BAR BULLETIN
Official Publication of the State Bar of New Mexico
September 13, 2017 • Volume 56, No. 37

Noble, by John Boland (see page 3)

johnbolandphotography.com

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STATE BAR of NEW MEXICO

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8
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About Cover Image and Artist: John Boland's passion of photography is fueled by his lifetime love of nature. His photographs of wild horses in New Mexico demonstrate and embody the power of the quintessential essence of the wild horse. Boland took many of the photos in this series while exploring remote wild places of New Mexico on his bicycle. More of his work can be viewed at www.johnbolandphotography.com.

Notices

Court News

New Mexico Supreme Court Commission on Access to Justice

September Meeting

The next meeting of the Commission on Access to Justice is noon-4 p.m., Sept. 15, at the State Bar Center. Interested parties from the private bar and the public are welcome to attend. Further information about the Commission is available at Access to Justice at nmcourts.gov.

New Mexico Supreme Court Statewide ADR Commission

Meeting Notice

The next meeting of the Statewide ADR Commission is 10 a.m.–12:30 p.m., Sept. 22, at the Bernalillo County Metropolitan Court (Room 849) in Albuquerque. The Commission will decide on recommendations to the New Mexico Supreme Court for the implementation of HB131, regarding a sliding fee scale for use in district court dispute resolution services for civil cases. All interested parties are welcome to attend. More information about the Commission is available at www.nmcourts.gov > Court Services/Programs > ADR > NM ADR Commission.

Compilation Commission

Coming Soon—*Criminal and Traffic Law Manual*

The New Mexico Compilation Commission announces the official *2017 New Mexico Criminal and Traffic Law Manual*®. Exclusive to this official version are the section numbers of new or amended statutes extracted from the official New Mexico Statutes Annotated 1978®, a Table of Sections affected by 2017 legislation, and a Chapter 30, NMSA 1978 Table of Chargeable Criminal Offenses. Pertinent official NMRA excerpts from the Rules of Criminal Procedure, Evidence, and court-approved forms are included. Order yours at 505-827-4821 or 866-240-6550. Private practitioners, $31; Government, $29.

First Judicial District Court

New Fax Number for Chief Judge Mary Marlowe Sommer

Effective Sept. 5, Chief Judge Mary Marlowe Sommer has a new fax number. The Division VIII fax number is 505-455-8169.

Professionalism Tip

With respect to the public and to other persons involved in the legal system:

I will be mindful of my commitment to the public good.

Second Judicial District Court

Exhibit Destruction Notice

Pursuant to 1.21.2.617 Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy Domestic (DM/DV) exhibits filed with the Court for cases for the years of 1993 to the end of 2012, including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through Sept. 29. Parties with cases with exhibits should verify exhibit information with the Special Services Division, at 505-841-6717 from 10 a.m.-2 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Seventh Judicial District Court

Destruction of Exhibits

Pursuant to the Supreme Court retention and disposition schedule, 1.21.2.617, the Seventh Judicial District Court, Catron County, Socorro County, Sierra County, and Torrance County will destroy exhibits filed with the Court; all unmarked exhibits, oversized poster boards/maps, diagrams and miscellaneous items; the Domestic (DM/DV) cases for the years of 1987 to the end of 2015; the Civil (CV/PB) cases for the years of 1997 to the end of 2015; the Sequestered exhibits (SQ/PQ/JQ/SI/SA) cases for the years of 1992 to the end of 2015; including but not limited to cases which have been consolidated. Counsel for parties are advised that exhibits may be retrieved through Sept. 22. For more information or to claim exhibits, contact Jason Jones, court executive officer, at 575-835-0050. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Twelfth Judicial District Court

Judicial Appointment

On Sept. 1, Gov. Susana Martinez announced the appointment of Steven Blankinship to Division I of the Twelfth Judicial District Court.

State Bar News

Attorney Support Groups

- Sept. 18, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)
- Oct. 2, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month. Group will not meet in September due to the Labor Day holiday.)
- Oct. 9, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert, 505-242-6845.

Board of Bar Commissioners

Meeting Agenda

The agenda for the Sept. 8 Board of Bar Commissioners meeting is available at www.nmbar.org > About Us > Governance > BBC Minutes.

Paralegal Division

Half-Day Mixed Bag CLE—Open to Paralegals and Attorneys

The Paralegal Division presents a "Half-Day Mixed Bag" CLE program (3.0 G), from 9 a.m.–noon, Sept. 23, at the State Bar Center. The CLE is open to paralegals and attorneys. The cost is $35 for Paralegal Division members, $50 for non-member paralegals and $55 for attorneys. Topics include Pre-Adjudication Animal Welfare (P.A.W.) Court, third party sexual harassment and the attorney/paralegal relationship. Contact Christina Babcock at cbabcock1@cnm.edu.

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.

Solo and Small Firm Section

Fall Speaker Series Line-up

The Solo and Small Firm Section will again sponsor monthly luncheon presentations on unique law-related subjects and this fall's schedule opens with Joel Jacobsen, *Journal Business Outlook* columnist and retired assistant attorney general, will present on current legal-business topics in New Mexico and (inter)nationally on Sept. 19. Due to the delay in appointing a new U.S. Attorney, the Section has shuffled its schedule of speakers for the rest of the fall. Gene Grant, host of New Mexico in Focus, will be the guest speaker on Oct. 17. On Nov. 21, join Eric Sirotkin, a local lawyer who has taken a new direction in the last decade, who has written books on international law including North Korea (four trips there) and forgiveness commissions. And on Jan. 16, Mark Rudd, former UNM associate professor and social activist, will speak about political movements over the last fifty years and the effects (if any) on American and international law. All presentations will take place from noon-1 p.m. at the State Bar Center. Contact Breanna Henley at bhenley@nmbar.org to R.S.V.P.

UNM

Law Library Hours Through Dec. 16

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.
Holiday Closures	
Sept. 4 (Labor Day)	
Nov. 24–25 (Thanksgiving)	

New Mexico Law Review

Symposium: A Look at Aid in Dying

The *New Mexico Law Review* presents "Establishing New Rights A Look at Aid in Dying"(5.5G) from 9 a.m.-4 p.m., Sept. 23, at the UNM School of Law. This Symposium will explore aid in dying from medical and legal perspectives, the background of New Mexico's rulings on aid in dying, and how other states have tried or succeeded in legalizing aid in dying. It will also focus on the issue of using state supreme courts and constitutions to create rights that do not currently exist on a national level. Erwin Chemerinsky, Dean of the University of California Berkeley School of Law, will present the keynote address on the history of state constitutions in providing civil rights. New Mexico Supreme Court Justice Charles W. Daniels will present on the New Mexico Supreme Court's history of interpreting its constitution to establish civil liberties. Panels comprised of New Mexico judges and legal experts will discuss the topics of Aid in Dying and the role of state judiciaries. Early registration is strongly encouraged. Visit http://lawschool.unm.edu/events/aid/registration.html.

Utton Center

The Fate of Environmental Law during the Trump Administration

Professor David Uhlmann of the University of Michigan Law School will present "The Fate of Environmental Law during the Trump Administration" (1.25 G) from 5:15-6:30 p.m. on Sept. 20 at the UNM School of Law, room 2402. President Trump is vowing to undo many of the environmental regulations implemented during the past administration and has announced his intent to withdraw from the Paris Accord. For more than 25 years the U.S. has retreated from the bipartisan support that created the modern environmental law system and allowed the fate of the environment to become yet another topic of partisan discord. These challenges call for a broad-based, bipartisan social movement to protect the environment that sustains all life on Earth. There is no registration fee and parking is free at the law school. For more information, call Laura at 505-277-3253. This program is held in cooperation with the State Bar Natural Resources, Energy and Environmental Section.

Other Bars

New Mexico Women's Bar Association

Free Marketing Seminar

The New Mexico Women's Bar Association is presenting a free marketing seminar for attorneys from 11:45 a.m.–1:15 p.m., Sept. 15, at the State Bar Center. "Three Things You Should Do Now To Get More Business Later" is being presented by Lisa Simon, chief marketing and business development officer from Phoenix for Lewis Roca Rothgerber Christie LLP. Simon is an inductee of the Legal Marketing Association Hall of Fame and will share best practices to develop more work. Box lunches will be provided to pre-registered participants at no fee. Register by email at nmwba1990@gmail.com or visit nmwba.org for more information.

New Mexico Supreme Court
Committees, Boards, and Commissions
Notice of 2017 Year-End Vacancies

The Supreme Court of New Mexico is seeking applications to fill upcoming year-end vacancies on the many of its committees, boards, and commissions. Applicants will be notified of the Court's decisions at the end of the year. Unless otherwise noted below, any person may apply to serve on any of the following committees, boards, and commissions:

Appellate Rules Committee (appellate public defender position)
Board Governing Recording of Judicial Proceedings (attorney position)
Board of Bar Examiners (active status NM attorneys only)
Children's Court Rules Committee (children's court and delinquency proceeding attorney positions)
Children's Court Improvement Commission (statewide education and substance abuse treatment positions)
Code of Judicial Conduct Committee
Code of Professional Conduct Committee
Courts of Limited Jurisdiction Rules Committee
Disciplinary Board (attorney position)
Domestic Relations Rules Committee
Drug Court Advisory Committee (district judge and juvenile justice positions)
Judicial Branch Personnel Grievance Board (judicial employee position)
Judicial Branch Personnel Rules Committee (judicial employee position)
Judicial Continuing Legal Education Committee (district judge position)
Judicial Education and Training Advisory Committee (appellate judge and magistrate court clerk positions)
Metropolitan Courts Rules Committee
Minimum Continuing Legal Education Board (active status NM attorneys only)
Rules of Civil Procedure Committee (district judge position)
Rules of Criminal Procedure Committee
Statewide ADR Commission (magistrate judge and metro court ADR positions)
UJI-Civil Committee
UJI-Criminal Committee (district judge position)

Anyone interested in volunteering to serve on one or more of the foregoing committees, boards, or commissions may apply by sending a letter of interest and resume to Joey D. Moya, Chief Clerk, by mail to P.O. Box 848, Santa Fe, New Mexico 87504, by email to nmsupremecourtclerk@nmcourts.gov, or by fax to 505-827-4837. The letter of interest should describe the applicant's qualifications and may prioritize no more than three committees of interest.

The deadline for applications is Friday, Oct. 6.

Board of Bar Commissioners Election Notice 2017

Pursuant to Supreme Court Rule 24-101, the Board of Bar Commissioners is the elected governing board of the State Bar of New Mexico. Candidates must consider that voting members of the Board of Bar Commissioners are required to do the following:

Duties and Requirements for Board of Bar Commissioner Members:

- Attend all Board meetings (up to six per year), including the Annual Meeting of the State Bar.
- Represent the State Bar at local bar-related meetings and events.
- Communicate regularly with constituents regarding State Bar activities.
- Promote the programs and activities of the State Bar and the New Mexico State Bar Foundation.
- Participate on Board and Supreme Court committees.
- Evaluate the State Bar's programs and operations on a regular basis.
- Ensure financial accountability for the organization.
- Support and participate in State Bar referral programs.
- Establish and enforce bylaws and policies.
- Serve as a director of the New Mexico State Bar Foundation Board.

Notice is hereby given that the 2017 election of six commissioners for the State Bar of New Mexico will close at noon, Nov. 30. Nominations to the office of bar commissioner shall be by the written petition of any 10 or more members of the State Bar who are in good standing and whose principal place of practice is in the respective district. Members of the State Bar may nominate and sign for more than one candidate. (See the nomination petition on the next page.) **The following terms will expire Dec. 31, and need to be filled in the upcoming election. All of the positions are three-year terms and run from Jan. 1, 2018–Dec. 31, 2020.**

First Bar Commissioner District

Bernalillo County
Two positions currently held by:
- Aja N. Brooks
- Raynard Struck

Third Bar Commissioner District

Los Alamos, Rio Arriba, Sandoval and Santa Fe counties
Two positions currently held by:
- J. Brent Moore *
- Elizabeth J. Travis

Sixth Bar Commissioner District

Chaves, Eddy, Lea, Lincoln and Otero counties
Two positions currently held by:
- Erinna M. Atkins
- Jared G. Kallunki

*Ineligible to seek re-election

Send nomination petitions to:

Interim Executive Director Richard Spinello
State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199-2860
rspinello@nmbar.org

Petitions must be received by 5 p.m., Oct. 20

Direct inquiries to 505-797-6038 or kbecker@nmbar.org.

Nomination Petition for Board of Bar Commissioners

We, the undersigned, members in good standing of the State Bar of New Mexico, nominate _____, whose principal place of practice is in the _____Bar Commissioner District, State of New Mexico, for the position of commissioner of the State Bar of New Mexico representing the _____Bar Commissioner District.

Submitted_____, 2017

(1) _____ _____
Signature

_____ _____
Type or Print Name *Address*

(2) _____ _____
Signature

_____ _____
Type or Print Name *Address*

(3) _____ _____
Signature

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(4) _____ _____
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(5) _____ _____
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(6) _____ _____
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(7) _____ _____
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(8) _____ _____
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(9) _____ _____
Signature

_____ _____
Type or Print Name *Address*

(10) _____ _____
Signature

_____ _____
Type or Print Name *Address*

YOU'RE INVITED

The State Bar of New Mexico
and the Young Lawyers Division
invite you to attend the annual

STATE BAR OPEN HOUSE

to mix and mingle with members
of the legal community and to welcome
newly admitted lawyers to the profession.

THURSDAY, SEPT. 14 • 5:30-7:30 p.m.
State Bar of New Mexico
5121 Masthead NE in Albuquerque

Join us for food, beverages, State Bar Center tours, exhibitor booths and for your chance to win a Premium Professional Development Package worth up to 15.0 CLE credits and other door prizes!

Please R.S.V.P. you and your guest(s) by visiting
www.nmbar.org/OpenHouse.

STATE BAR of NEW MEXICO

Legal Education

September

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 (2016)**
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

15 **28th Annual Appellate Practice Institute**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

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

20 **The Fate of Environmental Law During the Trump Administration with Prof. David Uhlmann**
1.25 G
Live Seminar, Albuquerque
UNM Natural Resources and Environmental Law Program and Utton Center
505-277-3253

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)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

21 **Structured Settlements in Claims Negotiations**
1.0 G
Live Seminar, Albuquerque
National Structured Settlements Trade Association
202-289-4004

22 **2017 Tax Sympmosium**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **How Jurors View Mistakes and Conflicts**
1.5 EP
Live Seminar, Santa Fe
Attorneys Liability Assurance Society
www.alas.com

23 **Half-Day Mixed Bag CLE**
3.0 G
Live Seminar, Albuquerque
State Bar of New Mexico Paralegal Division
505-203-9057

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

29 **PLSI 50th Anniversary CLE: Evolution of Indian Laws and Indian Lawyers**
4.5 G, 2.0 EP
Live Seminar, Isleta
American Indian Law Center
www.ailc-inc.org

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

September

29 **Deposition Practice in Federal Cases (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Ethically Managing Your Law Practice (2016 Ethicspalooza)**
1.0 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 **Bankruptcy Law: The New Chapter 13 Plan**
3.1 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Lawyers' Duties of Fairness and Honesty (Fair or Foul 2016)**
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 Cases (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **2017 Health Law Symposium**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Employment and Labor Law Institute**
5.0 G, 1.0 EP
Live Webcast/Live Seminar, 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

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

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

12 **Contempt of Court: The Case that Forever Changed the Practice of Law (2017 Annual Meeting)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

13–14 **Heartburn Issues: How Not To Commit Malpractice in Military Divorce Relocation Cases**
Total Possible CLE Credits: 10.0 G, 1.0 EP (plus an optional 1.0 EP)
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

19 **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

20 **Death of Expertise: Skeptical Views of Scientific Evidence**
3.5 G, 2.5 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Ethics and Client Money: Trust Funds, Setoffs and Retainers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

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

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

Effective September 1, 2017

PUBLISHED OPINIONS

A-1-CA-34597	State v. B Adamo	Affirm	08/31/2017
A-1-CA-35307	State v. D Lewis	Reverse/Remand	08/31/2017

UNPUBLISHED OPINIONS

A-1-CA-36004	J Gilbert v. M Kalman	Reverse	08/28/2017
A-1-CA-36070	US Bank V. D Sandoval	Affirm	08/30/2017
A-1-CA-36073	L Wigley v. Sears Holding	Dismiss	08/30/2017
A-1-CA-36130	State v. C Pacheco-Marez	Affirm	08/30/2017
A-1-CA-36172	State v. A Sarellano	Affirm	08/30/2017
A-1-CA-36143	State v. H Humbles	Affirm	08/31/2017

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

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 September 13, 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
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9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017

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12-307.2	Electronic service and filing of papers	08/21/2017*
12-314	Public inspection and sealing of court records	03/31/2017

*The rule adopted effective July 1, 2017, implemented mandatory electronic filing for cases in the Supreme Court. The rule adopted effective August 21,2017, implements mandatory electronic filing in the Court of Appeals.

Rules Governing Admission to the Bar

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

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-024

No. S-1-SC-35349 (filed June 30, 2017)

In the Matter of the Estate of Edward K. McElveny, Deceased,
MICHAEL PHILLIPS, as Personal Representative of the
Estate of Edward K. McElveny,
Petitioner-Respondent,
v.
STATE OF NEW MEXICO, ex rel. DEPARTMENT OF TAXATION AND REVENUE,
Respondent-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
RAYMOND Z. ORTIZ, District Judge

CARMELA STARACE
Albuquerque, New Mexico

CRISTY J. CARBON-GAUL
LAW OFFICE OF
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for Petitioner

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for Respondent

Opinion

Judith K. Nakamura, Chief Justice

{1} We hold that the administrative claim filing provisions of the Uniform Unclaimed Property Act (UPA), NMSA 1978, §§ 7-8A-1 to -31 (1997, as amended through 2007), are exclusive and mandatory and that individuals who wish to procure unclaimed property must exhaust the administrative remedies afforded them by the UPA. Consequently, estate representatives like Petitioner, Michael Phillips (Phillips), who seek to claim estate assets held as unclaimed property by Respondent, the New Mexico Department of Taxation and Revenue (Department), cannot circumvent the UPA's claim filing provisions by invoking provisions of the Uniform Probate Code (UPC), NMSA 1978, §§ 45-1-101 to -404 (1975, as amended through 2016). Although Phillips did not exhaust administrative remedies under the UPA, it is unnecessary to remand for further administrative proceedings. Two exceptions to the exhaustion requirement apply. The Department shall release to Phillips the unclaimed property it has in its custody that belongs to the estate Phillips represents.

I. BACKGROUND

{2} Edward K. McElveny (McElveny) died intestate in 1991. In April 2013, Phillips, McElveny's grandson, filed an application with the Santa Fe County Probate Court (Probate Court) to be informally appointed personal representative (PR) of McElveny's estate (Estate). In his application, Phillips noted that the Department had custody of approximately $70,000 (the Property) that belonged to McElveny and which the Department held as unclaimed property. Phillips asked the Probate Court to order the Department to release the Property to him as PR. The Probate Court granted Phillips' request, appointed him PR, and ordered the Department to release the Property to him. Phillips then filed an unclaimed property claim with the Department. Phillips left the claim form blank and attached to the blank claim form a copy of the Probate Court's order. *In re Estate of McElveny*, 2015-NMCA-080, ¶ 3, 355 P.3d 75.

{3} In June 2013, the Department wrote to Phillips, acknowledged receipt of his claim, but informed Phillips that it was "incomplete." Phillips responded by letter, protested that he had submitted all documentation the Department required to process and approve his claim, asserted that the Department was "bound" by the Probate Court's order, and requested confirmation that the Property would be released to him no later than July 28, 2013. The Department did not reply and did not release the Property to Phillips.

{4} In August 2013, the Probate Court determined that it no longer had jurisdiction over the probate proceedings as there was "a dispute concerning the distribution of the [E]state." The Probate Court transferred the case to the First Judicial District Court.

{5} In September 2013, Phillips filed a motion with the district court asking it to enforce the Probate Court's order and to issue sanctions against the Department. The Department moved to dismiss the proceedings and argued that the district court lacked subject matter jurisdiction because Phillips failed to exhaust administrative remedies. Phillips responded and claimed that the exhaustion doctrine was inapplicable because he was "*not suing* the Department, i.e.[,] not attempting to obtain subject matter jurisdiction over the Department for the purpose of stating a claim." He denied ever having filed an "administrative claim[;]" asserted that he attempted to "handle the Decedent's [E]state through probate court[;]" argued that, as PR of the Estate, he was "simply trying to fulfill his statutory duties to gather the [E]state assets . . . [;]" and pointed out that Section 45-1-302(B) of the UPC gives the district court exclusive jurisdiction to make determinations regarding a decedent's property as between the estate and any interested party.

{6} In February 2014, the district court entered an order in which it concluded that it had, as Phillips argued, exclusive jurisdiction under Section 45-1-302 of the UPC "to make determinations regarding a decedent's property as between [an] estate and any interested party." The court concluded that the Probate Court's order should "be given full effect" and ordered the Department to release the Property to Phillips.

{7} In a subsequent order filed in March 2014, the court issued a $3,000 sanction against the Department for refusing to comply with the Probate Court's order to

release the Property to Phillips. And in a still later order filed in April 2014 (but entered nunc pro tunc to the February 2014 order) the court issued the following additional findings and conclusions: Phillips "did not make an administrative claim to the Department and the Department never denied an administrative claim"; Phillips merely used the Department's claim form to deliver the Probate Court's order; and exhaustion of administrative remedies is not required where a litigant is merely trying to enforce an existing probate court order in district court. The Department appealed.

{8} The Department argued again in the Court of Appeals that the district court did not have jurisdiction to intervene and order the Department to release the Property to Phillips because Phillips failed to exhaust his administrative remedies. The Court was not persuaded and concluded that the claim filing provisions of the UPA were not exclusive and mandatory but merely "permissive." *In re McElveny*, 2015-NMCA-080, ¶¶ 11-13. Having concluded that the UPA's claim filing provisions are not exclusive, the Court determined that Phillips was not required to exhaust administrative remedies under the UPA. *Id.* ¶ 17. The Court affirmed the district court's order directing the Department to release the Property to Phillips. *Id.* ¶ 19. After the Court of Appeals issued its opinion, Phillips filed a motion for attorneys' fees as prevailing party under Rule 12-403 NMRA in which he requested approximately $12,500. The Court of Appeals granted his motion.

{9} The Department filed a petition for a writ of certiorari with this Court. We granted the petition, exercising our jurisdiction under Article VI, Section 3 of the New Mexico Constitution and NMSA 1978, § 34-5-14(B) (1972) to determine whether a litigant seeking unclaimed property must exhaust administrative remedies with the Department. To resolve this issue, we must first address whether the claim filing provisions of the UPA are exclusive. *See State ex rel. Norvell v. Ariz. Pub. Serv. Co.*, 1973-NMSC-051, ¶ 31, 85 N.M. 165, 510 P.2d 98 ("'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course." (internal quotation marks and citations omitted)).

II. DISCUSSION

A. Standard of Review

{10} Whether the claim filing provisions of the UPA are exclusive and whether individuals seeking unclaimed property must exhaust administrative remedies are both questions of statutory interpretation. *See Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 24, 147 N.M. 523, 226 P.3d 622 ("The exclusivity of any statutory administrative remedy turns on legislative intent." (internal quotation marks and citation omitted)); *see also Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 501 (1982) ("[T]he initial question whether exhaustion is required should be answered by reference to congressional intent . . . ."). "The meaning of language used in a statute is a question of law that we review de novo." *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61.

B. Exclusivity

{11} To determine whether the administrative procedures of the UPA are exclusive, we must examine "the comprehensiveness of the administrative scheme, the availability of judicial review, and the completeness of the administrative remedies afforded." *Lion's Gate Water*, 2009-NMSC-057, ¶ 24 (internal quotation marks and citation omitted). "An exclusive and comprehensive administrative process is one that provides for a plain, adequate, and complete means of resolution through the administrative process to the courts." *Id.* (internal quotation marks and citations omitted).

{12} The Court of Appeals concluded that the administrative procedures of the UPA are not exclusive and reached this conclusion by focusing on Section 7-8A-15. *In re McElveny*, 2015-NMCA-080, ¶¶ 10-13. The Court noted that Section 7-8A-15(a) provides that "[a] person . . . claiming property paid or delivered to the administrator may file a claim on a form prescribed by the administrator and verified by the claimant[,]" and observed that "may" is ordinarily understood as permissive. *In re McElveny*, 2015-NMCA-080, ¶¶ 10-11. The Court then noted that the word "shall," a mandatory term, appears in Section 7-8A-15(b), *In re McElveny*, 2015-NMCA-080, ¶ 12, and deduced that the juxtaposition of "may" and "shall" suggests that "may" must be understood as permissive in light of the fact that it appears in close proximity to a mandatory term. *Id.* ¶¶ 11-12; *see also Thriftway Mktg. Corp. v. State*, 1992-NMCA-092, ¶ 9, 114 N.M. 578, 844 P.2d 828 ("Where the terms 'shall' and 'may' have been juxtaposed in the same statute, ordinarily it must be concluded that the legislature was aware of and intended different meanings." (citation omitted)). Given the plain meaning of the term "may" and its proximity to a mandatory term, the Court was persuaded that our Legislature intended for Phillips to have discretion. *In re McElveny*, 2015-NMCA-080, ¶ 13. He could "either file a claim with the Department under Section 7-8A-15(a) or invoke the jurisdiction of the district court under Section 45-1-302(B)." *In re McElveny*, 2015-NMCA-080, ¶ 13. We understand this interpretive approach, but do not agree with it in this instance.

{13} The primary objective in statutory construction is to determine and give effect to legislative intent. *Bradbury & Stamm Constr. Co. v. Bureau of Revenue*, 1962-NMSC-078, ¶ 10, 70 N.M. 226, 372 P.2d 808 ("[A]ll rules of statutory construction are but aids in arriving at the true legislative intent." (citation omitted)). "The question whether a statutory requirement is mandatory or merely directory is answered by looking to the intent of the statute." *Stokes v. Tatman*, 1990-NMSC-113, ¶ 10, 111 N.M. 188, 803 P.2d 673. The Court of Appeals arrived at its conclusion regarding legislative intent by focusing narrowly on the words "may" and "shall." Our focus is broader; we must construe the entire statute as a whole so that all of its provisions are considered in relation to one another and so that all parts are given effect. *Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236; *State v. Herrera*, 1974-NMSC-037, ¶ 8, 86 N.M. 224, 522 P.2d 76 ("We attempt to construe statutes so that meaning and effect will be given to every part thereof."). Looking to the statute as a whole points us towards a conclusion diametrically different than that reached by the Court of Appeals.

{14} Section 7-8A-7 directs the Department to keep records related to unclaimed property, including records of the identity of the last known owner. Section 7-8A-7(B)(2). The Legislature's decision to require the Department to possess the information necessary to most effectively decide unclaimed property matters suggests that the Legislature intended the Department to decide these matters in the first instance. *Cf. Groendyke Transp., Inc. v. N.M. State Corp. Comm'n*, 1984-NMSC-067, ¶ 27, 101 N.M. 470, 684 P.2d 1135 ("[T]he special knowledge and experience of state agencies should be accorded deference." (internal quotation marks and citation omitted)).

{15} Section 7-8A-10(b) instructs that the state "assumes custody and responsibility for the safekeeping of the [unclaimed] property." As the custodian of unclaimed property, the Department has a duty to ensure that unclaimed property is returned only to rightful owners. *See* 1 Am. Jur. 2d *Abandoned, Lost, and Unclaimed Property* § 44 (explaining that the UPA is "custodial in nature" and that "[t]he objectives of the [UPA] are to protect unknown owners by finding them and restoring their property to them . . . ."); 30A C.J.S. Escheat § 12 ("Under a statute such as the [UPA], the state takes custody of unclaimed property and has full use of it until the rightful owner comes forward to claim it."). Because our Legislature imposed a duty upon the Department to ensure unclaimed property is returned only to rightful owners, the Legislature must have intended the Department to have some responsibility in determining who the rightful owners of unclaimed property might be. And if the Legislature intended the Department to have this responsibility, it must have intended the Department to exercise this responsibility in the first instance as administrative agencies do not review district court determinations. Construing the UPA to permit some entity other than the Department to make these first instance determinations would frustrate legislative intent. *See State v. Young*, 2004-NMSC-015, ¶ 9, 135 N.M. 458, 90 P.3d 477 (observing that statutes should be construed so as to facilitate their operation and achieve the Legislature's goals, and rejecting the defendants' proposed construction on grounds that it would frustrate legislative intent).

{16} Section 7-8A-15(b) is significant in a way not contemplated by the Court of Appeals. It provides that "the administrator shall allow or deny" claims for unclaimed property. *Id.* The "administrator" is "the [Department], the secretary of [the Department] or any employee of the [D]epartment who exercises authority lawfully delegated to him by the secretary[.]" Section 7-8A-1(1). If the administrative procedures of the UPA are not exclusive, and if some individual or tribunal other than those specified by the UPA may resolve whether a claimant seeking unclaimed property should or should not be granted that property, then Section 7-8A-15(b) would be rendered a nullity. *See Sec. Trust v. Smith*, 1979-NMSC-024, ¶ 11, 93 N.M. 35, 596 P.2d 248 ("[A] statute should not be construed in such a way as to nullify certain of its provisions."). In other words, if the Department "shall allow or deny claims," then the Department *must* adjudicate those claims.

{17} Section 7-8A-16(A) establishes an appellate process by which the Department's decisions regarding unclaimed property may be appealed to district court. Section 7-8A-16(B) addresses the appellate rights of claimants whose claims have "not been acted upon within ninety days" after filing with the Department. They "may maintain an original action to establish the claim in the district court for the first judicial district, naming the administrator as a defendant." *Id.* We must construe the UPA in such a way that the procedural directives of the statutory scheme are given full effect. *Herrera*, 1974-NMSC-037, ¶ 8. Under the Court of Appeals construction, a claimant can bypass the Department altogether, adjudicate the unclaimed property matter in the first instance in district court, and ignore Sections 7-8A-16(A) and (B). Moreover, a claimant could proceed in whichever judicial district court has venue under the UPC. *See* § 45-3-201(A) (establishing venue requirements for probate proceedings). This is inconsistent with Section 7-8A-16(B) which specifies the judicial district in which certain claims must be brought.

{18} Our review of these provisions leads us to conclude that our Legislature intended the UPA's administrative process to be exclusive and mandatory. The administrative process the varying provisions of the UPA establishes is plain, adequate, and complete. That process includes mechanisms that permit claim filing, identifies the entity responsible for deciding claims, and specifies how appeals to district court shall occur. Section 7-8A-16(A)-(B) Even if the Court of Appeals is correct that the term "may" is inescapably permissive, it is possible to accept this fact while still concluding that our Legislature intended Section 7-8A-15(a) to be mandatory. "May" does not necessarily connote that other, alternative avenues exist to pursue unclaimed property apart from filing a claim with the Department. "May" means only that a potential claimant *may elect* to file a claim with the Department or *may elect not* to file a claim and forego any attempt to procure unclaimed property. *Accord Lucero v. Bd. of Regents of Univ. of N.M.*, 2012-NMCA-055, ¶ 15, 278 P.3d 1043 (interpreting the term "may" in the grievance provisions of an employee handbook as permissive but only to the extent that the term denotes that an employee *may file* a grievance or *may elect to not file* a grievance and forego the grievance process, accept the disciplinary decision, and decline to challenge the disciplinary action). We find nothing in the UPC that causes us to doubt our conclusion that the administrative process of the UPA is exclusive.

{19} Phillips was not acting in accordance with his statutory obligations under the UPC when he sought and obtained an order from the Probate Court directing the Department to release the Property to him. *Contra In re McElveny*, 2015-NMCA-080, ¶ 9. Phillips could not simply take control of the Property upon his appointment as PR as the Department had custody of the Property as unclaimed property. Phillips could, of course, procure the Property by filing a claim with the Department and by establishing that the Property is Estate property. But this is a form of adjudication in which the Probate Court has no authority to engage.

{20} Probate courts are creatures of statute and their powers are entirely derived from statute. *In re Hickok's Will*, 1956-NMSC-035, ¶ 30, 61 N.M. 204, 297 P.2d 866; Curtis Hillyer, *Bancroft's Probate Practice* § 16-17, at 38-39 (2d ed. 1950) (observing that probate proceedings are "statutory" and that "such courts are creatures of the law and limited in their jurisdiction"); *cf. Caron v. Old Reliable Gold Min. Co.*, 1904-NMSC-016, ¶ 9, 12 N.M. 211, 78 P. 63 (same). The authority of New Mexico's probate courts derives from the UPC. *In re Estate of Harrington*, 2000-NMCA-058, ¶ 15, 129 N.M. 266, 5 P.3d 1070. Under the UPC, probate courts may preside over and may act only in informal probate proceedings. Section 45-1-302(C). Informal probate proceedings are nonadjudicatory. American Law Institute, *Uniform Probate Code Practice Manual Volume 1*, § 2, at 21 (2d ed. 1977); *cf.* Hillyer, *supra,* § 27, at 70 ("It is thoroughly established that in probate proceedings title to property as between the estate, the heirs or devisees, and a third person may not be tried."). The Probate Court could not adjudicate whether Phillips was entitled to the Property because it is not empowered to adjudicate. Thus, the Probate Court's order commanding the Department to release the Property to Phillips was "nugatory" and is vacated. *See* Hillyer, *supra*, § 28, at 74 ("Acts of the [probate] court in excess of the powers conferred upon it are nugatory and have no binding effect . . . .").

{21} While Section 45-1-302(B) of the UPC grants district courts sitting in probate general civil jurisdiction, *In re Harrington*, 2000-NMCA-058, ¶¶ 17-20, the UPA (which was enacted after the UPC) specifically delegated to the Department authority to adjudicate unclaimed property matters in the first instance and provides claimants dissatisfied with the Department's determination a path to seek review in district court. Section 7-8A-15(a), -16. A conferral of specific authority trumps any previous conferral of general authority. *See State v. Cleve*, 1999-NMSC-017, ¶ 17, 127 N.M. 240, 980 P.2d 23 (discussing the canon of statutory construction known as the general/specific statute rule). Accordingly, we reject the assertion that Section 45-1-302(B) "unambiguously grants jurisdiction to the district court to do exactly what it did here." *In re McElveny*, 2015-NMCA-080, ¶ 9. The district court did not have jurisdiction to determine in the first instance that the Property was Estate property and circumvent the claim filing and appellate provisions of the UPA. In addition, the district court could not simply enforce the Probate Court's order as the Probate Court had no authority to order the Department to release the Property to Phillips. The district court's order directing the Department to relinquish the Estate property to Phillips is vacated.

C. Exhaustion

{22} "The doctrine of administrative exhaustion arose as a way to coordinate the roles of the administrative and judicial branches, both of which are charged with regulatory duties." *Lobato v. State Env't Dep't*, 2012-NMSC-002, ¶ 12, 267 P.3d 65. The requirement that administrative remedies must be exhausted originates from two different sources: statutes and the common law. *U.S. Xpress, Inc. v. N.M. Taxation & Revenue Dep't*, 2006-NMSC-017, ¶ 12, 139 N.M. 589, 136 P.3d 999. The contours and rigidity of the requirement differ greatly depending upon which of these two sources the exhaustion requirement flows and, therefore, exhaustion is best thought of as "two distinct legal concepts." *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004).

{23} "If a statute explicitly requires a party to exhaust particular remedies as a prerequisite to judicial review . . . the statutorily mandated exhaustion requirements are jurisdictional. A court cannot excuse a petitioner from complying with an explicit and detailed statutory duty to exhaust administrative remedies." II Richard J. Pierce, Jr., *Administrative Law Treatise*, § 15.2, at 1219-20; *cf. Am. Fed'n of State v. Bd. of Cty. Comm'rs of Bernalillo Cty.*, 2016-NMSC-017, ¶ 14, 373 P.3d 989 ("If a statute creates a right and provides that only a specific class of persons may petition for judicial review of an alleged violation, then the courts lack the jurisdiction to adjudicate that alleged violation when the petition is brought by a person outside of that class."). "The common law duty[, on the other hand,] is flexible and pragmatic. It is subject to several judge-made exceptions." II Pierce, *supra*, § 15.2, at 1219. This non-jurisdictional form of exhaustion is firmly established and serves important functions which have been cataloged by the United States Supreme Court and leading treatises. *See McKart v. United States*, 395 U.S. 185, 193-95 (1969); *see also* II Pierce, *supra*, § 15.2, at 1222. Several of these functions are discussed in the analysis that follows.

{24} "A mere reference to the duty to exhaust administrative remedies conferred in an agency organic act is not enough to create a statutory duty to exhaust particular remedies." II Pierce, *supra*, § 15.3, at 1245. "A statute creates an independent duty to exhaust only when it contains 'sweeping and direct' statutory language indicating that there is no . . . jurisdiction prior to exhaustion . . . ." *Id.*; *see, e.g.*, *U.S. Xpress*, 2006-NMSC-017, ¶¶ 6-15 (concluding that statutory exhaustion applicable in light of the fact that the Legislature clearly expressed its intent "to require that tax refund claims proceed according to the requirements of the Tax Administration Act."). There is no direct and unequivocal statement in the UPA requiring exhaustion of administrative remedies. Nevertheless, we conclude that non-jurisdictional exhaustion is required for prudential reasons.

{25} The reasons for applying "the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand." *McKart*, 395 U.S. at 193. First, "[t]he agency, like a trial court, is created for the purpose of applying a statute in the first instance." *Id.* at 193-94. As we have already shown, our Legislature intended for the Department to decide unclaimed property matters in the first instance. Second, "[c]ertain very practical notions of judicial efficiency come into play as well." *Id.* at 195. Because the Department is required to keep records of last known owners, it is best positioned to determine who is entitled to unclaimed property and who is not. If exhaustion were not required and if a claimant could proceed initially before some tribunal other than the Department, time and effort might be expended unnecessarily attempting to resolve questions the Department is uniquely situated to address. Third, "it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages." *Id.* at 194. The Department's initial reticence to Phillips' claim might have dissipated had he simply submitted a completed claim form. This thought must remain speculation, however, because Phillips declined to pursue the administrative process with the Department to its end. Fourth, "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *Id.* at 195. Phillips accused the Department of a pattern and practice of needlessly withholding unclaimed property from rightful owners. We make no judgment about the merits of this accusation and make note of it only to illuminate that there are claimants who would prefer not to proceed before the Department. If the preferences of claimants governed, the Legislature's statutory scheme and the autonomy of the Department could be undermined. Lastly, unnecessary duplication and conflicts may arise if exhaustion is not mandated. *Whitney Nat'l Bank in Jefferson Par. v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422 (1965). The Department declined to relinquish the Property to Phillips and that decision was never appealed. Instead, Phillips asked the district court to decide the very issue that he initiated administrative proceedings to resolve. In effect, two tribunals came to conflicting conclusions in independent proceedings about the same matter. This is problematic, but this difficulty is easily remedied by requiring exhaustion. For these reasons, we conclude that Phillips was required to exhaust administrative remedies with the Department. But this conclusion in no way precluded Phillips from simultaneously initiating probate proceedings nor does it empower the Department to adjudicate probate matters.

{26} When—as in the present case—an individual seeks to be appointed PR of an estate and then seeks to procure estate assets existing as unclaimed property for purposes of estate settlement and distribution, two lines of inquiry are opened. First, should this individual be appointed PR?

Second, does the unclaimed property belong to the estate the PR represents? These are distinct and independent questions. The first must be resolved by the probate and district courts in probate proceedings under the provisions of the UPC. The second must be addressed by the Department under the provisions of the UPA. The probate proceedings and unclaimed property proceedings may proceed simultaneously and in parallel. Each adjudicative body is responsible for discrete determinations essential to one goal—the settlement and distribution of the estate. Explaining how these general principles apply in this case will aid comprehension of our conclusion.

{27} Phillips correctly initiated proceedings under the UPC to be appointed PR and correctly initiated administrative proceedings under the UPA by filing a claim with the Department as PR of the Estate. The district court's determinations that Phillips did not file a claim with the Department and that the Department did not deny a claim submitted by Phillips are not supported by substantial evidence. *See Getz v. Equitable Life Assurance Soc'y of U. S.*, 1977-NMSC-018, ¶ 14, 90 N.M. 195, 561 P.2d 468 (findings not supported by substantial evidence cannot be sustained on appeal). There is no genuine dispute that Phillips filed a claim with the Department and that the Department rejected that claim. *In re McElveny*, 2015-NMCA-080, ¶ 3. Phillips went awry when he asked the Probate Court to order the Department to release the money to him and when he asked the district court sitting in probate to enforce the Probate Court's order. These requests irreparably entangled two distinct proceedings. If Phillips was dissatisfied with the Department's decision in the UPA proceedings, he was obligated to exhaust administrative remedies and appeal that decision under the applicable appellate provision of the UPA. He did not.

D. Exceptions to Exhaustion

{28} If the UPA contained an express and unequivocal exhaustion requirement, we would be required to remand this matter to the Department so that the administrative proceedings could be brought to their conclusion. *See I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002) ("Generally speaking, a [reviewing court] should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."). But because exhaustion is required in this case not for statutory, jurisdictional reasons but for prudential, non-jurisdictional reasons, we have discretion. *See Rodrigues v. Donovan*, 769 F.2d 1344, 1348 (9th Cir. 1985) ("The judicially-created exhaustion doctrine does not limit jurisdiction; rather, it permits courts to decide whether to exercise jurisdiction."); *see also Lobato*, 2012-NMSC-002, ¶ 12 ("A rigid adherence to administrative exhaustion is not required in circumstances where the doctrine is inappropriate.").

{29} The Department rejected Phillips' claim because it was "incomplete," and offered three justifications for this conclusion: (1) Phillips failed to submit documentation "showing that the [P]roperty . . . would devolve to [him] alone under the applicable law of heirship[;]" (2) a "[q]uitclaim [d]eed" Phillips submitted was illegible; and (3) "the application should be made directly to [the Department] as unclaimed property custodian rather than probate." Because the Department cited these specific grounds as the basis for its decision, we need not remand this particular matter for further administrative proceedings. Two exceptions to the exhaustion requirement apply in this case.

{30} "A party to administrative proceedings need not exhaust administrative remedies when the agency has clearly acted in excess of its statutory authority." 5 Jacob A. Stein et al., *Administrative Law* § 49.02[3], at 49-107 (2015). The Department's first justification is not legally valid as it constitutes action beyond the scope of the Department's authority. Phillips was not required to submit documentation to the Department showing that the Property would devolve to him alone under our probate laws. The Department had only two questions before it: Is Phillips the lawfully appointed PR of the Estate? Does the Property belong to the Estate? "There is no factual dispute that the [P]roperty belongs to the Estate . . .[,]" *In re McElveny*, 2015-NMCA-080, ¶ 18, and Phillips did not apply to the Department in his individual capacity but as PR of the Estate and there has never been any doubt that Phillips was lawfully appointed PR. Who ultimately receives the Property (or portions of it) once Phillips settles and distributes the Estate's assets is a probate question, and nothing in the UPA suggests that our Legislature intended to empower the Department to involve itself in or decide probate matters. These matters are governed by the UPC and lie beyond the scope of the Department's statutory authority. Indeed, the very fact that the UPA expressly authorizes an "estate" to file a claim for unclaimed property indicates that our Legislature anticipated that estate representatives appointed in independent proceedings under the UPC might find it necessary to apply with the Department to obtain estate assets held by the Department as unclaimed property. *See* § 7-8A-15(a) (stating that a "person" may file a claim with the Department for unclaimed property); Section 7-8A-1(12) (defining the term "person" as used in the UPA to include an "estate"). These provisions do not suggest that our Legislature ever intended for the Department to make judgments about the propriety of a probate appointment or how estate assets should be distributed. We need not remand to permit Phillips an opportunity to submit to the Department documentation about who will ultimately receive shares of the Property as the Department has no authority to require Phillips to provide this documentation.

{31} A litigant's failure to exhaust administrative remedies can be excused if exhaustion would be futile. *Lobato*, 2012-NMSC-002, ¶ 12; II Pierce, *supra*, § 15.2, at 1229-30. Futility, as an exception to exhaustion requirements, applies where "the agency has deliberately placed an impediment in the path of a party, making an attempt at exhaustion a useless endeavor." 5 Stein, *supra*, § 49.02[4], at 49-116 to 49-118. The futility exception to exhaustion applies in light of the second and third justifications offered by the Department for its decision.

{32} We cannot see how the second justification offered by the Department—a quitclaim deed Phillips submitted was illegible—can have any bearing on whether Phillips is the lawfully appointed PR of the Estate and whether the Property, a sum of money, is Estate property. *See Deed*, Black's Law Dictionary (10th ed. 2014) (defining "quitclaim deed" as "[a] deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid."). The third justification offered by the Department is not entirely clear. We understand the Department to be asserting that Phillips wrongly assumed that he could submit the Probate Court order directing the Department to release the Property to him in place of a completed unclaimed property claim form. While we agree with the Department that a claimant seeking unclaimed property must complete the claim form "prescribed" by the Department, Section 7-8A-15(a), there is no genuine dispute that the Property is

Estate property and that Phillips is the PR of the Estate. Thus, we cannot see what the Department would have gained from requiring Phillips to complete the form. Courts and administrative tribunals alike should not sacrifice the efficient administration of the law at the service of empty formalism. Neither the second nor third justification illuminates some principle that explains the Department's long held opposition to Phillips' claim. What we see is needless adversity. Accordingly, remanding for further proceedings is futile.

{33} It is unnecessary to remand this matter for further administrative proceedings. The Department shall release the Property to Phillips.

E. Sanctions and Attorneys' Fees

{34} The district court imposed a $3,000 sanction on the Department because it failed to "act in accordance with the [Probate] Court['s] Order" to release the Property to Phillips. As already noted, the Probate Court did not have authority to order the Department to release the Property to Phillips and the Department was not required to comply with this aspect of the Probate Court's order. Thus, the imposition of the $3,000 sanction was an abuse of discretion and is vacated. *See Gonzales v. Surgidev Corp.*, 1995-NMSC-047, ¶ 33, 120 N.M. 151, 899 P.2d 594 (stating that a district court's award of monetary sanctions is reviewed for an abuse of discretion).

{35} The Court of Appeals awarded Phillips attorneys' fees as prevailing party on appeal. *See* Rule 12-403(A) NMRA ("Unless otherwise provided by law, the appellate court may, in its discretion, award costs to the prevailing party on request."); Rule 12-403(B)(3) ("Allowable costs may include . . . reasonable attorney fees for services rendered on appeal in causes where the award of attorney fees is permitted by law."). This ruling cannot stand given our discussion. We agree with the Department that the UPA claim filing provisions are exclusive and mandatory and that Phillips was required to exhaust administrative remedies. But we also agree with Phillips that the Department acted outside its statutory authority in denying Phillips' claim and agree that the Department must release the Property to him without any further delay. Both parties have prevailed on certain issues and, therefore, neither party is entitled to an award of costs as "prevailing party" under Rule 12-403. *See N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 33, 127 N.M. 654, 986 P.2d 450 ("We also conclude that neither party is entitled to recover allowable costs [under Rule 12-403(A)] . . . because the Court ruled in favor of each party on one issue . . . . Thus, there is no prevailing party . . . .").

III. CONCLUSION

{36} We reach the same conclusion as the Court of Appeals, but arrive at this end by a different course. The Court of Appeals' opinion is reversed to the extent that its analysis and conclusions diverge from ours. The sanctions imposed upon the Department by the district court are vacated as is the award of attorneys' fees granted by the Court of Appeals in favor of Phillips. The Department shall release the Property to Phillips without delay, and we remand this matter to the Department for this sole purpose.

{37} IT IS SO ORDERED.

JUDITH K. NAKAMURA,
Chief Justice

WE CONCUR:
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice
BARBARA J. VIGIL, Justice

Certiorari Denied, May 31, 2017, No. S-1-SC-36449

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-052

No. 34,651 (filed April 5, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
BRANDON LOZOYA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
ANGIE K. SCHNEIDER, District Judge

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

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Chief Public Defender
ALLISON H. JARAMILLO
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Jonathan B. Sutin, Judge

{1} Defendant Brandon Lozoya was charged and convicted by a jury of contributing to the delinquency of a minor (CDM), in violation of NMSA 1978, Section 30-6-3 (1990), and shoplifting, in violation of NMSA 1978, Section 30-16-20(A)(1) (2006). On appeal, Defendant argues (1) that his convictions for CDM and shoplifting as an accessory violate double jeopardy; (2) alternatively, his conviction for CDM violates the plain language of Section 30-16-20(C), under a statutory construction analysis; (3) the State failed to present sufficient evidence of CDM; (4) the district court erred in failing to include knowledge of age as an element in the CDM instruction; (5) the district court erred in allowing the State to impeach Defendant with his prior conviction; and (6) the prosecutor committed prosecutorial misconduct during closing argument. We hold that Defendant's convictions for CDM and shoplifting violate double jeopardy, and for the reasons stated in this opinion, we reverse and remand with instructions to vacate the shoplifting conviction.

BACKGROUND

{2} Defendant was at a house party in Alamogordo, New Mexico, when he was offered a ride to Walmart to get more alcohol. He accepted the ride, and when he entered the backseat of a female friend's vehicle, he noticed that a third person, Child, was in the front passenger seat. Defendant and Child had never met each other before. The three individuals drove for approximately three to four minutes to Walmart. When they arrived, Defendant and Child got out of the car, entered Walmart, and headed toward the alcohol section.

{3} Defendant and Child dispute what was known to Defendant before entering Walmart and while they were in Walmart's alcohol section. Child testified that her intent when she was dropped off at Walmart was to steal bottles of alcohol. She testified that she had discussed her intent to shoplift with Defendant, and Defendant "looked out to see if anyone was coming" while she shoplifted. According to Child, Defendant pointed out bottles of alcohol that he wanted, but she instead only placed bottles she wanted in her purse. Child testified that she told Defendant that she did not have any money. Child admitted that she did not tell Defendant her age and admitted that she had never met Defendant before that night.

{4} Defendant testified that no one suggested stealing liquor and that he had no idea Child intended to shoplift. According to Defendant, he did not know Child was shoplifting until she had taken a second bottle. Defendant also testified that he had no idea how old Child was and assumed she was twenty-one years old.

{5} After Child placed two bottles of alcohol in her purse, Defendant and Child headed toward the exit. They were stopped by a Walmart asset protection associate who asked that they return the bottles. The associate testified that her observations made her believe that Defendant and Child were there together, and she believed that Defendant was assisting Child in picking out merchandise to steal. She further testified that Defendant asked her if she would agree to not call the police if they returned the items. The items were returned, and Child and Defendant left Walmart separately. The associate called the police, and Child and Defendant were both apprehended by law enforcement.

{6} For his role in the crime, Defendant was charged with shoplifting under $250 (a petty misdemeanor) and CDM (a fourth degree felony). Prior to trial, Defendant moved to keep out the names or nature of his prior convictions for robbery and possession of cocaine if he testified. The court deferred ruling at that time, but at trial denied the motion, finding that the probative value for impeachment purposes outweighed any prejudicial effect. At trial, Defendant testified in his own defense, and during direct examination, admitted he had previously been convicted of robbery and possession of cocaine. On cross-examination, the State further questioned Defendant about his prior convictions. He also questioned whether Defendant was under the influence of illegal drugs on the night in question and asked whether he had a sexual interest in Child.

{7} During closing argument, the prosecutor remarked, "What is a twenty-seven-year-old man doing with a fifteen-year-old girl and another young lady in the car . . . ? Well, nothing good I expect." He also referenced the fact that a condom packet was found in Defendant's pocket after he was apprehended and searched by law enforcement, suggested that alcohol, minors, and condoms were "[n]ot a recipe for a good ending[,]" and pleaded to the jury "[d]on't allow him to do this to our children." According to the prosecutor, "[Defendant] went there with one purpose. To get booze and to have some fun that night. You can infer the rest." The prosecutor also mentioned, "regarding [the] issue of credibility," Defendant's

prior convictions, and categorized him as a "two-time felon." Defendant was convicted on both counts, and this appeal followed.

DISCUSSION

I. Double Jeopardy

{8} We begin by analyzing Defendant's claim that his CDM and shoplifting convictions violate double jeopardy and that this Court must vacate one of his convictions. Because we ultimately reverse Defendant's shoplifting conviction on double jeopardy grounds, we need not and do not separately address his statutory construction argument that appears to rely almost entirely on the logic and case law set forth in his double jeopardy argument.

{9} "The Fifth Amendment of the United States Constitution prohibits double jeopardy and is made applicable to New Mexico by the Fourteenth Amendment." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747; *see* U.S. Const. amends. V & XIV, § 1. The right to be free from double jeopardy protects, in relevant part, "against multiple punishments for the same offense." *State v. Montoya*, 2011-NMCA-074, ¶ 29, 150 N.M. 415, 259 P.3d 820 (internal quotation marks and citation omitted). The specific type of multiple punishment case we are dealing with here, where Defendant was convicted of crimes under two separate statutes,

> is categorized as a double[]description case, which prohibits charging a defendant with violations of multiple statutes for the same conduct in violation of the Legislature's intent. In such a case, double jeopardy bars a conviction if the conduct underlying the two offenses is unitary and the Legislature has not indicated an intent to punish the same conduct separately.

Id. ¶ 30 (alterations, internal quotation marks, and citations omitted). A double jeopardy challenge is a constitutional question of law that the appellate courts review de novo. *Swick*, 2012-NMSC-018, ¶ 10.

{10} The parties agree that the conduct underlying the CDM conviction and the shoplifting conviction was unitary and that, under a double description analysis, a double jeopardy violation exists. However, the parties disagree about which conviction should be vacated. Defendant argues that the CDM charge must be vacated because according to Section 30-16-20(C), "[a]n individual charged with a violation of this section shall not be charged with a separate or additional offense arising out of the same transaction[,]" and thus, the Legislature intended to bar punishment for CDM in cases, such as this, where CDM and shoplifting arose out of the same transaction. Defendant also argues that "[t]o the extent the reach of this statute is ambiguous, the rule of lenity applies" and that the Court should therefore vacate his CDM conviction as opposed to his shoplifting conviction. *See State v. Santillanes*, 2001-NMSC-018, ¶ 34, 130 N.M. 464, 27 P.3d 456 ("The rule of lenity counsels that criminal statutes should be interpreted in the defendant's favor when insurmountable ambiguity persists regarding the intended scope of a criminal statute." (internal quotation marks and citation omitted)).

{11} The State argues that under double jeopardy jurisprudence the shoplifting conviction, a petty misdemeanor that carries a lesser punishment, must be vacated, while the CDM conviction, a felony, must stand. *See State v. Montoya*, 2013-NMSC-020, ¶ 55, 306 P.3d 426 ("[W]here one of two otherwise valid convictions must be vacated to avoid violation of double jeopardy protections, we must vacate the conviction carrying the shorter sentence."); *State v. Lee*, 2009-NMCA-075, ¶ 16, 146 N.M. 605, 213 P.3d 509 ("When double jeopardy exists, the offense carrying the lesser punishment is to be vacated."). Defendant acknowledges that "typically the lesser conviction is vacated when both violate double jeopardy" but he asserts that the language in the shoplifting statute indicates that the Legislature intended only that shoplifting be charged.

{12} In evaluating that essential issue of whether we should vacate the shoplifting conviction or the CDM conviction, we are persuaded that the appellate courts' general practice of vacating the conviction carrying the shorter sentence in cases where double jeopardy protections have been violated is the proper approach here. In support of this approach of vacating the conviction with the lesser punishment, our Supreme Court has held that "[a]s a matter of separation of powers, it is the exclusive prerogative of the Legislature, the law-making branch of our representative democracy, to determine relative seriousness and punishment for criminal offenses." *Montoya*, 2013-NMSC-020, ¶ 56. Moreover, "as a matter of policy, it would be unacceptable for us to hold that where a person's criminal conduct would have violated either of two statutes, a defendant can escape liability for the one carrying the greater punishment by committing the crime in such a manner as to also violate the statute carrying the lesser penalty." *Id.*

{13} We further note that the approach of vacating the conviction carrying the lesser punishment has also been utilized specifically in the context of Section 30-16-20(C). In *State v. Ramirez*, 2008-NMCA-165, 145 N.M. 367, 198 P.3d 866, this Court considered whether to vacate a shoplifting conviction or a burglary conviction when it was determined that the two convictions violated the language of Section 30-16-20(C). The *Ramirez* Court stated that Section 30-16-20(C) evidenced a legislative intent that shoplifters not be "charged with multiple crimes arising from a single instance of shoplifting" and that:

> The prohibition on additional charges means the shoplifting charges were null when brought. It is for the [prosecution] to decide which charges to bring based upon the circumstances. Here, the [prosecution] chose burglary. Adding two charges of shoplifting in violation of the statutory limitation on additional charges was explicitly prohibited by the plain language of Section 30-16-20(C). Therefore, we vacate [the d]efendant's convictions for two counts of shoplifting and remand to the district court for resentencing.

Ramirez, 2008-NMCA-165, ¶¶ 16-17.

{14} Finally, the rule of lenity does not assist Defendant in his proposition that this Court should vacate the CDM conviction as opposed to the shoplifting conviction. The rule of lenity applies in cases where there is "insurmountable ambiguity" regarding legislative intent, and it "does not apply to a determination of which conviction to vacate as a result of impermissible multiple punishments." *Santillanes*, 2001-NMSC-018, ¶¶ 33, 34.

{15} In sum, we are not persuaded that the Legislature intended Section 30-16-20(C) to apply in double jeopardy circumstances to require the shoplifting conviction to stand and the other conviction to be vacated. Because our common law guides us to vacate the lesser offense and because the rule of lenity does not apply, we vacate the shoplifting conviction as opposed to the CDM conviction.

II. Sufficiency of the Evidence

{16} Defendant next argues that the State failed to present sufficient evidence of CDM. Specifically, he argues that (1) one of

the alternatives in the jury instruction that Defendant "allowed [Child] to shoplift" was legally inadequate under the statutory definition of the crime, and (2) the State was required to prove and failed to prove that he knew Child was under the age of eighteen.

{17} When reviewing claims of insufficient evidence, we "resolve all disputed facts in favor of the [prosecution], indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary." *State v. Smith*, 2016-NMSC-007, ¶ 19, 367 P.3d 420 (internal quotation marks and citation omitted). We then determine "whether the evidence, viewed in this manner, could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *State v. Sanders*, 1994-NMSC-043, ¶ 11, 117 N.M. 452, 872 P.2d 870. The issues of whether Defendant allowed Child to shoplift was legally adequate under the statute and whether the State was required to prove that Defendant knew Child was a minor are legal issues that require statutory construction for which our review is de novo. *See, e.g.*, *State v. Neatherlin*, 2007-NMCA-035, ¶ 8, 141 N.M. 328, 154 P.3d 703 ("The issue of whether [the d]efendant's mouth is a deadly weapon is one of law, applying law to the facts and requiring statutory construction; our review is de novo." (internal quotation marks and citation omitted)).

A. Legal Adequacy of Alternatives

{18} Defendant argues that the first alternative in the CDM jury instruction that Defendant allowed Child to shoplift is "legally inadequate" and not within the statutory definition of the crime. "[A] conviction under a general verdict must be reversed if one of the alternative bases of conviction is legally inadequate and it is impossible to tell which ground the jury selected." *State v. Downey*, 2008-NMSC-061, ¶ 40, 145 N.M. 232, 195 P.3d 1244 (internal quotation marks and citation omitted). Defendant points to New Mexico civil case law, recognizing that "[a]s a general rule, an individual does not have a duty to control the acts of a third party in the absence of a duty imposed by statute or recognized as a result of a special relationship that exists between a defendant and the tortfeasor." *Tercero v. Roman Catholic Diocese*, 2002-NMSC-018, ¶ 25, 132 N.M. 312, 48 P.3d 50; *see Johnstone v. City of Albuquerque*, 2006-NMCA-119, ¶ 7, 140 N.M. 596, 145 P.3d 76 ("To impose a duty, a relationship must exist that legally obligates [the d]efendant to protect [the p]laintiff's interest. Absent such a relationship, there exists no general duty to protect others from harm." (citation omitted)); *see also Romero v. Giant Stop-N-Go of N.M., Inc.*, 2009-NMCA-059, ¶ 7, 146 N.M. 520, 212 P.3d 408 (recognizing that "absent a special relationship, there is no duty to protect others from harm caused by criminal acts of third persons"). Defendant argues that, as a "virtual stranger" to Child, he had no responsibility for Child or her actions, and it was not his responsibility to stop her from shoplifting. Defendant asserts that because he had no duty to Child, any omission or failure to act is legally inadequate to prove CDM.

{19} In response, the State argues that the CDM conviction was based on legally adequate alternatives. It asserts that, given the definition of "allow" as provided in *Black's Law Dictionary*, the jury could have found Defendant guilty by determining that Defendant "committed an act of showing approval for or consenting to[] the shoplifting." The State also disagrees with Defendant's portrayal of himself as a stranger to Child. The State agrees that a stranger should not be charged with CDM if merely in the presence of a minor but argues that Defendant and Child were not strangers.

{20} We are unpersuaded by Defendant's arguments that he had no duty to Child and thus the State's theory of his guilt predicated on the fact that he "allowed Child to shoplift" was legally inadequate. There was sufficient evidence for a jury to conclude that Defendant and Child were acquainted to a degree that they were not strangers or "virtual strangers."

{21} In this case, Child testified that she had driven to Walmart with Defendant and had discussed her shoplifting with him. Defendant "looked out to see if anyone was coming" while she shoplifted. Child testified that she told Defendant that she did not have any money. The asset protection associate at Walmart testified that Defendant and Child appeared to be working together, and she believed that Defendant was assisting Child in picking out merchandise. Child and Defendant left Walmart separately but were ultimately apprehended together by law enforcement. Given the facts of this case, we decline to conclude that the alternative of allowing Child to shoplift fails to come within the statutory definition of the crime or that it is beyond the intended reach of the statute, as argued by Defendant. *See Griffin v. United States*, 502 U.S. 46, 59 (1991) (indicating that "[j]urors are not generally equipped to determine whether . . . the action in question . . . fails to come within the statutory definition of the crime"). Child's testimony provided sufficient evidence to convict Defendant of CDM.

B. Knowledge of Child's Age

{22} Defendant also argues that the State failed to present sufficient evidence that Defendant knew Child was under eighteen. He argues that CDM is not a strict liability offense and asserts that the State should have been required to prove that he knew Child was under eighteen as an essential element of CDM. In an attempt to bolster his position, Defendant points to CDM cases where the charged adult had reason to know the age of the child. *See, e.g.*, *State v. Trevino*, 1993-NMSC-067, ¶ 2, 116 N.M. 528, 865 P.2d 1172 (stating that the child was a fourteen-year-old child employed by the defendant); *State v. Cuevas*, 1980-NMSC-101, ¶ 4, 94 N.M. 792, 617 P.2d 1307 (stating that the defendant, who was a teacher, attended a party with minors from school and demonstrated drinking alcohol), *overruled on other grounds by State v. Pitts*, 1986-NMSC-011, 103 N.M. 778, 714 P.2d 582; *State v. Webb*, 2013-NMCA-027, ¶ 2, 296 P.3d 1247 (stating that the defendant picked up her daughter and daughter's friends from middle school); *State v. Dietrich*, 2009-NMCA-031, ¶¶ 59-60, 145 N.M. 733, 204 P.3d 748 (stating that the child was released twice to the defendant from a youth detention facility); *State v. Stone*, 2008-NMCA-062, ¶ 5, 144 N.M. 78, 183 P.3d 963 (stating that the defendant bought alcohol for his fifteen-year-old daughter and her friends).

{23} The State argues that knowledge of the age of Child need not be proved for a CDM conviction. The State looks to other states that have concluded CDM does require knowledge but that the mental state only applies to the act of contributing to the delinquency not to the child's age. *See, e.g.*, *Gorman v. People*, 19 P.3d 662, 667 (Colo. 2000) (en banc) (holding that "the culpable mental state of 'knowingly' [in Colorado's CDM statute] does not apply to the statute's age element"). The State asserts that the purpose of the statute is to protect children who may be "led astray" and that including knowledge of the child's age as an element of CDM "would require [that] the child, the individual the statute inten[d]s to protect, hold some sort of

responsibility to the adult to provide information as to his or her age." According to the State, that would be an absurd consequence and would undermine the purpose of the statute. Additionally, the State argues that even if this Court determines that the prosecution was required to prove that Defendant knew Child was under the age of eighteen, any potential prejudice was cured by the mistake of fact instruction that was given to the jury.

{24} The specific question of whether New Mexico's CDM statute requires proof that the charged adult knew the child's age is an issue of first impression. This Court has previously held that "where the [prosecution] seeks to convict a defendant of CDM for causing or encouraging a minor to refuse to obey the reasonable and lawful command or direction of the minor's parent . . . the [prosecution] must prove . . . that the defendant knew or by the exercise of reasonable care should have known of such command or direction." *State v. Romero*, 2000-NMCA-029, ¶ 31, 128 N.M. 806, 999 P.2d 1038. *Romero*, however, did not address knowledge of the child's age as an essential element. We also note that the CDM cases cited by Defendant, in which the charged adult had reason to know the age of the child, do not assist this Court because knowledge of the child's age in those cases was not the issue on appeal. *See Fernandez v. Farmers Ins. Co.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 (stating that generally "cases are not authority for propositions not considered" (internal quotation marks and citation omitted)).

{25} Although this Court has not specifically addressed the issue now before us on appeal, we have considered whether proof of criminal intent is generally required as an essential element of CDM. *State v. Gunter*, 1974-NMCA-132, ¶ 4, 87 N.M. 71, 529 P.2d 297. In *Gunter* we stated that "[a] reading of the statute indicates the [L]egislature did not intend that criminal intent be an element of the offense of [CDM]." *Id.* ¶ 5. In support of that conclusion, we noted that "[i]nfants have generally been a favored class for special protection in New Mexico" and held that the Legislature intended to make the commission of CDM a crime without regard to intent. *Id.* ¶¶ 6-7. *Gunter* is instructive. And our Supreme Court "has tacitly approved . . . that the [CDM] statute is constitutional although it imposes criminal sanctions for acts committed without criminal intent." *Pitts*, 1986-NMSC-011, ¶ 11.

{26} It is well established that "the intent of the Legislature in enacting [the CDM statute,] Section 30-6-3 and its predecessors was to extend the broadest possible protection to children, who may be led astray in innumerable ways. In order to realize this legislative purpose, [the appellate courts] have consistently rejected narrow constructions of the statute that would limit its usefulness in protecting children." *Id.* ¶ 10; *see also Cuevas*, 1980-NMSC-101, ¶ 12 ("[T]he purpose of our contributing statute is to protect children from harmful adult conduct."); *State v. McKinley*, 1949-NMSC-010, ¶ 13, 53 N.M. 106, 202 P.2d 964 (holding that the purpose of a predecessor CDM statute was "to protect the youth of our state from those evil and designing persons who would lead them astray, and [the appellate courts] are not disposed to in any way impair its usefulness by giving any narrow or strained construction to any of its plain and obvious provisions" (internal quotation marks and citation omitted)).

{27} Given the purpose of the CDM statute, we decline to narrowly construe the statute or limit its application by imposing a knowledge requirement as requested by Defendant. We conclude that CDM does not require proof that the offending adult know the age of the child to whose delinquency the adult contributed. Because we hold that CDM does not require proof that the offending adult know the at-issue child's age, we need not address Defendant's argument that failure to provide a knowledge-of-age element to the jury instruction constituted error.

III. Evidence of Defendant's Prior Conviction

{28} The appellate courts "review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse." *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72. Unless this Court concludes that the district court's ruling was clearly untenable or not justified by reason, we will not hold that the district court abused its discretion. *See State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829.

{29} Defendant argues that the district court erred in allowing the State to impeach him with his prior robbery conviction. He argues that his prior robbery conviction was not a crime of dishonesty, and even if it was, its probative value was weakened by its remoteness because it occurred almost ten years prior. He also argues that the State sought to include evidence of his prior conviction for improper propensity purposes—i.e., to portray Defendant as a person who steals. He argues that admission of his prior conviction was used as substantive evidence of guilt and that admission of the prior conviction deprived Defendant of a fair trial.

{30} The State responds that the district court properly admitted evidence of Defendant's prior robbery conviction. It argues that when Defendant took the stand in his own defense, subjecting himself to cross-examination, the prosecution appropriately seized the opportunity to question his credibility under Rule 11-609 NMRA. The State agrees that the crimes of robbery and shoplifting/CDM are similar in nature but argues that evidence of Defendant's prior conviction should not be prohibited based solely on the similarity of the crime. The State also argues that the fact Defendant's prior conviction occurred almost ten years prior does not impact its admissibility because Rule 11-609(B) only limits admission if more than ten years has elapsed. Finally, the State argues that the district court properly weighed the probative value of the evidence of Defendant's prior conviction and correctly determined that any prejudice was substantially outweighed.

{31} Rule 11-609(A)(1)(b) allows for impeachment of a witness by evidence of a criminal conviction. Rule 11-609(A)(1)(b) states that when

> attacking a witness's character for truthfulness by evidence of a criminal conviction[] for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one . . . year the evidence must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant[.]

Thus, because Defendant chose to act as a witness and testify on his own behalf, his character for truthfulness could be impeached by evidence of his prior convictions, so long as the evidence's probative value outweighed its prejudicial effect. Rule 11-609(B) further limits the use of a prior criminal conviction, but only applies if "more than ten . . . years have passed since the witness's conviction or release from confinement for it, whichever is later." Because the ten-year limitation did not apply to Defendant's conviction, the

State was not limited by Rule 11-609(B).

{32} We conclude that the district court did not abuse its discretion in holding that evidence of Defendant's prior robbery conviction was admissible as impeachment evidence. Defendant chose to testify in his defense, and his version of the incident conflicts with the version of the State's witnesses. Defendant's credibility was placed at issue, and we cannot say that the probative value for impeachment purposes failed to outweigh its prejudicial effect. Defendant denied involvement in Child's shoplifting scheme and denied knowing Child's age. Child, however, testified that she informed Defendant of her plan and that Defendant acted as her lookout. Thus, Defendant's credibility was a central issue. "Under such circumstances, it became more, not less, compelling to explore all avenues which would shed light on which of the two witnesses was to be believed." *State v. Trejo*, 1991-NMCA-143, ¶ 15, 113 N.M. 342, 825 P.2d 1252 (internal quotation marks and citation omitted).

{33} Although Defendant's robbery conviction and the shoplifting conviction could be considered similar in some respects and "convictions for the same crime should be admitted sparingly[,] . . . evidence of a prior offense is not prohibited for impeachment purposes solely on the basis of its similarity with the presently charged crime." *Id.* ¶ 12 (citation omitted). We reject Defendant's argument that his robbery conviction should not have been admitted under Rule 11-609 because it was a crime of violence, as opposed to a crime of dishonesty. This Court has specifically held that robbery is a crime that involves dishonesty. *See State v. Day*, 1978-NMCA-018, ¶ 38, 91 N.M. 570, 577 P.2d 878 ("[R]obbery may not be a crime involving deceit, that is, false statement. However, it clearly involves theft, which is dishonesty."). As this Court noted in *Trejo*, "[w]hen an accused takes the witness stand he is in the same position as any other witness. He is not entitled to have his testimony falsely cloaked with reliability by having his credibility protected against the truth-searching process of cross-examination." 1991-NMCA-143, ¶ 15 (internal quotation marks and citation omitted).

IV. Prosecutorial Misconduct

{34} Finally, Defendant argues that the prosecutor committed prosecutorial misconduct during closing argument in making improper propensity arguments, mischaracterizing the evidence, and arguing in a manner designed to appeal to sentiment and passion by painting Defendant as a sexual predator of children when no evidence supported that characterization. Specifically, Defendant notes the following statements by the prosecutor: Defendant was a "two-time felon"; the questioning of Defendant's motives for being "with a fifteen-year-old girl and another young lady"; "[d]on't allow him to do this to our children"; and that the jury could "infer the rest" after noting, "Alcohol. Minors. Two females. Condoms. Not a recipe for a good ending." Not having objected at the time of the comments, Defendant argues that the prosecutor's misconduct resulted in fundamental error, and he requests that this Court reverse his convictions which, he asserts, were the result of an unfair trial.

{35} The State argues that the comments made by the prosecutor in his closing argument were "few and far between" and "a far cry from persistent or egregious." It argues that the prosecutor could comment on the credibility of Defendant's testimony during closing. Additionally, the State argues that the prosecution's argument regarding Defendant's intent to continue partying was based on properly admitted evidence and thus did not constitute prosecutorial misconduct.

{36} When, as in this case, no claim of prosecutorial misconduct was raised at trial, this Court reviews for fundamental error. *See State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728. "Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *Id.* (internal quotation marks and citation omitted). "Fundamental error occurs when prosecutorial misconduct in closing statements compromises a defendant's right to a fair trial, and [the appellate courts] will reverse a conviction despite defense counsel's failure to object." *State v. Sosa*, 2009-NMSC-056, ¶ 35, 147 N.M. 351, 223 P.3d 348. To determine whether Defendant was deprived of a fair trial, the appellate courts "review the comment in context with the closing argument as a whole . . . so that we may gain a full understanding of the comments and their potential effect on the jury." *State v. Fry*, 2006-NMSC-001, ¶ 50, 138 N.M. 700, 126 P.3d 516 (internal quotation marks and citation omitted). "[T]he general rule is that an isolated comment made during closing argument is not sufficient to warrant reversal." *Sosa*, 2009-NMSC-056, ¶ 29 (internal quotation marks and citation omitted).

{37} Upon reviewing the record, we conclude that the prosecutor's closing argument, when evaluated as a whole, did not deprive Defendant of a fair trial. We conclude that the prosecutor's statements regarding Defendant's criminal history referenced properly admitted evidence and did not constitute improper propensity evidence. The prosecutor's mention of Defendant's history was not the primary focus of the State's closing argument, and we cannot say that it clearly impacted the jury's verdict. Although we see no misconduct regarding the prosecutor's portrayal of Defendant as a two-time felon, we can see no legitimate reason why the prosecutor would attempt to impute meaning to the fact that Defendant had a condom in his pocket, or why the prosecutor would indicate that alcohol, minors, and condoms were "[n]ot a recipe for a good ending." The prosecutor's clear attempt to portray Defendant as a sexual predator was unnecessary and improper.

{38} Despite our view that the prosecutor acted improperly when making certain comments, we cannot conclude that the isolated comments that occurred over the course of the prosecutor's more than twenty-five-minute closing were "so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial[,]" thus giving rise to fundamental error. *Allen*, 2000-NMSC-002, ¶ 95 (internal quotation marks and citation omitted).

CONCLUSION

{39} For the foregoing reasons, we reverse and remand with instructions to vacate Defendant's shoplifting conviction, and we affirm Defendant's CDM conviction.

{40} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
JAMES J. WECHSLER, Judge

Certiorari Denied, May 31, 2017, No. S-1-SC-36461

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-053

Nos. 33,312 and 33,701 (consolidated) (filed April 10, 2017)

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

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY
ROBERT A. ARAGON, District Judge

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Opinion

Michael E. Vigil, Judge

{1} This is a driving while under the influence of intoxicating liquor (DWI) case that originated in the magistrate court and was then appealed to the district court. The district court ruled that there was no reasonable suspicion to stop the vehicle Defendant was driving, and granted Defendant's motion to suppress. The district court also denied Defendant's motion to dismiss based on a claim that the case was not adjudicated within the time limits of Rule 6-506(B) NMRA, commonly referred to as the "six-month rule." We reverse the district court order granting Defendant's motion to suppress and affirm the district court order denying Defendant's motion to dismiss.

I. BACKGROUND

{2} A criminal complaint filed in the magistrate court charged Defendant with aggravated DWI (third offense), driving under a suspended or revoked driver's license, failure to carry evidence of financial responsibility, and failure to maintain lane. Defendant filed a motion to suppress and a motion to dismiss, alleging the case was not heard within the time required by Rule 6-506(B). The motions were denied, and Defendant entered into a conditional plea and disposition agreement in which Defendant agreed to plead guilty to non-aggravated DWI (second offense), with all remaining charges dismissed on the condition that if he succeeded in his appeal on either motion, he could withdraw his guilty plea. The magistrate judge approved the plea and disposition agreement, and filed its judgment and sentence. *See State v. Celusniak*, 2004-NMCA-070, ¶¶ 7-8, 135 N.M. 728, 93 P.3d 10 (describing the procedure to follow for a conditional guilty plea in the magistrate court). Defendant then appealed to the district court.

{3} The appeal to the district court was de novo. Rule 5-826(J) NMRA ("Trials upon appeals from the magistrate or municipal court to the district court shall be de novo."). This means that in the district court there was "[a] new trial on the entire case—that is, on both questions of fact and issues of law—conducted as if there had been no trial in the first instance." *Black's Law Dictionary* 1737 (10th ed. 2014). In other words, the district court was not bound in any way by the magistrate court rulings, and the district court was required to make its own decision on the motion to suppress and make its own determination of whether the magistrate court complied with Rule 6-506. *See State v. Sharp*, 2012-NMCA-042, ¶ 5, 276 P.3d 969 (stating that in a de novo appeal, the district court must determine itself, independently of the magistrate court decision, "whether the magistrate court rules were followed"); *State v. Hicks*, 1986-NMCA-129, ¶ 6, 105 N.M. 286, 731 P.2d 982 ("In de novo proceedings, the district court is not in any way bound by the proceedings in the lower court."). Defendant again filed a motion to suppress and a motion to dismiss for a violation of Rule 6-506. Following an evidentiary hearing the district court entered its order granting Defendant's motion to suppress. The State appeals from this order. The district court also denied Defendant's motion to dismiss for a violation of Rule 6-506, and Defendant appeals from this order, but only if the State succeeds in its appeal. We address each appeal in turn.

II. Motion to Suppress

{4} Defendant's motion to suppress asserted that Deputy Merlin Benally of the McKinley County Sheriff's Department stopped Defendant without reasonable suspicion, and the stop therefore violated the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. *See State v. Candelaria*, 2011-NMCA-001, ¶ 10, 149 N.M. 125, 245 P.3d 69 ("In order to validly stop an automobile, police officers must possess, at a minimum, reasonable suspicion that a law has been violated."). Defendant also contended that the stop by Deputy Benally was a pretext stop and therefore unconstitutional under Article II, Section 10 of the New Mexico Constitution. *See State v. Ochoa*, 2009-NMCA-002, ¶¶ 1, 38, 146 N.M. 32, 206 P.3d 143 (holding that "pretextual traffic stops are not constitutionally reasonable" under the New Mexico Constitution).

A. Facts

{5} Deputy Benally was parked on the median of the highway to observe traffic and to make himself visible to slow down traffic to a safe speed. While so engaged, Deputy Benally saw Defendant driving, and because of prior encounters with Defendant, believed that Defendant's driver's license was suspended.

{6} Approximately three to four months earlier, Deputy Benally had conducted a traffic stop in which Defendant was the designated driver for the passengers who were intoxicated. Deputy Benally was informed by dispatch that Defendant's driver's license was suspended with an arrest clause, but because of the intoxicated conditions of the passengers,

Deputy Benally gave Defendant a warning and told him to fix his driver's license problem. Later, around the same time period, Deputy Benally stopped a different vehicle in which Defendant was a passenger. Deputy Benally ran Defendant's information through dispatch and learned that Defendant's driver's license was still suspended. In addition, and more recently, three to four weeks before the stop at issue, Deputy Benally was on duty and heard dispatch report that Defendant's driver's license was suspended when another deputy had arrested Defendant for DWI and driving with a suspended or revoked driver's license.

{7} Deputy Benally therefore turned his vehicle around and began to follow Defendant with the intent to stop Defendant based solely on his belief that Defendant had a suspended driver's license. *See* NMSA 1978, § 66-5-39(A) (1993, amended 2013) ("Any person who drives a motor vehicle on any public highway of this state at a time when [the person's] privilege to do so is suspended or revoked and who knows or should have known that his license was suspended or revoked is guilty of a misdemeanor[.]"). Because the road had "no shoulder" where he could safely stop Defendant, Deputy Benally waited until they reached a safe place to make the stop. As Deputy Benally followed Defendant, he believed that he saw Defendant drive over one of his lanes—a solid white line—and at a stop sign, also believed that he saw that the passenger in Defendant's vehicle did not have her seatbelt on. After Defendant turned onto a street where the stop could be safely made, Deputy Benally turned on his lights and stopped Defendant.

{8} After the stop, Deputy Benally confirmed that Defendant's driver's license was suspended. Deputy Benally also noted that Defendant had bloodshot, watery eyes, slurred speech, and an odor of alcohol on his person, and Defendant acknowledged that he had been drinking. Deputy Benally then conducted field sobriety tests, which Defendant failed. Defendant was then arrested, and Deputy Benally filed the criminal complaint in the magistrate court.

{9} The district court found that Deputy Benally saw Defendant driving, and based on the prior encounters with Defendant, believed that his driver's license was revoked. The district court further found that Deputy Benally decided to stop Defendant based only on his suspicion, and without calling on his radio to confirm that Defendant's driver's license was in fact revoked. The district court concluded that Deputy Benally's suspicion was insufficient to support a finding of reasonable suspicion for the stop. The district court further concluded that the seat belt and failure to maintain lane violations were pretext for the stop because Deputy Benally had already decided to stop Defendant before he observed those violations. The State appeals.

B. Standard of Review

{10} Our review of a district court's ruling on a motion to suppress involves mixed questions of fact and law. *State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964. "[W]e look for substantial evidence to support the [district] court's factual finding, with deference to the district court's review of the testimony and other evidence presented." *State v. Yazzie*, 2016-NMSC-026, ¶ 15, 376 P.3d 858 (internal quotation marks and citation omitted). "We then review the application of the law to those facts, making a de novo determination of the constitutional reasonableness of the search or seizure." *Id.* (internal quotation marks and citation omitted); *see State v. Hicks*, 2013-NMCA-056, ¶ 5, 300 P.3d 1183 (stating that whether an officer has a reasonable suspicion to stop the defendant's vehicle presents a legal question, which is reviewed on appeal de novo).

C. Analysis

{11} We have not heretofore analyzed reasonable suspicion any differently under Article II, Section 10 of the New Mexico Constitution than under the Fourth Amendment to the United States Constitution. *Yazzie*, 2016-NMSC-026, ¶ 38. Moreover, Defendant does not argue on appeal that in evaluating the constitutional reasonableness of the stop, our New Mexico Constitution affords greater protection than the United States Constitution. We therefore assume that both constitutions afford the same level of protection. *Id.* ¶ 39 (applying the same reasonable suspicion analysis to the stop under Article II, Section 10 of the New Mexico Constitution as was applied under the Fourth Amendment); *see State v. Hubble*, 2009-NMSC-014, ¶ 6, 146 N.M. 70, 206 P.3d 579 (stating that because there was no claim that the New Mexico Constitution affords greater protection than the United States Constitution, the issue of reasonable suspicion would be evaluated under federal Fourth Amendment law); *State v. Funderburg*, 2008-NMSC-026, ¶ 12, 144 N.M. 37, 183 P.3d 922 (stating that when no claim is made that the New Mexico Constitution affords greater protection than the United States Constitution, "we assume without deciding" that the protection under both constitutions is identical (internal quotation marks and citation omitted)).

{12} "Both the United States Constitution and the New Mexico Constitution protect a citizen against unreasonable searches and seizures." *Funderburg*, 2008-NMSC-026, ¶ 12. An officer has committed a "seizure" when he stops an automobile and detains the occupants for an investigatory detention. *Id.* ¶ 13. An officer "must have a reasonable suspicion of illegal activity" before the officer makes a traffic stop to investigate that illegal activity. *Hubble*, 2009-NMSC-014, ¶ 7 (internal quotation marks and citation omitted). "A reasonable suspicion is a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law." *State v. Jason L.*, 2000-NMSC-018, ¶ 20, 129 N.M. 119, 2 P.3d 856. A reasonable suspicion arises "if the officer is aware of specific articulable facts, together with rational inferences from those facts, that, when judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." *Hubble*, 2009-NMSC-014, ¶ 8 (internal quotation marks and citation omitted).

{13} The question presented is one of first impression in New Mexico: whether it was reasonable for Deputy Benally to have a suspicion that Defendant was driving with a revoked or suspended driver's license based upon his two prior encounters with Defendant, and having heard on the police radio three or four weeks earlier that Defendant was arrested for driving with a suspended or revoked driver's license and DWI. We conclude that Deputy Benally's stop of Defendant was supported by a constitutionally sufficient reasonable suspicion.

{14} Other jurisdictions have considered whether reasonable suspicion supports a traffic stop when it is based on an officer's knowledge that the driver's license of the driver was suspended or revoked and have concluded that such knowledge supports a finding of constitutionally adequate reasonable suspicion to make a stop for that offense. *See United States v. Sandridge*, 385 F.3d 1032, 1034-36 (6th Cir. 2004) (holding that the officer had reasonable suspicion to stop the defendant for an invalid driver's license when the officer learned, approximately over three weeks

before, that the defendant did not have a valid driver's license and nothing in the record suggested that the officer should have assumed the on-going violation had ceased); *State v. Leyva*, 599 So. 2d 691, 693 (Fla. Dist. Ct. App. 1992) (holding that the officer had, at a minimum, reasonable suspicion that the defendant was driving with a suspended license when the officer had "four-to-five-week-old" information that the defendant's driver's license was suspended); *State v. Harris*, 513 S.E.2d 1, 3 (Ga. Ct. App. 1999) (holding that the officer had reasonable suspicion to stop the defendant when the arresting officer was informed from other officers that, in "the last few weeks" prior to the stop, the defendant's driver's license was suspended (internal quotation marks omitted)); *State v. Duesterhoeft*, 311 N.W.2d 866, 866-68 (Minn. 1981) (holding that when the officer had learned a month earlier that the defendant owned the vehicle and had a suspended driver's license, the officer had reasonable suspicion to stop the defendant); *State v. Decoteau*, 2004 ND 139, ¶ 13, 681 N.W.2d 803 ("When an officer observes a person driving a vehicle, and the driver's license was suspended when the officer stopped him one week earlier, it is far from a 'mere hunch' to suspect the driver's license is still under suspension.").

{15} New Mexico precedent favors following the reasoning of the foregoing cases. In *Candelaria*, 2011-NMCA-001, ¶¶ 1, 9, 16, 19, we concluded that reasonable suspicion for a stop was satisfied under the United States Constitution when police officers ran the license plate of a vehicle and learned that the driver's license of the registered owner of the vehicle was suspended. We then followed *Candelaria* in holding that the New Mexico Constitution was not violated where a stop was based on information obtained from the Motor Vehicle Department (MVD) that the owner's driver's license was revoked. *Hicks*, 2013-NMCA-056, ¶¶ 1, 2, 4. More recently, our Supreme Court held in *Yazzie* that an officer had a reasonable suspicion to conduct a traffic stop for operating an uninsured vehicle in violation of the law when he relied on records of the MVD reporting that it was unknown if the vehicle he stopped was insured as required by the Mandatory Financial Responsibility Act. 2016-NMSC-026, ¶¶ 6, 30, 36.

{16} One of the cases we cited in support of our conclusion in *Candelaria* was *State v. Halvorson*, 2000 MT 56, ¶ 15-16, 299 Mont. 1, 997 P.2d 751. *Candelaria*, 2011-NMCA-001, ¶ 13. In *Halvorson*, a city police officer arrested a female driver for DWI who was driving a vehicle with a personalized license plate, and because the driver refused to take a breathalizer test, her driver's license was revoked for six months. *Halvorson*, 2000 MT 56, ¶ 3. The city police officer was married to a county deputy sheriff, who followed the arrest on his radio, and later discussed the circumstances of the arrest and license suspension with his wife, the city police officer. *Id*. ¶ 4. Four months later, the county deputy sheriff saw a vehicle with the same personalized license plate being driven by a woman, and recognizing the license plate and remembering the earlier arrest, he made a traffic stop of the vehicle which it turned out, was being driven by the same woman who was arrested earlier for DWI. *Id*. ¶ 5. The *Halvorson* court concluded that the stop was supported by reasonable suspicion. *Id*. ¶ 16.

{17} Having been guided by the foregoing authorities, and having considered the basis for Deputy Benally's suspicion that Defendant was driving under a suspended or revoked driver's license, we conclude that Deputy Benally's suspicion was constitutionally reasonable. Three or four months earlier, Deputy Benally stopped Defendant and learned that his driver's license was suspended with an arrest clause. Deputy Benally let Defendant go with a warning to fix his licensing issue. Shortly thereafter, in another personal encounter with Defendant, Deputy Benally learned that Defendant's driver license was still suspended. Within three to four weeks prior to the stop, Deputy Benally learned that Defendant was arrested for driving with a suspended or revoked license and DWI. There was no reason for Deputy Benally to believe that Defendant had fixed his license problem, and Defendant does not contend that the information forming the basis for his belief that Defendant was driving under a suspended or revoked driver's license was stale or otherwise unreliable. Moreover, we fail to see why Deputy Benally was required to call his dispatch to confirm his suspicion that Defendant's license was still suspended under the circumstances. "[R]easonable suspicion is a commonsense, nontechnical conception, which requires that officers articulate a reason, beyond a mere hunch, for their belief that an individual has committed a criminal act." *Funderburg*, 2008-NMSC-026, ¶ 15 (alteration, internal quotation marks, and citation omitted). Deputy Benally's reason for stopping Defendant satisfies this standard.

{18} We hold that Deputy Benally's stop was supported by a constitutionally adequate reasonable suspicion that Defendant was driving under a suspended or revoked driver's license. Accordingly, it is not necessary for us to address whether the seatbelt and failure to maintain lane violations were pretext for the stop. We reverse the district court on the motion to suppress and proceed to the second point raised on appeal.

II. Motion to Dismiss

{19} Commonly referred to as the "six-month rule," Rule 6-506(B) requires a trial in the magistrate court to commence within one hundred eighty-two days from seven separate triggering events, whichever occurs latest. Considering Defendant's arraignment on November 5, 2012 as the applicable triggering event, trial was required to commence one hundred eighty-two days later—on May 6, 2012. Rule 6-506(B)(1) (stating in pertinent part that trial shall commence within one hundred eighty-two days after the date of the arraignment). Trial was scheduled three days later, on May 9, 2012. Defendant's motion to dismiss asserted that because trial was not held by May 6, 2012, and an extension to commence trial was not properly granted by the magistrate judge, the case should have been dismissed with prejudice under Rule 6-506(E)(2). "In the event the trial of any person does not commence within the time limits provided in this rule, including any court-ordered extensions, the case shall be dismissed with prejudice." *Id*. Following a hearing, the district court denied Defendant's motion to dismiss.

A. Facts

{20} A period of delay resulted from multiple judges being assigned to preside over the case. The case was first assigned to Judge Henrietta S. Soland, who arraigned Defendant on November 5, 2012. Judge Soland set a pretrial conference for November 20, 2012, which was then rescheduled to December 5, 2012. Judge Soland retired at the end of December 2012 when her term expired, and on January 10, 2013, Judge Timothy F. Hodo was assigned to preside over the case. Judge Hodo promptly set a hearing on Defendant's motion to suppress and set trial for January 30, 2013. However, Defendant excused Judge Hodo from the case on January 24, 2013, and on February 13, 2013, Judge Stanley R. King was assigned. He presided over the case until its conclusion.

{21} On February 13, 2013, Judge King set the case for a hearing on Defendant's motion to dismiss and set trial to commence on March 5, 2013. However, Defendant did not appear for the March 5, 2013 hearing and trial. The stated reason for Defendant's non-appearance was that Defendant had rushed to Albuquerque, New Mexico to be with his niece, who had been placed on life support. No bench warrant for failure to appear was issued, apparently because Defendant had reported in advance to counsel and the court that he was going to be absent and why. Judge King reset the case for trial to commence on May 3, 2013, but Judge King "cancelled" this setting, and the trial was again reset for May 9, 2013. On May 7, 2013, Defendant filed a motion to dismiss in the magistrate court, alleging a violation of Rule 6-506(B), and on May 8, 2013, the State responded by filing a motion for an extension of time to commence the trial under Rule 6-506(C). The next day, on May 9, 2013, the day set for trial, Judge King ordered that the State be granted a thirty-day extension of time to commence the trial. In addition, because Defendant failed to appear for the trial, Judge King issued a bench warrant for Defendant's arrest. Defendant surrendered on May 16, 2013, and Judge King approved the conditional plea agreement that same day.

B. Standard of Review

{22} We are called upon here to interpret a rule adopted by our Supreme Court and how it was applied by the district court. These are questions of law that are reviewed de novo on appeal. *State v. Dorais*, 2016-NMCA-049, ¶ 18, 370 P.3d 771 ("On appeal, we review the district court's analysis of the six[-]month rule de novo."); *see Sharp*, 2012-NMCA-042, ¶¶ 4-6 (addressing the construction of the magistrate court six-month rule and sanctions for its violation); *State v. Granado*, 2007-NMCA-058, ¶ 11, 141 N.M. 575, 158 P.3d 1018 (addressing the construction of the metropolitan court six-month rule); *State v. Dominguez*, 2007-NMCA-132, ¶¶ 7-8, 142 N.M. 631, 168 P.3d 761 (addressing the construction of the now repealed six-month rule for the district court).

C. Analysis

1. A Final, Appealable Order Is Before Us

{23} The denial of a motion to dismiss ordinarily contemplates future proceedings in a case. Because we only decide appeals from final orders, we first address whether Defendant's appeal is properly before us. Defendant entered into a conditional guilty plea in the magistrate court. The condition was that if he succeeded on the motion to suppress or the motion to dismiss on appeal, he was entitled to withdraw his guilty plea. If Defendant is not successful in the appeal on both issues, nothing remains but to remand the case to the magistrate court for execution of the sentence.

{24} In the de novo appeal to the district court, Defendant prevailed on his motion to suppress, but not the motion to dismiss. The State has now succeeded in its appeal in this Court from the district court order granting Defendant's motion to suppress. Defendant may therefore properly appeal from the order denying his motion to dismiss. Rule 12-201(C) NMRA ("An appellee may . . . raise issues for determination only if the appellate court should reverse, in whole or in part, the judgment or order appealed from."). Moreover, the district court order is a final, appealable order, because if this Court decides against Defendant on this issue, there is nothing left to do except remand the case for enforcement of the judgment and sentence imposed by the magistrate court. *See Celusniak*, 2004-NMCA-070, ¶ 14 (recognizing that in a de novo appeal to the district court after the defendant enters a conditional guilty plea in the magistrate court following the denial of a motion to suppress, and the district court finds against the defendant, the district court order is a final appealable order because "there are no issues remaining in the defendant's adjudication").

2. There Was No Error in Denying Defendant's Motion to Dismiss

{25} Having determined that Defendant's appeal is properly before us, we now turn to the merits. The State's motion for an extension of time was filed on May 8, 2013, two days after the May 6, 2013 deadline. Rule 6-506(D) provides that a motion to extend the time to commence trial may be filed within the applicable time limit, "or upon exceptional circumstances shown within ten (10) days after the expiration of the time period." The parties' briefs dispute whether "exceptional circumstances" were shown that justified the late filing of the State's motion. Defendant argues that the State failed to demonstrate "exceptional circumstances" to allow for its late filing and that it was therefore error for Judge King to even consider the State's motion. The State responds that because Judge King had already orally ruled on May 3, 2013, before the six-month limit expired, and that the trial would be vacated and reset, Judge King properly considered its motion.

{26} In addition, before an extension of the six-month time to commence trial can be granted, Rule 6-506(C)(5) requires a determination by the magistrate court "that exceptional circumstances exist that were beyond the control of the state or the court that prevented the case from being heard" within the six-month period. Related to this issue, because the magistrate court proceedings were not on the record, and Judge King did not testify in the hearing before the district court, the parties also dispute whether the district court could rely on the prosecutor's representations about what Judge King determined were the "exceptional circumstances" to "cancel" the May 3, 2013 trial setting.

{27} We decline to address these competing arguments because Rule 6-506 itself answers whether the district court was correct in denying Defendant's motion to dismiss. The latest triggering event here is under Rule 6-506(B)(5), which provides that "if the defendant is arrested for failure to appear or surrenders in this state for failure to appear," trial must commence within one hundred eighty-two days after "the date of arrest or surrender of the defendant."

{28} Defendant failed to appear for trial on March 5, 2013, but apparently because he was attending to his niece who was placed on life support and notified the court and counsel, Judge King did not issue an arrest warrant, nor was a warrant required. Rule 6-207(A) NMRA (providing that if any person has been ordered by the magistrate judge to appear at a certain time and place, and fails to do so, "the court may issue a warrant for the person's arrest"); *see Granado*, 2007-NMCA-058, ¶ 23 (construing identical language in the metropolitan court rule counterpart to mean that a judge may, but is not required to, issue a bench warrant for a person who fails to appear as required, and that the judge has discretion whether to issue a bench warrant). Because no bench warrant was issued, Rule 6-506(B)(5) does not apply. *See Granado*, 2007-NMCA-058, ¶¶ 25-26 (concluding that although the metropolitan court judge stated that a bench warrant was going to be issued when the defendant failed to appear at trial, and because no bench warrant was actually issued, the automatic extension provided by the metropolitan court's counterpart rule did not apply).

{29} However, Judge King did issue a bench warrant when Defendant failed

to appear for trial on May 9, 2013, and Defendant surrendered on May 16, 2013. Under the circumstances, we conclude that our holding in *Dorais* applies, and is dispositive. In *Dorais*, the six-month rule did not expire until December 28, 2006, and trial was set for November 9, 2006. 2016-NMCA-049, ¶ 15. Because the defendant arrived late for the trial on November 9, 2006, the magistrate judge had him arrested for failure to appear. *Id.* Trial was ultimately held on August 13, 2007, and the defendant was convicted. *Id*. ¶ 16. As in this case, the defendant in *Dorais* argued to the magistrate court and in his de novo appeal to the district court that Rule 6-506 was violated. *Dorais*, 2016-NMCA-049, ¶¶ 16-17. We held: "[T]he mere fact of [the d]efendant's absence at the appointed place and time permitted the magistrate court to issue the bench warrant and order [the d]efendant arrested. Because the triggering event specified in the six[-]month rule—arrest for failure to appear—is also unqualified in any way, once [the d]efendant was arrested, the six-month clock began anew." *Id*. ¶ 18. When a bench warrant is issued, Rule 6-506(B)(5) is self-executing, and under its terms, an additional six-month period to commence trial begins upon arrest or surrender. Therefore, the State was not required to file a motion for extension of time to commence the trial. Moreover, the fact that the arrest warrant here was issued after the initial six-month period elapsed is of no consequence, because the rule does not contain such a qualification. Under the terms of the rule, if a defendant fails to appear, causing a bench warrant to be issued for his arrest, that defendant forfeits the right to be brought to trial within the initial six-month period. Following *Dorais*, we hold that an additional six-month period to bring Defendant to trial commenced on May 16, 2013, when Defendant surrendered on the warrant. There was no violation of Rule 6-506.

III. CONCLUSION

{30} The order of the district court granting Defendant's motion to suppress is reversed, the order of the district court denying Defendant's motion to dismiss is affirmed, and this case is remanded to the district court for further proceedings consistent with this opinion.

{31} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
JAMES J. WECHSLER, Judge

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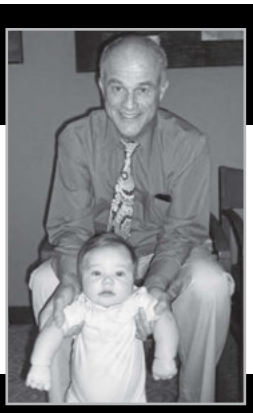

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