4040 to set up a time to visit the closet.

Professor David J. Stout Honored with Justice Minzner Award

Join the Committee on Women and the Legal Profession in presenting the 2016 Justice Pamela B. Minzner Outstanding Advocacy for Women Award to Professor David Stout for his outstanding advocacy for women, in particular women in the legal profession. The award reception will be held from 5:30–7:30 p.m., Aug. 24, at the Albuquerque Country Club. Hors d'oeuvres will be provided and a cash bar will be available. R.S.V.P.s are appreciated. Contact Co-chairs Quiana Salazar-King at salazar-king@law.unm.edu or Laura Castille at lcastille@cuddymccarthy.com.

Criminal Law Section

Albuquerque Mayoral Candidate Debate

The Criminal Law Section has partnered with New Mexico in Focus to bring members of the legal community and public a free Albuquerque Mayoral Candidate Debate from 6-8 p.m., Aug. 15, at the State Bar Center in Albuquerque and by live stream. Gene Grant, host of NMiF, Jeff Proctor, justice correspondent for NMiF, and Martha Burk, contributor to NMiF, will moderate the debate. Live stream information will be available at www.nmbar.org/CriminalLaw the day of. Proposed candidate questions, with a focus on criminal justice or other, are being accepted until Aug. 11. To submit a question or for additional information, contact NMCrimLawSection@gmail.com. To learn more about the candidates, visit www.cabq.gov/voting-elections/candidate-information/2017-mayoral-candidates.

Notice to Attorneys: Electronic Filing Coming to the New Mexico Court of Appeals

Beginning Aug. 21, 2017, electronic filing and service will be mandatory for all new and pending cases in the Court of Appeals through the same Odyssey File and Serve system used in state district courts and New Mexico Supreme Court. Unlike in the district courts, electronic filing and service will be available in the Court of Appeals at no charge. Payment of the $125 docket fee, however, is still required and cannot be accepted through the File and Serve system at this time. Accordingly, for those cases initiated in the Court of Appeals through the File and Serve system for which a docket fee is due, payment must be made by check made payable to the New Mexico Court of Appeals and received by the Court Clerk's Office no later than five days after the case is accepted for filing.

See Rule 12-307.2(C) NMRA. The Court of Appeals will be offering in-person and online training sessions in August and September for any attorney who is not already registered and familiar with the File and Serve system. Additional details will be posted on the Court of Appeals' website.

Real Property, Trust and Estate Section

Division Meetings Open to Section Membership

To more effectively promote its activities, the Real Property, Trust and Estate Section established two divisions in 2014: the Real Property Division and the Trust and Estate Division. The RPTE Board of Directors overseeing the divisions will meet on the following dates: Real Property Division: noon-1 p.m., Sept. 20, at the State Bar Center and noon-1 p.m., Dec. 6, during the Real Property Institute; Trust and Estate Division: noon-1 p.m., Aug. 16, at the State Bar Center and 8-8:30 a.m., Nov. 16, during the Probate Institute. At the meetings, members will be updated about recent rule changes and brainstorm activities for the remainder of 2017 and beginning of 2018. Meals will be provided during the meetings. R.S.V.P. to Breanna Henley at bhenley@nmbar.org. If you cannot attend the meeting but would like to provide suggestions of what you would like to see from the divisions this year, or have questions generally, contact Real Property Division Chair Charles Price at cprice@cpricelaw.com or Trust and Estate Division Chair Greg MacKenzie at greg@hurleyfirm.com.

UNM

Law Library

Hours Through Aug. 20

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.

Other Bars

New Mexico Criminal Defense Lawyers Association

Las Cruces Evidence CLE

Get the breakdown on rules of evidence in state and federal court, finding electronic evidence on your own and knowing when to hire an expert and an update on Crawford hearsay and impeachment all at the New Mexico Criminal Defense Lawyers Association's "Evidence: The Latest in How to Find it, Use it, and Admit it" (6.2 G) CLE on Aug. 25 in Las Cruces. Following the CLE, NMCDLA members and their friends and families are invited to our annual Las Cruces membership party and auction. Visit nmcdla.org to join NMCDLA and register for the seminar today.

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

Address Changes

All New Mexico attorneys must notify both the Supreme Court and the State Bar of changes in contact information.

Supreme Court
Web: supremecourt.nmcourts.gov
Email: attorneyinfochange@nmcourts.gov
Fax: 505-827-4837
Mail: PO Box 848
Santa Fe, NM 87504-0848

State Bar
Web: www.nmbar.org
Email: address@nmbar.org
Fax: 505-797-6019
Mail: PO Box 92860
Albuquerque, NM 87199

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

Legal Education

August

3 **Ethical Approach Towards Mediation, Litigation, Arbitration and Other ADR Practices**
2.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Drugs in the Workplace (2016)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

4 **2017 ECL Solo and Business Bootcamp Parts I and II**
3.4 G, 2.7 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **2016 Trial Know-How! (The Reboot)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Lawyers Ethics in Employment Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Tricks and Traps of Tenant Improvement Money**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Gross Receipts Tax Fundamentals and Strategies**
6.0 G
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com

11 **Diversity Issues Ripped from the Headlines (2017)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **Attorney vs. Judicial Discipline (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **New Mexico DWI Cases: From the Initial Stop to Sentencing (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **Human Trafficking (2016)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **New Mexico Defense Lawyers Association and West Texas TADC Joint Seminar**
4.5 G, 1.5 EP
Live Seminar, Ruidoso
New Mexico Defense Lawyers Association
www.nmdla.org

11 **Introduction to New Mexico Money Laundering**
1.5 G
Live Seminar, Las Cruces
Peter Ossorio
575-522-3112

14 **Traffic Law**
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davidmiles.com

17–18 **10th Annual Legal Service Providers Conference**
10.0 G, 2.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

25 **Evidence: The Latest in How to Find It, Use It, and Admit It**
6.2 G
Live Seminar, Las Cruces
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

28 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **The Use of "Contingent Workers"—Issues for Employment Lawyers**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **The Law and Bioethics of Using Animals in Research**
6.2 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

September

8 **Practical Succession Planning for Lawyers**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **2016 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

September

8 **Add a Little Fiction to Your Legal Writing (2016)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Techniques to Avoid and Resolve Deadlocks in Closely Held Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Ethical Implications of Section 327 of the bankruptcy Code**
2.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **What Notorious Characters Teach About Confidentiality**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

14 **The Ethics of Representing Two Parties in a Transaction**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **New Mexico Conference on the Link Between Animal Abuse and Human Violence**
11.7 G
Live Seminar, Albuquerque
Positive Links
www.thelinknm.com

18 **Ethical Considerations in Foreclosures**
1.0 EP
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

19 **How to Make Your Client's Estate Plan Survive Bankruptcy**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Concealed Weapons and Self-Defense**
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

21 **Controversial Issues Facing the Legal Profession (2016)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Legal Technology Academy for New Mexico Lawyers (2016)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Guardianship in New Mexico/The Kinship Guardianship Act (2016)**
4.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **32nd Annual Bankruptcy Year in Review (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Transgender Law and Advocacy (2016)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Ethics for Government Attorneys**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

October

2 **Uncovering and Navigating Blind Spots Before They Become Land Mines**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Lawyers' Duties of Fairness an Honesty**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **2016 Administrative Law Institute**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Deposition Practice in Federal Practice**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Ethics, Disqualification and Sanctions in Litigation**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Basic Practical Regulatory Training for the Electric Industry**
27.0 G
Live Seminar, Albuquerque
Center for Public Utilities NMSU
business.nmsu.edu

Constitution Day

September 17, 2017

In the spirit of Constitution Day and to aid in the fulfillment of Public Law 108-447 Sec. 111 Division J - SEC. 111(b), the YLD organizes a public education program that provides participating New Mexico fifth-grade classes with U.S. Constitution booklets to keep and an educational lesson from a licensed New Mexico attorney.

Statewide attorney volunteers are needed for this program! Roughly hour-long educational lessons will take place during the week of Sept. 11–15 at elementary schools across New Mexico.

Please accept this offer to earn pro bono hours and connect with New Mexico's youth. Educator feedback reflects that this is a worthwhile program and an exciting and inspiring experience for students. More than 33,000 New Mexico students have been served during this program's lifetime.

For more information and to volunteer,
visit www.nmbar.org/ConstitutionDay

Deadline to participate is Aug. 18.

State Bar of New Mexico
Young Lawyers Division

STATE BAR of NEW MEXICO
CHILDREN'S LAW SECTION

15th Annual Art Contest

How I will leave my footprint on the world.

Through the years, the Children's Law Section Art Contest has demonstrated that communicating ideas and emotions through art and writing fosters thought and discussion among youth on how to change their lives for the better. This year's theme is designed to encourage youth from around the state who have come into contact with the juvenile justice system to think about how they will make contributions to the world during their lifetime. Using materials funded by the Section's generous donors, contestants will decorate flip flops to demonstrate their idea.

How can I help?

Support the Children's Law Section Art Contest by way of a donation that will enable contest organizers to purchase supplies, display artwork, provide prizes to contestants and host a reception for the participants and their families. Art supplies and contest prize donations are also welcome.

To make a tax deductible donation, visit www.nmbar.org/ChildrensLaw or make a check out to the New Mexico State Bar Foundation and note "Children's Law Section Art Contest Fund" in the memo line. Please mail checks to:

State Bar of New Mexico
Attn: Breanna Henley
PO Box 92860
Albuquerque, NM 87199

For more information contact
Alison Pauk at alison.pauk@lopdnm.us.

UNM Law Scholarship Golf Classic a Rousing Success!

Thanks to everyone who sponsored, participated in and contributed—the UNM Law Scholarship Golf Classic presented by U.S. Eagle Federal Credit Union was the best yet!

Together we set a new record and raised over $60,000. Three full-ride scholarships will be awarded to one extraordinary law student in each class for all three years of his or her study. We can offer these life-changing scholarships because of you! Special thanks to our Presenting Sponsor U.S. Eagle FCU, to our Eagle Sponsors Albert Law, MINDSET and Dixon, Scholl & Carrillo for leading the way, and to all of our sponsors for their commitment. Visit http://lawschool.unm.edu/alumni/events/golf.php to learn more about our sponsors, tournament and work of the Law Alumni/ae Association. See you again in 2018!

UNM SCHOOL OF LAW

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 July 21, 2017

PUBLISHED OPINIONS

No. 34822	1st Jud Dist Santa Fe LR-14-25, HON BEVACQUA-YOUNG v M STEELE (reverse and remand)	7/17/2017

UNPUBLISHED OPINIONS

No. 34884	4th Jud Dist San Miguel CV-15-68, P KESLER v US BANK (dismiss)	7/18/2017
No. 34934	WCA-10-53399, R CASE v HANNA PLUMBING (reverse and remand)	7/18/2017
No. 35163	3rd Jud Dist Dona Ana CR-14-362, STATE v M MANCHA (affirm)	7/18/2017
No. 35165	4th Jud Dist San Miguel CV-12-254, US BANK v P KESLER (affirm in part, reverse in part and remand)	7/18/2017
No. 36018	1st Jud Dist Santa Fe DM-11-367, M DUBEAU v J HOGDEN (dismiss)	7/18/2017
No. 36148	8th Jud Dist Taos JQ-16-2, CYFD v JOE T (affirm)	7/18/2017
No. 36244	2nd Jud Dist Bernalillo CR-16-3466, STATE v M GARCIA (reverse and remand)7/18/2017	
No. 36006	9th Jud Dist Curry CR-16-138, STATE v J STEWARD (affirm)	7/19/2017
No. 36041	2nd Jud Dist Bernalillo LR-16-5, STATE v J HAGER (affirm)	7/19/2017
No. 36149	8th Jud Dist Taos JQ-16-2, CYFD v MELISSA D (affirm)	7/19/2017
No. 35829	2nd Jud Dist Bernalillo CR-14-5843, STATE v J HERRON (affirm)	7/20/2017

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

Clerk's Certificate of Admission

On July 18, 2017:
Kat Fox
Century Automotive Service Corporation
10555 Montgomery Blvd. NE, Bldg. 2
Albuquerque, NM 87111
888-338-0389
kfox@centuryservicecorp.com

Clerk's Certificate of Change to Inactive Status

Effective June 1, 2017:
G. Emlen Hall
916 La Luz Drive NW
Albuquerque, NM 87107
505-917-2950
hall@law.unm.edu

Clerk's Certificate of Name Change

As of July 14, 2017:
Elizabeth A. Harrison f/k/a Elizabeth A. Farrington
Paul Kennedy & Associates, PC
201 Twelfth Street NW
Albuquerque, NM 87102
505-842-8662
eharrison@paulkennedylaw.com

As of July 19, 2017:
Jay K. Nair f/k/a Jaykrishnan Nair
PO Box 26945
520 Gold Avenue SW,
Suite 1127 (87102)
Albuquerque, NM 87102
800-570-3876 (phone & fax)
law@jknair.com

As of July 21, 2017:
Jordyn Whisenant Preut f/k/a Jordyn Whisenant
6605 Uptown Blvd. NE,
Suite 340
Albuquerque, NM 87110
505-883-9662
jordyn.whisenant@gmail.com

Clerk's Certificate of Withdrawal

Effective July 24, 2017:
Meredith Jolie
1634 I Street NW, Suite 400
Washington, DC 20006

Clerk's Certificate of Reinstatement to Active Status

Effective July 14, 2017:
Jean Philips
810 E. Green Avenue
Gallup, NM 87305
505-730-6594
jeanphilips@hotmail.com

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 August 2, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-079	Public inspection and sealing of court records	03/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-112	Public inspection and sealing of court records	03/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-112	Public inspection and sealing of court records	03/31/2017
Civil Forms		
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the District Courts		
5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123	Public inspection and sealing of court records	03/31/2017
5-204	Amendment or dismissal of complaint, information andindictment	07/01/2017
5-401	Pretrial release	07/01/2017
5-401.1	Property bond; unpaid surety	07/01/2017
5-401.2	Surety bonds; justification of compensated sureties	07/01/2017
5-402	Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
5-403	Revocation or modification of release orders	07/01/2017
5-405	Appeal from orders regarding release or detention	07/01/2017
5-406	Bonds; exoneration; forfeiture	07/01/2017
5-408	Pretrial release by designee	07/01/2017
5-409	Pretrial detention	07/01/2017
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the Magistrate Courts		
6-114	Public inspection and sealing of court records	03/31/2017
6-207	Bench warrants	04/17/2017
6.207.1	Payment of fines, fees, and costs	04/17/2017
6-401	Pretrial release	07/01/2017
6-401.1	Property bond; unpaid surety	07/01/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-403	Revocation or modification of release orders	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017
6-408	Pretrial release by designee	07/01/2017
6-409	Pretrial detention	07/01/2017
6-506	Time of commencement of trial	07/01/2017
6-703	Appeal	07/01/2017
Rules of Criminal Procedure for the Metropolitan Courts		
7-113	Public inspection and sealing of court records	03/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
7-401	Pretrial release	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017
7-406	Bonds; exoneration; forfeiture	07/01/2017
7-408	Pretrial release by designee	07/01/2017
7-409	Pretrial detention	07/01/2017
7-506	Time of commencement of trial	07/01/2017
7-703	Appeal	07/01/2017

Rules of Procedure for the Municipal Courts

8-112	Public inspection and sealing of court records	03/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
8-401	Pretrial release	07/01/2017
8-401.1	Property bond; unpaid surety	07/01/2017
8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
8-403	Revocation or modification of release orders	07/01/2017
8-406	Bonds; exoneration; forfeiture	07/01/2017
8-408	Pretrial release by designee	07/01/2017
8-506	Time of commencement of trial	07/01/2017
8-703	Appeal	07/01/2017

Criminal Forms

9-301A	Pretrial release financial affidavit	07/01/2017
9-302	Order for release on recognizance by designee	07/01/2017
9-303	Order setting conditions of release	07/01/2017
9-303A	Withdrawn	07/01/2017
9-307	Notice of forfeiture and hearing	07/01/2017
9-308	Order setting aside bond forfeiture	07/01/2017
9-309	Judgment of default on bond	07/01/2017
9-310	Withdrawn	07/01/2017
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017

Children's Court Rules and Forms

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From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-019

No. S-1-SC-35881 (filed May 15, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CLIVE PHILLIPS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
DAVID WILLIAMS, District Judge

MARK A. EARNEST
THE HASTINGS LAW FIRM
Albuquerque, New Mexico

THERESA M. DUNCAN
LAW OFFICE OF
THERESA M. DUNCAN
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for Appellant

HECTOR H. BALDERAS
Attorney General
MARIS VEIDEMANIS
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

Opinion

Edward L. Chávez, Justice

{1} This case addresses the procedure for determining whether a jury is deadlocked. A jury is deadlocked or "hung" on a crime when the jurors cannot unanimously agree on a verdict of guilty or not guilty for that crime. If the jury is deadlocked on a crime, the defendant may be retried for that crime without violating constitutional protections against double jeopardy. Conversely, double jeopardy protections prevent a retrial when the jury has rendered a verdict. It follows from these basic precepts that when a jury is unable to reach unanimous agreement on an open count with lesser included offenses, the judge must poll the jury and clearly establish on the record on which offense in the count the jury was deadlocked. The defendant may be retried on the offense on which the jury was deadlocked and any lesser included offenses. Importantly, the judge must confirm that the jury did not unanimously agree that the defendant was not guilty of one or more of the included offenses because the constitutional protection against double jeopardy precludes the State from prosecuting the defendant for such offense(s) since the jury's unanimous agreement on a verdict of not guilty constitutes an acquittal. If the judge fails to clearly establish on the record the offense(s) on which the jury was deadlocked, all but the lowest offense must be dismissed and the dismissed offense(s) cannot be retried.

{2} In this case, the jury announced that it was hung on Count 1, which required it to consider whether Defendant Clive Phillips was guilty of first-degree premeditated murder, second-degree murder, or voluntary manslaughter. The district court then polled the jurors. During the poll, seven jurors stated that the jury had unanimously agreed Phillips was not guilty of first-degree murder, but five jurors indicated the jury was unable to reach a verdict on that crime. The only verdict form given to the jury that exclusively referred to first-degree murder was the guilty verdict form, so there is no written record of whether the jury had acquitted Phillips of that crime or deadlocked during deliberations. The district court determined that the jury was hung on first-degree murder. We hold that the judge failed to clearly establish on the record whether the jury deadlocked on first-degree murder, and therefore Phillips can only be retried on the lowest offense in Count 1, which is voluntary manslaughter. We reverse the district court and remand to dismiss the first- and second-degree murder charges with prejudice.

BACKGROUND

{3} Phillips shot his former girlfriend and shot and killed his friend after discovering them in bed together at the home they all shared. The State prosecuted Phillips for a number of crimes, and seven counts were submitted to the jury after trial, including Count 1, which contained the crimes of first-degree murder, second-degree murder, and manslaughter. The jurors did not enter a verdict on Count 1.

{4} To resolve Count 1, the jury had the option of entering a verdict finding Phillips guilty of first-degree murder, second-degree murder, or voluntary manslaughter, or a verdict finding him not guilty of all three crimes. Because second-degree murder is a lesser included offense of first-degree murder, and voluntary manslaughter is a lesser included offense of both first- and second-degree murder, the model jury instruction used in this case requires jurors to individually consider each greater offense before considering a lesser offense. *See* UJI 14-6012 NMRA; UJI 14-250 NMRA. Under the model jury instruction, the jurors first must determine whether they unanimously agree that the defendant is guilty of first-degree murder. UJI 14-250. If they agree that the defendant is guilty, the jury enters a guilty verdict for first-degree murder and does not need to consider second-degree murder or voluntary manslaughter. *Id.* If not, after reasonable deliberation, the jurors must then consider second-degree murder. *Id.* The jurors follow the same procedure with respect to second-degree murder and only consider voluntary manslaughter if they cannot unanimously agree that the defendant was guilty of second-degree murder. *Id.*

{5} If the jurors unanimously determine that there is reasonable doubt that the defendant committed any one of the aforementioned crimes, their verdict must be that the defendant is not guilty of that crime. *Id.* The jury in this case was not provided with a "not guilty" verdict form for each crime. Thus, if the jurors unanimously agreed that Phillips was not guilty of first-degree murder, they had no verdict form on which to indicate an acquittal on that specific crime because the only "not guilty" verdict form available to the jury on Count 1 required the jury to unanimously find Phillips not guilty of all three crimes.

{6} If the jurors cannot unanimously agree on any verdict for a count with lesser included offenses such as Count 1 in this case, the trial court must poll the jurors, beginning with the greatest offense, to determine whether they unanimously found the defendant not guilty of any individual offense within the count. Rule 5-611(D) NMRA. If the jury has unanimously found a defendant not guilty of any offense within the count, the trial court is required to enter a verdict of not guilty for the offense and for any greater degree of the offense. *Id.*

{7} The jurors in this case deliberated for three days. On the second day of deliberations, the jurors sent a note to the court indicating that some jurors believed that Phillips was guilty of second-degree murder because the State had proved that there was no sufficient provocation, and therefore those jurors were forced to vote against manslaughter. The note also indicated that the jurors agreed on all other elements of both offenses and asked the court for guidance on how to proceed. The note did not mention whether the jurors had voted to acquit Phillips or were deadlocked on first-degree murder. The court replied that the jurors had been "given all the procedural instructions." The jury continued to deliberate.

{8} On the third day, after approximately six additional hours of deliberations, the jury sent a note to the court reading: "What does it mean if we don't sign any of the papers on Count 1? We are hung." Concerning Count 1, the jury only received four papers for signature. The first was a verdict, which read "We find the defendant guilty of first degree murder by a deliberate killing as charged in Count 1." The second was a verdict, which read "We find the defendant guilty of second degree murder an included offense of Count 1." The third was a verdict, which read "We find the defendant guilty of voluntary manslaughter an included offense of Count 1." The fourth and last was a verdict, which read "We find the defendant not guilty of Count 1."

{9} Later that afternoon, the court called in the jury, and a juror informed the court that the jurors had not reached a verdict on Count 1 and that they would not reach a verdict, even with more time to deliberate. With respect to the charges in Count 1, the court asked "so as to none of them, you could not reach an agreement?" to which the juror responded "No," which the court—despite the form of the question—interpreted to mean that the jurors could not reach an agreement. A jury poll was therefore required by Rule 5-611(D) to determine whether the jury had unanimously voted not guilty as to any offense included within Count 1.

{10} The district court polled the jurors to "inquire whether the jury ha[d] truly deadlocked on the greater offense of first-degree murder." As the court began its polling, the following colloquy ensued:

> THE COURT: I need to ask each and every one of you the question as to whether you have truly deadlocked on the greater offense of first-degree murder. I will start with you, Mr. Ashe.
>
> THE JUROR: So I don't understand how the—
>
> THE COURT: Yes or no, whether you were deadlocked with regards to the greater offense of first-degree murder. You cannot reach a decision as to that charge?
>
> THE JUROR: And the word "deadlock" meaning?
>
> THE COURT: That you unanimously could not reach a decision with your fellow jurors as to that charge.
>
> THE JUROR: I hate to say the wrong thing, but I believe we did reach a decision, and we went down to the next charge; is that correct?
>
> THE COURT: So with regards to first-degree, you were not deadlocked with first-degree?
>
> THE JUROR: No.
>
> THE COURT: I'm asking you, Mr. Ashe.
>
> THE JUROR: No.
>
> The second juror also indicated that the jury was not deadlocked. The third juror initially responded to the question of whether the jury was deadlocked on first-degree murder with "I thought we were," but eventually said no. The next three jurors also answered no.

{11} The seventh juror sought further clarification:

> THE JUROR: Can I ask a question? I mean, deadlocked meaning we couldn't agree?
>
> THE COURT: Correct. You could not arrive at a verdict.
>
> THE JUROR: Then, yes, we were deadlocked.

The next four jurors also answered yes to indicate that the jury was deadlocked on first-degree murder. The twelfth juror responded no to the same question. Thus, seven jurors indicated that the jury agreed on first-degree murder, which could only mean that the jury had agreed that Phillips was not guilty of that crime, but five jurors indicated that the jury was deadlocked. However, those five jurors indicated that they were deadlocked immediately after being told that "deadlocked" meant they could not agree on a *verdict*. Because the only verdict form offered to the jury for first-degree murder was a guilty verdict form, these five jurors could have answered "yes" to reflect that the jury could not agree to enter *that* verdict—finding Phillips guilty of first-degree murder. If this is what the five jurors meant by their answers, these answers could be consistent with the other seven jurors seemingly saying that the jury agreed that Phillips was not guilty of first-degree murder, for which there was no verdict form. Yet another reasonable interpretation of the answers from those five jurors is that the jury could not agree that Phillips was either guilty or not guilty of first-degree murder and was therefore hung on that crime.

{12} Despite the jurors' apparent inability to agree on whether they had disagreed, the district court declared that the jury was "split" and "in complete disagreement" on first-degree murder. Defense counsel astutely argued that the jurors' conflicting answers indicated that they were confused about the question, and therefore she urged the court to clarify the jury's resolution of the first-degree murder charge. The court responded that it had asked a yes-or-no question and could not clarify the jurors' responses any further, then declared a mistrial and reserved the State's right to retry Phillips on every crime in Count 1: first-degree murder, second-degree murder, and voluntary manslaughter.

{13} Phillips brought a motion to dismiss the first- and second-degree murder charges on double jeopardy grounds, arguing that the district court had not established a clear record of whether the jury had deadlocked on first- and second-degree murder due to the jurors' ambiguous responses during the jury poll. The district court denied his motion and held that the jury poll demonstrated that the jurors were hung on first-degree murder, and accordingly there was manifest necessity for the court's declaration of a mistrial as to every crime within Count 1. Phillips appealed to this Court to challenge the district court's denial of his motion to dismiss.

DISCUSSION

{14} The sole legal issue in this case is whether the district court abused its discretion by determining that the jurors were hung on first-degree murder based on the jury poll. *See State v. Wardlow*,

1981-NMSC-029, ¶ 13, 95 N.M. 585, 624 P.2d 527 (applying an abuse of discretion standard to the trial court's determination that there was no reasonable possibility that the jury could agree on a verdict). When jurors are polled regarding their verdict, the trial court is under a nondiscretionary duty to clarify any ambiguity in the jurors' responses and obtain a clear and unambiguous response from the jury, beginning with the highest offense included in the count. *See State v. Holloway*, 1987-NMCA-090, ¶¶ 13, 16, 106 N.M. 161, 740 P.2d 711 ("The responsibility for preserving the right to a voluntary and unanimous verdict rests primarily on the trial court. . . . Where a juror's response indicates uncertainty concerning unanimity, a jury poll requires exploration of the uncertainty or dissent." (citations omitted)). The responses from the jurors in this case were ambiguous because some jurors indicated that the jury had reached a unanimous agreement on the charge of first-degree murder, while others stated that the jury could not unanimously agree to enter a verdict for the same charge. The jurors should have given uniform answers as to whether they unanimously agreed on the charge or could not agree. Their conflicting answers indubitably demonstrated confusion with the district court's question.

{15} In the face of juror confusion, the district court possessed significant discretion to undertake "proper remedial measures" to clarify the jurors' ambiguous responses. *Id.* ¶ 17. For example, the district court could have explained that the term "deadlocked" means that the jury could not unanimously agree that Phillips either was or was not guilty of first-degree murder, and then it could have re-polled the jury. In the alternative, the court could have requested not guilty verdict forms for each crime, submitted all verdict forms to the jury, and could then have directed the jurors to retire for further deliberations to determine whether they unanimously agreed on a verdict for any of the crimes. Rule 5-611(E). We do not intend to imply that these were the only methods available to the district court for clarifying the jurors' ambiguous responses during its polling of the jurors.

{16} However, the district court did not have the option of taking the action it did in this case. Without establishing a clear record indicating the crimes on which the jurors had failed to reach a unanimous verdict, it was an abuse of discretion for the court to conclude that the jury was hung and that there was manifest necessity justifying a mistrial on all of the crimes in Count 1. *See Holloway*, 1987-NMCA-090, ¶ 17 ("This discretion, and the action taken by the [trial] court, . . . must resolve any doubt concerning the unanimity of a verdict. . . . [T]he verdict should be definite in nature and devoid of any ambiguity."). **{17}** We have long held that in cases such as this where the record is "silent upon which, if any, of the specific included offenses the jury had agreed and upon which the jury had reached an impasse," we must "resolve any doubt in favor of the liberty of the citizen" and "dismiss[] upon double jeopardy grounds . . . such offenses on which the record is unclear." *State v. Castrillo*, 1977-NMSC-059, ¶ 14, 90 N.M. 608, 566 P.2d 1146.[11] In *Castrillo*, the defendant was tried by a jury on first-degree murder with second-degree murder and voluntary manslaughter as the lesser included offenses. *Id.* ¶ 1. The foreman announced that the jury was deadlocked and that there was no purpose in continuing to deliberate. *Id.* ¶ 14. The judge declared a mistrial and then asked the foreman for a numerical split. *Id.* The foreman indicated that the split was nine for acquittal, and responded "Yes" when the judge asked, "Nine for acquittal and three for *some degree of conviction*?" *Id.* (emphasis added). The phrase "some degree of conviction" did not clearly establish upon which of the three crimes—first-degree murder, second-degree murder, or voluntary manslaughter—the jury was deadlocked. *Id.* ¶¶ 1, 14. The *Castrillo* Court noted that the lack of a clear record as to whether the jurors disagreed on first- or second-degree murder demonstrated no manifest necessity to declare a mistrial, and therefore jeopardy attached to those crimes and precluded the State from seeking a retrial. *Id.* ¶ 14. However, the defendant in *Castrillo* could be retried on the least included offense, voluntary manslaughter, because the jury would not have been hung had it reached a unanimous decision on manslaughter—it would have instead entered an acquittal on the entire count. *Id.*; *see also State v. Garcia*, 2005-NMCA-042, ¶ 22, 137 N.M. 315, 110 P.3d 531 (noting that "it would appear to be logically inconsistent, if not a logical impossibility" for a jury to simultaneously deadlock on a greater offense and acquit on a lesser included offense).

{18} The same principle applies here because the district court in this case failed to create a clear record "as to which of the included offenses the jury was considering at the time of its discharge." *Castrillo*, 1977-NMSC-059, ¶ 14. This case presents an interesting wrinkle because the jury's note during the second day of deliberations demonstrates that at that point in the deliberations it was hung on second-degree murder. However, the note merely provides a snapshot of the jury's thinking partway through deliberations and does not give a definitive answer as to its final disposition of each crime within Count 1. *See Harrison v. Gillespie*, 640 F.3d 888, 899 (9th Cir. 2011) ("Because of the significance of the entire deliberative process, the jurors' preliminary votes in the jury room do not constitute a final verdict, even if they are unanimous. Instead, the verdict must be rendered by the jury in open court and accepted by the court in order to become final." (citations omitted)). Indeed, the jury's note would not be sufficient even if it had been sent to the court on the same afternoon as the jury poll because once the court conducted the jury poll, the results of that poll were the ultimate expression of the jury's verdict at the time of its discharge. *See Holloway*, 1987-NMCA-090, ¶ 23 (holding that the results of a jury poll superceded any contrary verdict determined in the jury room because jurors are free to change their votes and register dissent to a previously announced verdict during the jury poll). Here there was no clear record of the jury's decision at the time of its discharge. Thus, constitutional double jeopardy protections bar retrial on the first- and second-degree murder charges, but jeopardy has not attached to voluntary manslaughter, and the State may retry Phillips for that lesser included offense.

CONCLUSION

{19} Because the district court failed to clarify the ambiguous and conflicting jurors' responses during the jury poll, we vacate the district court's order denying Phillips' motion to dismiss the charges of first- and second-degree murder and remand the case to the district court with instructions to dismiss those charges with prejudice.

{20} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

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

[1]Although in *Wardlow* this Court stated that *Castrillo* was overruled to the extent that it was inconsistent with *Wardlow*, we now clarify that we perceive no inconsistency between those cases. *Wardlow*, 1981-NMSC-029, ¶ 15.

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-020

No. S-1-SC-34093 (filed May 22, 2017)

ARSENIO CORDOVA,
Plaintiff-Respondent,
v.
JILL CLINE, THOMAS TAFOYA, LORETTA DELONG, JEANELLE LIVINGSTON, CATHERINE COLLINS, ROSE MARTINEZ, ESTHER WINTER, ELIZABETH TRUJILLO, AND JANE DOES 1 THROUGH 10,
Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
ABIGAIL ARAGON, District Judge

JULIA LACY ARMSTRONG
ARMSTRONG & ARMSTRONG, P.C.
Taos, New Mexico
for Petitioner Jill Cline

SAMUEL M. HERRERA
THE HERRERA FIRM, P.C.
Taos, New Mexico
for Petitioner Thomas Tafoya

STEVEN K. SANDERS
Albuquerque, New Mexico
for Petitioners Loretta DeLong, Jeanelle Livingston, Catherine Collins, Rose Martinez, Esther Winter, and Elizabeth Trujillo

MARCUS E. GARCIA
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LINDA HELEN BENNETT
L. HELEN BENNETT, PC
Albuquerque, New Mexico
for Respondent

Opinion

Barbara J. Vigil, Justice

{1} This dispute comes before the Court in relation to a malicious abuse of process claim made by Taos school board member Arsenio Cordova (Cordova) against eighteen members of an unincorporated citizens' association (collectively, Petitioners) following their efforts to remove Cordova from office under the Local School Board Member Recall Act (Recall Act), NMSA 1978, §§ 22-7-1 to -16 (1977, as amended through 2015). We hold that petitioners who pursue the recall of a local school board member under the Recall Act are entitled to the procedural protections of the New Mexico statute prohibiting strategic litigation against public participation (Anti-SLAPP statute). *See* NMSA 1978, § 38-2-9.1 (2001). We also conclude that petitioners are entitled to immunity under the *Noerr-Pennington* doctrine when they exercise their right to petition unless the petitioners (1) lacked sufficient factual or legal support, and (2) had a subjective illegitimate motive for exercising their right to petition. *See E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961) ("To hold that . . . the people cannot freely inform the government of their wishes . . . would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights."); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (relying on *Noerr's* protection of "effort[s] to influence public officials regardless of intent or purpose" of the efforts); *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-62 (1993) (holding that if the challenged litigation is objectively baseless, a court examines the subjective motivation behind the litigation to determine if the lawsuit is a sham).

{2} Accordingly, we reverse the Court of Appeals' holdings that the Anti-SLAPP statute and the *Noerr-Pennington* doctrine do not apply. We also reverse the Court of Appeals' holding that it did not have jurisdiction over Petitioners with pending counterclaims. *Cordova v. Cline*, 2013-NMCA-083, ¶¶ 15-17, 308 P.3d 975. We affirm the district court's holding that Petitioners' conduct was in support of the political process of a school board member recall; and thus, Petitioners properly invoked the substantive protection of the *Noerr-Pennington* doctrine and the procedural and remedial provisions of the Anti-SLAPP statute. Pursuant to Section 38-2-9.1(A), we uphold the district court order granting Petitioners' motion to dismiss. Pursuant to Section 38-2-9.1(B), Petitioners are statutorily entitled to an award of attorney fees.

I. BACKGROUND

{3} Jill Cline, a parent with children enrolled in the Taos Municipal School District, organized Citizens for Quality Education (CQE) and registered it as an unincorporated citizens' association with the Taos County Clerk. Members of CQE included Cline, Taos Municipal School Board Member Thomas Tafoya, and various other current and former school administrators. CQE alleged that Cordova had committed acts of misfeasance and malfeasance while in office. CQE initiated a petition to recall Cordova from the Taos school board pursuant to the Recall Act. *See* §§ 22-7-2, -8.

{4} After collecting the requisite signatures, CQE submitted its petition to the Taos County Clerk as required under the Recall Act. *See* §§ 22-7-8(F), -9. The Taos County Clerk filed an application with the district court on May 28, 2009, requesting "a hearing [for a] determination by the court of whether sufficient facts exist[ed] to allow the petitioner to continue with the recall process" as required by the Recall Act. Section 22-7-9.1(A). Under the Recall Act, such hearing must "be held not more than ten days from the date the application is filed by the county clerk." Section 22-7-9.1(B). The hearing was continued twice and was not held until September 16, 2009.

{5} At the start of the hearing, CQE voluntarily dismissed its recall petition. Given CQE's voluntary dismissal of the recall petition, the district court did not determine whether there was adequate support for the recall process to proceed.

{6} Two days later, on September 18, 2009, Cordova filed a complaint against eight named members of CQE as well as ten un-

named members in their individual capacities. Cordova contended that Petitioners' recall efforts were in furtherance of a personal vendetta as opposed to legitimate claims of malfeasance or misfeasance in office. He alleged that Petitioners initiated the recall without demonstrating probable cause of his misfeasance or malfeasance in office and that the voluntary dismissal of their petition precluded any finding of whether it was adequately supported. He argued that Petitioners' affidavits were incompetent and backdated. Further, Cordova's complaint stated that the incompetent affidavits, coupled with the two continuances and voluntary dismissal of the petition, constituted malicious abuse of process. Cordova sought damages for malicious abuse of process, civil conspiracy, and prima facie tort.

{7} In response to Cordova's complaint, six of the named Petitioners filed a motion to dismiss for the failure to state a claim under Rule 1-012(B)(6) NMRA, and for violations under the Anti-SLAPP statute, § 38-2-9.1(A) (requiring that "a special motion to dismiss . . . be considered by the court on a priority or expedited basis"). Petitioners asserted that Cordova filed his complaint in retaliation for their petitioning activity and thus violated their right to petition under the First Amendment to the United States Constitution. Each filing separately, Cline and Tafoya also moved to dismiss Cordova's complaint, invoked New Mexico's Anti-SLAPP statute as an affirmative defense, *see* § 38-2-9.1, and asserted counterclaims against Cordova for malicious abuse of process.

{8} The district court granted Petitioners' motions to dismiss, finding that Petitioners' "speech and conduct occurred in connection with public meetings and a public hearing and were in support of the political process of school board member recall[,] thus invoking the substantive protection of the First Amendment and the procedural and remedial provisions of the SLAPP statutes." The district court did not address Cline and Tafoya's counterclaims.

{9} Cordova moved for certification for interlocutory appeal or, alternatively, for partial final judgment as to the district court's order. Then, without waiting for the district court to rule on his motion, Cordova filed a notice of appeal of the district court's dismissal order in the Court of Appeals. As a result, the district court entered an order finding that Cordova's filing of a notice of appeal divested it of jurisdiction and thereby declined to rule on his motion to certify the dismissal order for interlocutory appeal or for partial final judgment. The district court determined that it was likewise divested of jurisdiction to address the unresolved counterclaims of Cline and Tafoya.

{10} The Court of Appeals assumed jurisdiction of this appeal and concluded that Petitioners' actions in the district court fell outside the scope of public meetings that benefit from Anti-SLAPP statutory protection. *Cordova*, 2013-NMCA-083, ¶¶ 1, 14. The Court of Appeals held that the district court's dismissal of Cordova's claims for civil conspiracy and prima facie tort should be affirmed but that his malicious abuse of process claim was sufficient to survive a motion to dismiss. *Id.* ¶ 29. Finally, the Court of Appeals determined that Cordova did not appeal from a final judgment, and thus the Court of Appeals excluded Cline and Tafoya from its holding. *Id.* ¶ 17.

II. STANDARD OF REVIEW

{11} Each of the issues we are called upon to address requires de novo review. We review the interpretation of statutory language de novo. *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 22, 147 N.M. 583, 227 P.3d 73. We also review the interpretation and application of the United States Constitution de novo. *See State v. Pangaea Cinema, L.L.C.*, 2013-NMSC-044, ¶ 8, 310 P.3d 604. Finally, we review a dismissal under Rule 1-012(B)(6) de novo. *Valdez v. State*, 2002-NMSC-028, ¶ 4, 132 N.M. 667, 54 P.3d 71.

III. DISCUSSION

A. Appellate Jurisdiction under the Anti-SLAPP Statute

{12} As a threshold matter, we must determine whether we have appellate jurisdiction over Petitioners Cline and Tafoya while they have pending counterclaims in the district court. Pursuant to Rule 1-054(B)(2) (2008, amended 2016),[1] the Court of Appeals concluded that it had jurisdiction over only those Petitioners without counterclaims, and thus excluded Cline and Tafoya from the reach of its decision. *Cordova*, 2013-NMCA-083, ¶ 16 (holding that "the judgment is final for Defendants who did not have counterclaims against Cordova . . . [because] [a]n order disposing of the issues contained in the complaint but not the counterclaim is not a final judgment." (second alteration in original) (internal quotation marks and citations omitted)). Petitioners argue that the Court of Appeals had jurisdiction over all parties under the Anti-SLAPP statute because the overall purpose of the Anti-SLAPP statute would be thwarted by piecemeal litigation if some Petitioners were excluded from the appeal. *See* § 38-2-9.1(C) (providing an " 'expedited appeal' from a trial court order on the special motions"). We agree with Petitioners and hold that Section 38-2-9.1(C) allows any party to bring an interlocutory appeal from a trial court order on the special motion(s) brought pursuant to Anti-SLAPP statute.

{13} Our primary goal in interpreting statutory language is to "give effect to the intent of the Legislature." *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022 (internal quotation marks and citation omitted). "We look first to the plain meaning of the statute's words, and we construe the provisions of the Act together to produce a harmonious whole." *Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 14, 146 N.M. 453, 212 P.3d 341 (internal quotation marks and citation omitted). When we interpret the plain language of a statute, we read all sections of the statute together so that all parts are given effect. *Diamond v. Diamond*, 2012-NMSC-022, ¶ 25, 283 P.3d 260. "[I]f the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, we will reject the plain meaning in favor of an interpretation driven by the statute's obvious spirit or reason." *State v. Trujillo*, 2009-NMSC-012, ¶ 21, 146 N.M. 14, 206 P.3d 125 (internal quotation marks and citations omitted).

{14} Section 38-2-9.1(C) of the Anti-SLAPP statute provides that "[a]ny party shall have the right to an expedited appeal from a trial court order on the special motions described in Subsection B of this section or from a trial court's failure to rule on the motion on an expedited basis." Subsection B lists several pre-trial motions. Section 38-2-9.1(B) ("If the rights afforded by this section are raised as an affirmative defense and if a court grants a motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment filed within ninety days of the filing of the moving party's answer, the

[1]Rule 1-054(B) has since been amended so that a judgment in a multiparty lawsuit that adjudicates all issues "as to one or more, but fewer than all, . . . parties," is not automatically deemed final. The new rule requires the court to expressly determine that there is "no just reason for delay," thus avoiding the piecemeal litigation that occurred in this case. *Id.*

court shall award reasonable attorney fees and costs incurred by the moving party in defending the action."). Importantly, the plain language of Subsection A explicitly provides that the expedited process must allow for the "*early consideration* of the issues raised by the motion and to prevent the unnecessary expense of litigation." Section 38-2-9.1(A) (emphasis added). Therefore, the plain language of Subsections A, B, and C of the Anti-SLAPP statute describe an expedited process that "is necessarily interlocutory in nature." Frederick M. Rowe & Leo M. Romero, *Resolving Land-Use Disputes by Intimidation: SLAPP Suits in New Mexico*, 32 N.M. L. Rev. 217, 231 (2002).

{15} The Legislature has the authority to establish appellate jurisdiction and to create a right of appeal. *See Lovelace Med. Ctr. v. Mendez*, 1991-NMSC-002, ¶ 11, 111 N.M. 336, 805 P.2d 603 ("The appellate jurisdiction of both this Court and the court of appeals is within the legislative power to prescribe."); *Taggader v. Montoya*, 1949-NMSC-068, ¶ 7, 54 N.M. 18, 212 P.2d 1049 (noting that the Legislature has the authority to determine what "questions should be subject to judicial review by appeal"); *State v. Arnold*, 1947-NMSC-043, ¶ 11, 51 N.M. 311, 183 P.2d 845 ("The creating of a right of appeal is a matter of substantive law and outside the province of the court's rule making power."). The legislative power to create such a rule derives from Article VI, Section 2 of the New Mexico Constitution.

> Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal.

Id. Thus, "unless unconstitutional, it is not the role of this Court to question the wisdom, policy or justness of legislation enacted by our legislature." *State v. Maestas*, 2007-NMSC-001, ¶ 25, 140 N.M. 836, 149 P.3d 933.

{16} Our interpretation also furthers the purpose of the Anti-SLAPP statute. *See* § 38-2-9.2 (noting that the purpose of the statute is to protect citizens who exercise their right to petition from the financial burden of having to defend against retaliatory lawsuits and such claims "should be subject to *prompt dismissal or judgment* to prevent the abuse of the legal process" (emphasis added)). Both the plain language and the purpose of the Anti-SLAPP statute underscore a clear legislative intent to provide an interlocutory appeal. *See Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710, 712 (7th Cir. 1986) (noting "in free-speech cases[,] interlocutory appeals sometimes are more freely allowed"). To conclude otherwise would result in protracted piecemeal litigation, a result which would be antithetical to the plain language and purpose of the Anti-SLAPP statute.

{17} For these reasons, we reverse the Court of Appeals' holding declining jurisdiction over Cline and Tafoya and conclude that the Anti-SLAPP statute provides a right to an interlocutory appeal under the expedited appeal provision. As a result, our holdings in this opinion apply to all Petitioners in this case, including Cline and Tafoya.

B. New Mexico's Anti-SLAPP Statute Applies to Petitioners' Recall Efforts

{18} The central issue presented in this appeal is whether Petitioners' recall efforts fall within the protections of the Anti-SLAPP statute. Petitioners argue that Cordova sued them in retaliation for their attempt to recall him from office. Petitioners allege that Cordova's lawsuit is a strategic lawsuit against public participation, commonly referred to as a "SLAPP suit." *See* Rowe & Romero, *supra*, at 218. SLAPP suits "are filed solely for delay[,] distraction . . . and to [impose] litigation costs" on activists exercising their constitutional right to petition as guaranteed by the First Amendment. Rowe & Romero, *supra*, at 218 (citing *Dixon v. Superior Ct.*, 36 Cal. Rptr. 2d 687, 693 (Ct. App. 1994)). Such lawsuits are brought under the guise of a wide array of tort, contract, or civil rights conspiracy causes of actions targeting the petitioners. Rowe & Romero, *supra*, at 219. Rather than treating SLAPP suits as an ordinary commercial or tort litigation, courts must identify the challenged activities of the target of the SLAPP suit in relation to their First Amendment protections. *Id.*

{19} To curtail SLAPP suits, New Mexico enacted an Anti-SLAPP statute. Section 38-2-9.1. The Legislature enacted the Anti-SLAPP statute with the policy goal of protecting its citizens from lawsuits in retaliation for exercising their right to petition and to participate in quasi-judicial proceedings. Section 38-2-9.2. In order to accomplish this goal, the Legislature created expedited procedures for dismissing actions "seeking money damages against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-judicial proceeding before a tribunal or decision-making body of any political subdivision of the state," Section 38-2-9.1(A), and allowing for the recovery of costs and attorney fees incurred in pursuing the dismissal, Section 38-2-9.1(B). The Legislature defined "public meeting in a quasi-judicial proceeding" to include "any meeting established and held by a state or local governmental entity, including without limitations, meetings or presentations before state, city, town or village councils, planning commissions, review boards or commissions." Section 38-2-9.1(D). The Legislature specifically included protection of "the rights of its citizens to participate in quasi-judicial proceedings before local and state governmental tribunals" in the Anti-SLAPP statute. Section 38-2-9.2. By protecting quasi-judicial proceedings, the Legislature did not intend for public hearings to be unprotected. We conclude that the Legislature intended to protect all public participation, whether it be in quasi-judicial proceedings or public hearings. The specific protection in the Anti-SLAPP statute for participation in public hearings before tribunals also comports with a national political ethos, that "encourage[s], promote[s], and purport[s] to protect citizens' testifying, debating, complaining, campaigning, lobbying, litigating, appealing, demonstrating, and otherwise 'invoking the law' on public issues." George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation"* ("*SLAPPS*"): *An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 945-46 (1992); *see also* Rowe & Romero, *supra*, at 221-23 (summarizing a lawsuit filed in state district court against protestors who appealed city approval of Wal-Mart's development plan to the district court and then the Court of Appeals and describing the lawsuit as a SLAPP because it was intended to discourage the protestors' public participation in opposing the development).

{20} Petitioners argue that, because Cordova's lawsuit bears the traditional hallmarks of a SLAPP suit, the Court of Appeals erred by reversing the district court's application of the Anti-SLAPP statute's procedural remedies. *See* Pring & Canan, *supra*, at 948, 950 (listing common characteristics of SLAPP suits including the involvement of local issues, politically active defendants, money damage claims which

are disproportionate to realistic losses, and the inclusion of " 'Doe' defendants []to spread the chill[]"). At issue is whether Petitioners' actions preceding their voluntary dismissal of the recall petition at the sufficiency hearing were "*in connection* with a public hearing . . . before a tribunal . . . ." Section 38-2-9.1(A) (emphasis added).

{21} The Recall Act sets forth standards and procedures for petitioning to recall a local school board member, including the form of the petitions, § 22-7-6, canvassers' affidavits, § 22-7-7, petitioners' responsibilities for alleging acts of malfeasance or misfeasance, and for filing with the county clerk, § 22-7-8, and responsibilities of the county clerk, § 22-7-9. In the context of a recall petition, the only "public hearing" is a sufficiency hearing before a district judge and potentially an appellate court. Section 22-7-9.1. The public hearing is limited to a judge's "review of the completed face sheet together with affidavits submitted by the petitioner setting forth specific facts in support of the charges specified on the face sheet" and a "determination whether sufficient facts exist to allow petitioners to continue with the recall process." Section 22-7-9.1(C). The Recall Act's requirement of a public hearing before a tribunal is sufficient to bring Petitioners' activity under the protections of the Anti-SLAPP statute. We are also persuaded that the phrase "in connection with" in Section 38-2-9.1(A) reveals the Legislature's intent to protect all activities related to the public hearing before a tribunal—in this case the collection of petitions, filing with the county clerk, the county clerk's responsibilities, etc.

{22} The Court of Appeals erred when it focused solely on the sufficiency hearing before the district court. *Cordova*, 2013-NMCA-083, ¶ 14 (concluding "that a sufficiency hearing before a district court for a recall petition is not a public meeting or quasi-judicial proceeding as defined by the Anti-SLAPP statute. It is a judicial proceeding."). Such a narrow interpretation of the language of the Anti-SLAPP statute is contrary to the Legislature's broad intent to protect citizens exercising their right to petition—here the right to engage in the recall process—from SLAPP suits. *See* § 38-2-9.2.

{23} For these reasons, we hold that the Legislature intended the Anti-SLAPP statute to protect individuals, like Petitioners, from lawsuits intended to chill their participation in recall proceedings. The next question is whether Petitioners are entitled to the substantive protections provided by the *Noerr-Pennington* doctrine.

C. *Noerr-Pennington* Doctrine Analysis

1. Evolution of the *Noerr-Pennington* doctrine

{24} While the Anti-SLAPP statute provides the procedural protections Petitioners require, the *Noerr-Pennington* doctrine is the mechanism that offers Petitioners the substantive First Amendment protections they seek. The *Noerr-Pennington* doctrine is a body of federal law that provides First Amendment protections for citizens who petition the government. *See Noerr*, 365 U.S. 127; *Pennington*, 381 U.S. 657. Under the *Noerr-Pennington* doctrine, those who engage in conduct aimed at influencing the government, including litigation, are shielded from retaliation provided their conduct is not a sham. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014) (relying on *Noerr*, 365 U.S. 127, and *Pennington*, 381 U.S. 657).

{25} The *Noerr-Pennington* doctrine emerged in the antitrust context from the Supreme Court's interpretation of the Sherman Act. *See Noerr*, 365 U.S. at 135-36; *Pennington*, 381 U.S. at 669-70. It provides protection for petitioners by excluding petitioning activity as a basis for a federal antitrust claim. *See Noerr*, 365 U.S. at 135-36; *Pennington*, 381 U.S. at 669-70. Subsequent decisions give weight to the First Amendment right to petition, thus imputing a First Amendment analysis to the doctrine. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (extending *Noerr-Pennington* protections to "the right to petition . . . all departments of the [g]overnment" including administrative agencies and courts); *see also* Joseph B. Maher, *Survival of the Common Law Abuse of Process Tort in the Face of a Noerr-Pennington Defense*, 65 U. Chi. L. Rev. 627, 630-36 (1998); Zachary T. Jones, *"Gangster Government:" The Louisiana Supreme Court's Decision in Astoria v. Debartolo on the Application of the Noerr-Pennington Doctrine to State Law Tort Claims*, 55 Loy. L. Rev. 895, 900 (2009). Accordingly, the *Noerr-Pennington* doctrine refers to two principles establishing the basis for *Noerr-Pennington* immunity: (1) a statutory interpretation of the Sherman Act; and (2) immunity predicated on the First Amendment right to petition. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 888 (10th Cir. 2000).

{26} Many "federal and state courts have concluded that the *Noerr-Pennington* doctrine is rooted in the First Amendment right to petition and therefore must be applied to all claims implicating that right, not just to antitrust claims." Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 Idaho L. Rev. 67, 95-96 (1996) (citing cases where "the doctrine has been applied to claims for tortious interference with contract and with business relations/economic advantage, defamation, violation of civil rights, abuse of process, and intentional infliction of emotional distress" (footnotes omitted)); *see e.g. BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002) ("[W]e would not lightly impute to Congress an intent to invade . . . freedoms protected by the Bill of Rights, such as the right to petition." (internal quotation marks and citation omitted)); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 930 (9th Cir. 2006) (stating that the *Noerr-Pennington* doctrine applies outside of the antitrust context); *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (holding that the *Noerr-Pennington* doctrine is not limited to the antitrust context but "applies equally in all contexts").[2] Given this historical evolution, we consider the recall activities at issue to fall within the rubric of the *Noerr-Pennington* doctrine.

2. The sham exception to the *Noerr-Pennington* doctrine

{27} The *Noerr-Pennington* doctrine protections are not absolute. *Noerr*, 365 U.S. at 144. To be entitled to First Amendment protection under the *Noerr-Pennington* doctrine, the activity must be genuine and not a mere sham. *Id*. Sham petitions lacking a genuine, legitimate purpose of

[2]Notably, in *Cardtoons*, the Tenth Circuit held that "it is more appropriate to refer to immunity as *Noerr-Pennington* immunity only when applied to antitrust claims. In all other contexts . . . such immunity derives from the right to petition." 208 F.3d at 889-90. (footnote omitted). Other courts have considered *Cardtoons* an outlier case. *See Sosa*, 437 F.3d at 937. Indeed, the subsequent United States Supreme Court case, *see BE & K Constr. Co.*, 536 U.S. at 525, extended the applicability of the *Noerr-Pennington* doctrine outside the antitrust realm. *See also Tichinin v. City of Morgan Hill*, 99 Cal. Rptr. 3d 661, 676 n.9 (Ct. App. 2009) ("[T]he *Sosa* court . . . doubted that *Cardtoons* survived subsequent Supreme Court decisions extending applicability of the *Noerr-Pennington* doctrine." (citations omitted)).

procuring favorable governmental action are not protected by the First Amendment. *See Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1082 (1988). The United States Supreme Court has reaffirmed this sham exception in cases outside of the antitrust context. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983). Therefore, the application of the *Noerr-Pennington* doctrine to the instant case turns on whether Petitioners' recall activities were a sham. *See Prof'l Real Estate Inv'rs, Inc.*, 508 U.S. at 60-62.

{28} To constitute a sham, the petitioning activities must meet a two-part test. First, the petitioning activities "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 60. Only upon a finding that the challenged activities are objectively baseless may the fact-finder proceed to the second element of the test—whether the subjective motivation underlying the challenged conduct was improper. *See id.* at 60-62. ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."). In other words, for Cordova to overcome the *Noerr-Pennington* doctrine through the sham exception, he must first establish that Petitioners' recall petition was objectively baseless in that it did not have sufficient factual or legal support. Upon such showing, Cordova must then establish that the primary purpose for the recall was to effectuate an improper objective.

3. A heightened pleading standard is required under the *Noerr-Pennington* doctrine

{29} We review whether the district court properly dismissed Cordova's complaint under Rule 1-012(B)(6). Under a motion to dismiss, Cordova's allegations must be assumed true. *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917 (stating that on review, "we accept all well-pleaded factual allegations in the complaint as true and resolve all doubts in favor of sufficiency of the complaint" (internal quotation marks and citation omitted)). In the context of the *Noerr-Pennington* doctrine's protection of the First Amendment right to petition, courts require a heightened pleading standard for addressing allegations of misuse or abuse of process. *Protect Our Mountain Environment, Inc. v. Dist. Ct. In & For Cty. Of Jefferson*, 677 P.2d 1361, 1369 (Colo. 1984) (en banc). In *Protect Our Mountain Env't, Inc.*, the Colorado Supreme Court stated that the heightened standard requires that

> when . . . a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment.

Id.; *see also Forras v. Rauf*, 39 F. Supp. 3d 45, 52-54 (D.D.C. 2014) ("In order to . . prevail[] on a claim in opposition to an Anti-SLAPP motion to dismiss, a plaintiff . . . must demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts." (internal quotation marks and citations omitted)). This heightened standard is "necessary to avoid 'a chilling effect on the exercise of this fundamental First Amendment right . . . [, and c]onclusory allegations are not sufficient to strip a defendant's activities of *Noerr-Pennington* protection.' " *Oregon Nat. Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991) (citation omitted); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1083 (9th Cir. 1976) ("[W]here a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.").

{30} We agree with this principle. In furtherance of the policy upon which the Anti-SLAPP statute is based, we adopt a heightened standard of pleading for claims seeking damages for conduct protected by the First Amendment. *See Oregon Nat. Res. Council*, 944 F.2d at 533. This higher standard of pleading requires more than conclusory allegations in the complaint. In the instant case, Cordova must plead his claims with sufficient factual and legal specificity to establish that the recall activities were a sham to overcome both the *Noerr-Pennington* doctrine and the affirmative defense under the Anti-SLAPP statute.

{31} According to Cordova's complaint, the County Clerk filed the recall petition with the district court on June 1, 2009. The district court was required to review affidavits to determine whether there were sufficient facts stated to support the allegations in the recall petition. Section 22-7-9.1(C). The sufficiency hearing should have been conducted within ten days from the County Clerk's application to the court—in this case by June 10, 2009. Section 22-7-9.1(B). Thus, the affidavits supporting the allegations of malfeasance and misfeasance should have been filed by June 10, 2009. *Id.*

{32} Cordova contends that the petitioning activity was objectively baseless because the affidavits were backdated. As stated in Cordova's complaint, the affidavits filed in support of the recall petition did not exist at the time the recall petition was filed. Although the date on the affidavits is June 9, 2009, they refer to events occurring much later—in July and August 2009. The affidavits were not prepared until September 8 or 9, 2009.

{33} Cordova also contends that the petitioning activity was objectively baseless because Petitioners voluntarily dismissed their petition at the sufficiency hearing. Cordova alleges in his complaint that the sufficiency hearing was continued twice at the request of Petitioners. Cordova claims that the delay in scheduling the sufficiency hearing "was intended to harass, annoy, embarrass, and cost . . . Cordova money." He further contends in his complaint that the delay was intended to cause adverse publicity against Cordova, as shown by a press release dated September 9, 2009. Cordova states that the claims against him made by Cline and Tafoya were therefore illegitimate, "politically motivated[,] and intended to curry favor with the School Administrators." He alleges that the filing of the affidavits "was done to publicize rumor, innuendo and gossip, with the intent of harassing, embarrassing and humiliating" him. Finally, Cordova makes a blanket assertion that he was "damaged" without specifying what damages he actually incurred. We now consider whether these allegations satisfy the objective and subjective elements of the sham exception.

4. Objectively baseless element of the sham exception

{34} Taking Cordova's allegations as true, Petitioners' affidavits supporting the recall were not timely filed under the requirements set forth in Section 22-7-9.1. The Recall Act mandates that the recall petitioner's affidavits set forth specific facts in support of the recall and be submitted to the district court by the sufficiency hearing. Section 22-7-9.1(C). The deadline for conducting the sufficiency hearing was

June 10, 2009, ten days after the petition was filed with the County Clerk. Section 22-7-9.1(B). While the affidavits were dated June 9, 2009, they were not submitted to the district court until September 8 or 9, 2009, approximately three months after the ten-day statutory deadline for conducting the sufficiency hearing. Further, the affidavits refer to events which occurred after June 9, 2009. It is logical to require affidavits in support of a recall petition to be filed before the statutory deadline for the sufficiency hearing. Section 22-7-9.1(C). Perhaps more importantly, however, the affidavits must refer to events that occurred before the filing of the recall petition.

{35} Here, the affidavits in support of the recall petition failed to meet the statutory requirements of the Recall Act because they were untimely, backdated, and contained attestations of events occurring after the affidavits were signed and after the recall petition was filed with the district court. Because it was impossible for the affiants to appear in person before the notary public at a single time and place and vouch for the truthfulness or accuracy of the affidavits—which referred to events occurring after their affidavits were signed—no reasonable litigant could realistically expect success on the merits.[3] *See* NMSA 1978, § 14-12A-2(F) (2003) (definition of jurat). Therefore, the recall petition was objectively baseless. However, our analysis under the *Noerr-Pennington* doctrine does not end there. To pierce its shield, Cordova must also adequately allege in his complaint that the primary purpose of Petitioners' efforts to recall him from serving on the school board was improper.

5. Subjective motivation element of the sham exception

{36} Next, we examine Cordova's complaint to determine whether Cordova alleged sufficient facts to show that Petitioners' primary purpose in pursuing the recall was based upon an improper subjective motive. As set forth above, Cordova states that Petitioners had improper motives in bringing their recall petition because they "were politically motivated" and intended to embarrass him. Cordova asserts that such allegations are sufficient to establish that the motivations underlying the petition were "illegitimate."

{37} In New Mexico, persons who choose to serve on school boards assume public roles with the understanding that citizens have a state constitutional right to petition the government to recall them from office. N.M. Const. art. XII, § 14. The facts alleged in Cordova's complaint regarding the recall activities undertaken in this case demonstrate the lawful exercise of this right and reveal, at most, a difference in opinion as to how the Taos school district should be managed. The conclusory allegations in Cordova's complaint are based on Petitioners' disagreement with his conduct and actions as a school board member.

{38} From the face of Cordova's complaint, we cannot decipher precisely how Petitioners' motivations, even if political, make them improper. Nor can we identify an illegitimate motive on the part of Petitioners. In reviewing a dismissal for failure to state a claim, dismissal is appropriate only if the nonmoving parties are "not entitled to recover under any theory of the facts alleged in their complaint." *Delfino*, 2011-NMSC-015, ¶ 12 (internal quotation marks and citation omitted); *see also Las Luminarias of the N.M. Council of the Blind v. Isengard*, 1978-NMCA-117, ¶ 4, 92 N.M. 297, 587 P.2d 444 (stating that generally, "New Mexico adheres to the broad purposes of Rules of Civil Procedure and construes the rules liberally, particularly as they apply to pleading"). However, given the strictures of the First Amendment as well as the heightened pleading standard we hereby adopt, the complaint "must include allegations of the specific activities" which demonstrate that the petitioning activity falls within the sham exception. *Oregon Nat. Res. Council*, 944 F.2d at 533 (internal quotation marks and citation omitted).

{39} In this case, Cordova's complaint lacks the factual specificity necessary to establish an improper subjective motivation. By its nature, the subjective motivation of the recall process may indeed be political, but that does not render it improper. Without more, the complaint lacks the necessary specificity to show that Petitioners' subjective motivation was improper and therefore a sham. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991) (holding that "[a] sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means" (internal quotation marks and citations omitted)).

{40} By requiring an improper motive, this two-step sham exception encompasses a "breathing space" that "overprotects baseless petitioners" which is necessary for the effective exercise of First Amendment rights. *Sosa*, 437 F.3d at 932-34; *see also Tichinin*, 99 Cal. Rptr. 3d at 675. Thus, just as the malice requirement in a defamation claim against a public official "protects some false statements to ensure that the right of free speech remains robust and unfettered, so too the improper-motive requirement of the sham exception protects some baseless petitions . . . to ensure that citizens may enjoy the right to petition the government through access to the courts without fear of . . . liability." *Tichinin*, 99 Cal. Rptr. 3d at 675.

{41} We conclude that the allegations in the complaint are not sufficient to establish an improper motive but rather are differences of opinion and political views. As such, the petitioning activities undertaken by Petitioners against Cordova are an act in furtherance of their right to petition the government under the First Amendment. Under the heightened pleading standard attributed to claims made against such conduct, the complaint fails to meet that heightened threshold to qualify Petitioners' actions as a sham and thereby pierce the protection under the *Noerr-Pennington* doctrine. Accordingly, we affirm the district court's decision to dismiss the complaint. Because we affirm the district court's dismissal of Cordova's complaint under the *Noerr-Pennington* doctrine, we need not address the legal sufficiency of Cordova's malicious abuse of process claim.

IV. CONCLUSION

{42} We reverse the Court of Appeals holdings that the Anti-SLAPP statute and the *Noerr-Pennington* doctrine do not apply. As a result, we uphold the district court order dismissing Cordova's claims against Petitioners. We remand to the district court to determine the remedies available under the Anti-SLAPP statute.

{43} IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

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

[3]We recognize that some of the averments may have concerned relevant events which occurred before the filing of the recall petition, but invalidity of the affidavits does not permit the district court to consider such information.

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-045

No. 33,961 (filed February 27, 2017)

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

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

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Opinion

Stephen G. French, Judge

{1} A jury convicted Defendant Anthony Patterson of two counts of trafficking oxycodone by distribution, contrary to NMSA 1978, Section 30-31-20(A)(2), (B)(1) (2006). Defendant argues that the district court committed reversible error by denying him the opportunity to: (1) cross-examine an undercover narcotics enforcement agent (Undercover Agent), about a prior instance of untruthfulness and about a conversation between Undercover Agent and a confidential informant; and (2) present an entrapment defense. Defendant also argues that the district court's order to return the computer projector he received as payment in one of the drug transactions was improper. We agree with Defendant that the district court improperly limited Defendant's cross-examination, contrary to Rule 11-608 NMRA. Accordingly, we reverse Defendant's convictions. We leave Defendant's other arguments unexamined.

BACKGROUND

{2} We focus our background discussion on the subset of facts relevant to the issue we reach in this opinion. Defendant was arrested in connection with two sales of narcotic pills. The transactions took place principally between Defendant, Undercover Agent, and a confidential informant.

{3} At trial, Undercover Agent testified that on October 26, 2011, Defendant exchanged five oxycodone pills for a backpack with a computer projector in it and, on November 18, 2011, sold five oxycodone pills. The confidential informant did not testify.

{4} On cross-examination of Undercover Agent, Defendant sought to inquire about an occasion that the Undercover Agent purportedly admitted in court to misrepresentation in a police report:

> Counsel: [R]egarding these reports that you make. And you're saying that they're accurate except in this case you said there may be some typos on these two reports, is that correct?
>
> Undercover Agent: That's correct.
>
> Counsel: Okay. Now, were you involved with [the confidential informant] on [another case]?
>
> Undercover Agent: I was, yes.
>
> Counsel: And actually, that charge went federal [be]cause there was a gun charge, right?
>
> State: Objection, Judge: relevance.
>
> Court: Counsel approach, please.
>
> [at the bench conference]
>
> Court: Where are we going now, [counsel]?
>
> Counsel: Now, we're going into testimony under oath in a federal preliminary hearing that [Undercover Agent] was untruthful in his report [in another case]. I believe its—
>
> State: [interrupting] [inaudible] improper impeachment.
>
> Counsel: [inaudible] . . . the accuracy of his report.
>
> State: It's an improper impeachment.
>
> Without presenting an opportunity for Defendant to respond, the district court sustained the State's objection.

{5} The jury found Defendant guilty of two counts of trafficking of oxycodone. He was sentenced to nine years of incarceration, suspended to five years of supervised probation conditioned on, among other terms, the return of the projector received by Defendant in exchange for drugs. Defendant appeals.

DISCUSSION

1. Excluded Cross-Examination Regarding a Purported Prior Act of Misrepresentation

{6} Defendant contends that it was error for the district court to prevent him from cross-examining Undercover Agent regarding a purported prior act of misrepresentation in a police report from another case. Defendant argues that the district court's ruling was contrary to Rule 11-608 and violated Defendant's confrontation rights under the Sixth Amendment of the United States Constitution and Article II, Section 14 of the New Mexico Constitution. We first review the exclusion of the Undercover Agent's testimony about a prior misrepresentation under our evidentiary rules. We review evidentiary decisions of the district court for an abuse of discretion. *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829. Evidentiary error is not grounds for a new trial unless harmful. *State v. Tollardo*, 2012-NMSC-008, ¶ 32, 275 P.3d 110. Error under the rules of evidence is harmful where there is any reasonable probability that the error contributed to the verdict. *Id.* ¶ 36.

{7} "All relevant evidence is generally admissible, unless otherwise provided by law[.]" *State v. Balderama*, 2004-NMSC-008, ¶ 23, 135 N.M. 329, 88 P.3d 845. "Evidence that reflects on a [witness's] credibility is relevant." *State v. Johnson*, 2010-NMSC-016, ¶ 41, 148 N.M. 50, 229 P.3d 523. "Any doubt whether the evidence

is relevant should be resolved in favor of admissibility." *Balderama*, 2004-NMSC-008, ¶ 23. Pursuant to Rule 11-608(B)(1), cross-examination about specific instances of conduct probative of the witness's character for truthfulness is generally admissible, although extrinsic evidence is not admissible to prove such conduct. *See id.* Evidence that is otherwise admissible may be excluded if its probative value is substantially exceeded by danger of unfair prejudice, confusion of issues, waste of time, delay, or presentation of cumulative evidence. *See* Rule 11-403 NMRA.

{8} At trial, neither Defendant, the State, nor the district court mentioned any rule of evidence when discussing Defendant's proffer. The State objected on grounds of, in turn, relevance and improper impeachment. The district court sustained one or, perhaps, both of the State's objections without explanation. On appeal, Defendant argues that: preventing him from questioning the Undercover Agent about a misrepresentation in a police report was an abuse of discretion under Rule 11-608(B)(1), the evidence was not excluded as unfairly prejudicial under Rule 11-403, and reversal is required because there is a reasonable probability that the district court's erroneous exclusion contributed to Defendant's convictions. The State does not counter by arguing that the evidence was inadmissible under Rule 11-608(B); that, if admissible, exclusion of the evidence was within the court's discretion under Rule 11-608(B); or that, if there was error, it was harmless. Instead, the State argues that the evidence was not relevant and was not admissible under Rule 11-404(B)(1) NMRA, which prohibits evidence of a prior wrong or other act to demonstrate that a person was more likely to have acted in accordance with the character revealed by the wrong or act. We begin by examining the State's arguments.

{9} Because untruthfulness in a police report recently authored by a witness is probative of that witness's credibility, testimony about such a report is relevant. *See Baum v. Orosco*, 1987-NMCA-102, ¶¶ 23, 26, 106 N.M. 265, 742 P.2d 1 (allowing, in a case involving purported excessive force, questioning about an officer's prior untruthfulness directed at the officer's credibility). The State's second argument—that Defendant's line of questioning would be inadmissible under Rule 11-404(B)(1)—is without consequence for our analysis because the inadmissibility of evidence under one rule of evidence does not preclude the admissibility of the evidence for another purpose under another rule. *See State v. Omar-Muhammad*, 1987-NMSC-043, ¶ 29, 105 N.M. 788, 737 P.2d 1165 ("Evidence admissible for one purpose is not to be excluded because it is inadmissible for another purpose."). We move on, then, to Defendant's arguments, beginning with whether Rule 11-608(B) permits the questioning of the Undercover Agent about a specific prior act of untruthfulness in a different police report involving another arguably related case.

{10} Rule 11-608(B)(1) permits cross-examination of a witness about a specific incident or act that is probative of his or her character for truthfulness. We think testimony about a purported recent admission under oath by Undercover Agent of an untruthful or inaccurate police report he authored is probative of his character for truthfulness. *Cf. United States v. Bocra*, 623 F.2d 281, 288 (3d Cir. 1980) ("The classic example of a permissible inquiry [pursuant to federal Rule 608(b)] would be an incident in which the witness had lied."). Such testimony is unlike a line of inquiry that might place a witness or defendant in a bad light but is not probative of character for truthfulness. *See, e.g.*, *State v. Padilla*, 1994-NMCA-067, ¶¶ 30-31, 118 N.M. 189, 879 P.2d 1208 (holding that the district court did not abuse its discretion under Rule 11-608(B) by preventing cross-examination of a police officer about a charge of criminal sexual penetration against the officer because the charge was not a specific instance of conduct bearing on credibility). Because the excluded line of inquiry lies squarely within the scope of evidence permitted under Rule 11-608(B)(1), we turn to the question of whether the district court's exclusion of that line of inquiry was an abuse of discretion.

{11} A court abuses its discretion when it makes an evidentiary ruling that "is clearly against the logic and effect of the facts and circumstances of the case" and "clearly untenable or not justified by reason." *State v. Samora*, 2016-NMSC-031, ¶ 37, 387 P.3d 230 (internal quotation marks and citation omitted). Factors that inform a court's exercise of discretion under Rule 11-608(B) include:

> (1) whether the witness's testimony is crucial or unimportant, (2) the relevancy of the act of misconduct to truthfulness, (3) the nearness or remoteness of the misconduct to the time of trial, (4) whether the matter inquired into is likely to lead to time-consuming, distracting explanations on cross-examination or re-examination, and (5) whether there will be unfair humiliation of the witness and undue prejudice to the party who called the witness.

1 Kenneth S. Broun et al., *McCormick on Evidence* § 41 (7th ed. 2016).[1] We review the district court's exercise of discretion through the prism of those five factors.

{12} It is important to our analysis that Undercover Agent's testimony was crucial to the case against Defendant. *See Gordon v. United States*, 344 U.S. 414, 417 (1953) ("[W]here . . . the [g]overnment's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny."); *accord United States v. Morales-Quinones*, 812 F.2d 604, 613 (10th Cir. 1987) ("Where the testimony of a witness is critical to the [g]overnment's case, the defendant has a right to attack the [witness's] credibility

[1]Although we observe that, prior to this case, New Mexico appellate courts have not applied enumerated factors to a Rule 11-608 abuse of discretion analysis, our appellate courts have applied enumerated factors when analyzing for an abuse of discretion under Rule 11-609 NMRA. *See State v. Trejo*, 1991-NMCA-143, ¶¶ 9, 16, 113 N.M. 342, 825 P.2d 1252 (enumerating six factors relevant to a district court's analysis of whether to admit evidence pursuant to Rule 11-609 and, after analyzing under those factors, determining that the district court did not abuse its discretion admitting evidence). Rule 11-609 is related to Rule 11-608 in that both provide avenues for the cross-examination of a witness for the purpose of attacking the witness's character for truthfulness. *Compare* Rule 11-609 (providing for cross-examination under limited circumstances about a witness's prior conviction for the purpose of attacking the witness's character for truthfulness), *with* Rule 11-608 (providing for cross-examination under limited circumstances about a witness's prior bad acts not resulting in conviction for the purpose of attacking the witness's character for truthfulness). Given the relatedness of the two rules, the use by our appellate courts of enumerated factors for a Rule 11-609 analysis informs our decision to enumerate factors for a Rule 11-608 analysis.

by wide[-]ranging cross-examination."); *United States. v. Dennis*, 625 F.2d 782, 798 (8th Cir. 1980) ("Where the testimony of one witness is critical to the government's case, the defendant has a right to attack that witness's credibility by a wide-ranging cross-examination."); *United States v. Fortes*, 619 F.2d 108, 118 (1st Cir. 1980) ("[W]hen a case turns to a large extent on the credibility of [the] defendant's accuser, broad cross-examination of that principal witness should be allowed."). The State has not made an argument that anyone other than Undercover Agent testified as an eyewitness to Defendant's role in the transactions for which Defendant was convicted, nor has the State pointed to other testimony linking Defendant to the oxycodone pills. Undercover Agent's credibility and character for truthfulness, which Defendant sought to challenge, was thus axiomatically central to this case. As a result, the first abuse of discretion factor firmly favors Defendant's argument. *See United States v. Torres*, 569 F.3d 1277, 1283 (10th Cir. 2009) ("While the admission of [Rule 608(b)] evidence is at the discretion of the district court, it may well be an abuse of discretion not to allow such cross-examination in a criminal case where the vast majority of inculpatory evidence is based on a lone witness's testimony." (internal quotation marks and citation omitted)).

{13} We next turn to abuse of discretion factors two through five. A misrepresentation in a police report is the kind of specific incident of misconduct relevant to truthfulness. With regard to the temporal relationship between the purportedly untruthful report in another case and the trial in this case, the record is insufficient to determine whether the police report or the purported admission was remote in time, nor has the State argued that the other case was old. Although the inquiry into Undercover Agent's previous report in the federal case would involve a new factual inquiry, we will not speculate regarding whether such inquiry would be time-consuming, distracting, or unreasonable. Regardless, Undercover Agent's testimony was cardinal, and therefore his credibility was not a collateral matter; a valid challenge to his credibility, which merited trial time and attention. *See Gordon*, 344 U.S. at 417 ("[W]here . . . the [g]overnment's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny."); *See also Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."). Finally, we do not perceive that this narrow, police report type of inquiry would be, on its face, unfairly humiliating to Undercover Agent or unduly prejudicial.

{14} We conclude that the district court's ruling to exclude Defendant's inquiry into the truthfulness of Undercover Agent's police report in the federal case was error. Any material misstatement in Undercover Agent's police report was highly relevant to the agent's credibility and character for truthfulness under Rule 11-608(B). We also conclude that, based upon the five abuse of discretion factors, the district court's ruling was clearly against the logic and effect of the facts and circumstances in this case. Accordingly, the district court's ruling was clearly not justified by reason and resulted in abuse of discretion under Rule 11-608(B). *See State v. Samora*, 2016-NMSC-031, ¶ 37 (stating that a court abuses its discretion when it makes an evidentiary ruling that "is clearly against the logic and effect of the facts and circumstances of the case" and "clearly untenable or not justified by reason." (internal quotation marks and citation omitted)). However, that conclusion does not end our inquiry into the district court's exercise of discretion.

{15} Under Rule 11-403, a court has discretion to exclude otherwise admissible evidence if the "probative value [of the evidence] is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.* Neither at trial nor on appeal has the State made an argument that the evidence at issue was or should be excluded under Rule 11-403. Nor do we have any evidence in the record that the district court applied Rule 11-403 to exclude the evidence. Accordingly, we do not conclude that Defendant's proffered line of inquiry was excluded under Rule 11-403. Nevertheless, we may affirm if the district court was right for any reason, *State v. Astorga*, 2015-NMSC-007, ¶ 44, 343 P.3d 1245, including proper exclusion under Rule 11-403. We therefore continue with an analysis of the exclusion under Rule 11-403.

{16} The five factors that informed our Rule 11-608(B) analysis also speak to a Rule 11-403 analysis.[2] The first three factors—whether the witness's testimony is crucial or unimportant, the relevancy of the act of misconduct to truthfulness, the nearness or remoteness of the misconduct to the time of trial—all relate to the probative value of the evidence. The final two—whether the matter inquired into is likely to lead to time-consuming, distracting explanations on cross-examination or re-examination, and whether there will be unfair humiliation of the witness and undue prejudice to the party who called the witness—relate to prejudice, confusion, or waste of time. In all, our analysis of the Rule 11-608(B) factors does not indicate that the probative value of the proffered evidence would be substantially outweighed by the enumerated dangers of Rule 11-403.

{17} Also important to our Rule 11-403 analysis is whether there was a good-faith basis for Defendant's line of questioning. *See* 1 Broun, *supra*, at § 41 ("[T]he cross-examiner may not pose the question unless she has a good[-]faith basis in fact for the inquiry."); *State v. Robinson*, 1983-NMSC-040, ¶ 5, 99 N.M. 674, 662 P.2d 1341 ("In considering the character of the prior conduct, the [district] court must take care to distinguish actual misconduct from a mere accusation of misconduct."). Without at least a good-faith basis for an inquiry, the inquiry would likely have little, if any, probative value relative to prejudicial effect. *See id.* ¶ 7 ("The impeachment of a witness by insinuations based on unsubstantiated allegations of prior misconduct provides the trier of fact with no information relevant to the witness's credibility and carries a great potential for prejudice."). Put another way, a baseless inquiry might be no more than a smear. *See id.* ¶ 8 (stating that a line of inquiry about mere suspicions of prior misconduct was innuendo and admitted erroneously). In this case, the State did not challenge the basis for Defendant's inquiry that involved Undercover Agent's "testimony under oath in a federal preliminary hearing." Nor did

[2]In fact, an evidence treatise refers to the federal equivalent of New Mexico evidentiary Rule 11-403 and Rule 11-611 NMRA as "codify[ing] the wide discretion of the court in controlling impeachment" under the federal equivalent to Rule 11-608. 4 Jack B. Weinstein et al., *Weinstein's Federal Evidence*, § 608.02[3][c] (Mark S. Brodin, ed., Matthew Bender 2d ed. 2016) (footnote omitted); *see also Bocra*, 623 F.2d at 288, ("[Federal] Rule 608(b) is meant to tie into [federal] Rule 403[.]").

the district court inquire any further. Nor does the State raise this issue on appeal. Therefore, we have no basis in the record to conclude that Defendant's inquiry was without a good-faith factual basis.

{18} Lastly, we observe that some holdings rely heavily on whether the credibility of the witness was challenged adequately on cross-examination without the excluded evidence offered as probative of the witness's truthfulness. *See Fortes*, 619 F.2d at 118 (stating that "the extent to which the excluded question bears upon character traits that were otherwise sufficiently explored" is to be considered when analyzing whether the evidence was properly excluded under the federal equivalent of Rule 11-608(B)); *see also Fortes*, 619 F.2d at 118 (holding that the district court did not abuse its discretion in excluding cross-examination of an important witness about his truthfulness in a prior incident because "extensive inquiry" was made into the witness's credibility through inquiry into other conduct and statements). In this case, the State has not made the argument that Undercover Agent's credibility was adequately challenged without the excluded line of questioning. It appears that the district court did not tailor the scope of cross-examination directed at Undercover Agent's credibility but, instead, forestalled entirely that line of inquiry. Moreover, it did so summarily and without analysis on the record. Defendant's excluded inquiry did not overlap with an alternative challenge to Undercover Agent's credibility, nor is this a case in which Defendant challenges only the scope of an inquiry that was permitted but limited by the district court. *See United States v. Estell*, 539 F.2d 697, 699-700 (10th Cir. 1976) (holding that the district court did not abuse its discretion where the district court tailored the scope of an inquiry about a witness's drug dealing by allowing defense counsel "wide latitude" for questioning on the subject but preventing inquiry into the source of the drugs). In sum, we do not find any reason that Defendant's inquiry could be properly excluded pursuant to Rule 11-403.

{19} Having determined that the exclusion of Defendant's line of inquiry was error, we examine whether there was any reasonable probability that the error contributed to the verdict in order to determine whether reversal is required. *See Tollardo*, 2012-NMSC-008, ¶¶ 25, 36 (stating that harmless error does not require reversal and error under our evidentiary rules is harmless unless there is a reasonable probability that the error contributed to the verdict). We observe that the State has not made any argument that the error was harmless. This puts the State at a disadvantage. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("We will not . . . guess at what a party's arguments might be." (alteration, internal quotation marks, and citation omitted)); *State v. Duran*, 2015-NMCA-015, ¶¶ 19-20, 343 P.3d 207 (stating that "[t]he [s]tate bears the burden to prove the error was harmless" when analyzing for non-constitutional evidentiary error).

{20} Defendant argues that the error was not harmless. It is undisputed that the State relied solely upon the testimony of Undercover Agent to establish all the critical elements of its case against Defendant. The jury's assessment of Undercover Agent's credibility was therefore the lens through which the jury evaluated the State's case. Because Undercover Agent's testimony was indispensable and the jury's perception of his credibility critical, we are not in the position to say that there was no reasonable probability that the erroneous exclusion of Defendant's challenge to Undercover Agent's character for truthfulness contributed to Defendant's conviction. *See United States v. Whitmore*, 359 F.3d 609, 622-23 (D.C. Cir. 2004) (holding that evidentiary error was not harmless where the defendant was precluded from challenging the character for truthfulness of the "sole and critical eye-witness" and the corroborating evidence was minimal); *State v. Smith*, 2001-NMSC-004, ¶ 16, 130 N.M. 117, 19 P.3d 254 ("[I]n New Mexico, it is the fact[-]finder that determines credibility."). Accordingly, the error was not harmless. *See Tollardo*, 2012-NMSC-008, ¶ 36 (stating that error under the rules of evidence is not harmless where there is any reasonable probability that the error contributed to the verdict). We do not reach Defendant's claim of constitutional error on this issue, *see Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 (stating that courts avoid constitutional questions not necessary to the disposition), or Defendant's other arguments.

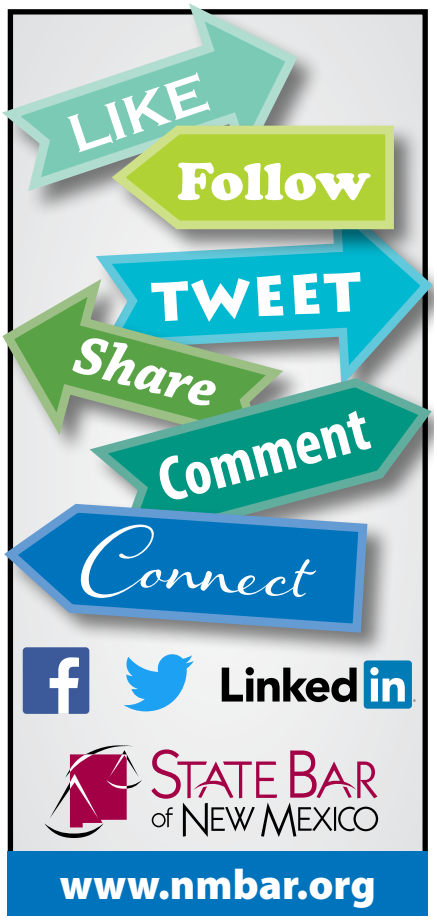
CONCLUSION

{21} We reverse Defendant's convictions and remand to the district court.

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

STEPHEN G. FRENCH, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
TIMOTHY L. GARCIA, Judge



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Miller Stratvert:	**Clinic Attorneys:**
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The Pueblo of Laguna seeks proposals to have their Public Defender and Prosecutor services assessed prior to September 30, 2017. The work product will include a written and oral report to the Pueblo Council and written professional standards for public defenders and prosecutors. Contractor must conduct an onsite assessment to determine whether standards are being met and recommend corrective actions. The onsite assessment must include courtroom observations, a sampling of criminal court case files, interviews with Laguna Court, Probation, Prosecution and Public Defender personnel, and completing and collecting data from a public survey. The person or team conducting the assessment must have experience working with tribal courts and knowledge of prosecution and defender standards. Proposals with resumes of the assessment team must be sent to: Monica Murray, Court Administrator, Pueblo of Laguna at mmurray@lagunapueblo-nsn.gov and received by August 16, 2017.

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EOE
Department: Administration

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Park & Associates, LLC is seeking a full or part time paralegal, with a minimum of 3 to 5 years of experience. Experience is preferred in general civil practice, including medical malpractice defense, personal injury and civil rights. Candidates should have excellent writing and research skills, and the ability to work independently. A paralegal certificate or degree is preferred. Competitive salary and benefits. All inquiries will be kept confidential. Please submit resume and salary requirements to: jertsgaard@parklawnm.com

Paralegal & LGL ASST A Perm#18546
PURPOSE: The position provides assistance to Office of General Counsel attorneys for the Department of Transportation, Santa Fe New Mexico in practice areas of administrative and government law, employment, labor, garnishments, contracts and torts. The position is responsible for case management and calendaring and will conduct legal research, investigate facts and prepare legal documents as needed. The position will assist in areas of litigation, including but not limited to discovery and hearing preparation. The position has primary responsibility for preparation of wage withholding and garnishment files, pleadings and communications with creditors, debtors and other state and federal agencies. You can apply at the State of New Mexico Personnel Office, https://www.governmentjobs.com/careers/newmexico

Services

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