

BAR BULLETIN

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Attica, Greece—View to Aegean, by Dean G. Loumbas (see page 3)

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Meetings

November

30

Trial Practice Section Board

Noon, Kelley & Boone, Albuquerque

December

5

Bankruptcy Law Section Board

Noon, Macaroni Grill at Winrock, Albuquerque

5

Health Law Section Board

9 a.m., teleconference

6

Employment and Labor Law Section Board

Noon, State Bar Center

8

Prosecutors Section Board

Noon, State Bar Center

12

Appellate Practice Section Board

Noon, teleconference

Workshops and Legal Clinics

December

1

Civil Legal Clinic

10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

6

Civil Legal Clinic

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

6

Divorce Options Workshop

6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

6

Consumer Debt/Bankruptcy Workshop

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

8

Civil Legal Clinic

10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

About Cover Image and Artist: Dean Loumbas is a speech-language pathologist residing and working in San Francisco. His paintings have been accepted and shown in regional, national and international juried exhibitions as well as in juried museum shows. Loumbas' paintings have been published as cover art for the *Journal of Pediatric and Adolescent Medicine*, the *Journal of Academic Medicine* and the *Journal of Speech-Language Pathology*. His current work redefines the solid form by presenting geometric shapes in close relationships which create horizons and abstract 'landscapes' that take the viewer on multiple journeys through numerous visual and spatial transformations. For more information and additional work, email dlou33@cs.com.

Notices

COURT NEWS

Supreme Court Law Library Hours and Information

The Supreme Court Law Library is open to any individual in the legal community or public at large seeking legal information or knowledge. The Library's staff of professional librarians is available to assist visitors. The Library provides free access to Westlaw, Lexis, NM OneSource and HeinOnline on public computers. Search the online catalog at <https://n10045.eos-intl.net/N10045/OPAC/Index.aspx>. Visit the Library at the Supreme Court Building, 237 Don Gaspar, Santa Fe NM 87501. Learn more at lawlibrary.nmcourts.gov or by calling 505-827-4850.

Hours of Operation

Monday–Friday 8 a.m.–5 p.m.

Reference and Circulation

Monday–Friday 8 a.m.–4:45 p.m.

Second Judicial District Court Destruction of Exhibits

Pursuant to 1.21.2.617 FRRDS (Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy exhibits filed with the Court, the criminal cases for the years of 1979 to the end of 2001 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 Jan. 29, 2018. Those who have 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 defendant(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.

Bernalillo County Metropolitan Court Closure Notice

The Metropolitan Court will be closed from 11 a.m.–1:30 p.m. on Dec. 13 for the Court's annual holiday lunch.

STATE BAR NEWS

Attorney Support Groups

- Dec. 4, 5:30 p.m.
First United Methodist Church, 4th and

Professionalism Tip

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

I will make all reasonable efforts to decide cases promptly.

Lead SW, Albuquerque (Group meets the first Monday of the month.)

- Dec. 11, 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 at 505-242-6845.

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: Dec. 6, during the Real Property Institute. At the meetings, members will be updated about recent rule changes and brainstorm activities for 2018. Meals will be provided during the meetings. R.S.V.P. to Breanna Henley at bhenley@nmbar.org. If you cannot attend the meeting but would like to provide suggestions of what you would like to see from the divisions this year, or have questions generally, contact Real Property Division Chair Charles Price at cprice@cpricelaw.com or Trust and Estate Division Chair Greg MacKenzie at greg@hurleyfirm.com.

UNM SCHOOL OF LAW

Law Library Hours Through Dec. 16

Building and 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

Nov. 24–25 (Thanksgiving)

Women's Law Caucus

Justice Mary Walters

2018 Honoree Nomination

Each year, the Women's Law Caucus at the University of New Mexico School of Law chooses an outstanding woman in the New Mexico legal community to honor in the name of former Justice Mary Walters, who was the first woman appointed to the New Mexico Supreme Court. The Women's Law Caucus is currently soliciting nominations for the 2018 recipient of the Award. To nominate an inspiring woman, submit the following information to Erin Phillips at phillier@law.unm.edu by Dec. 1. Include: nominee name and firm/organization/title; a description of why that person should receive the award; if that nominee is chosen, would you be willing to introduce them; and the nominator's name and email/phone so we can contact you for more information.

OTHER BARS

Albuquerque Lawyers Club December Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its December lunch meeting with featured speaker Judge James Parker. He will present "A History of the U.S. District Court for the District of New Mexico." The lunch meeting will be held at noon, Dec. 6, at Seasons Restaurant, located at 2031 Mountain Road, NW, Albuquerque. The luncheon is free to members. Non-members pay \$30 for advance registration or \$35 a the door. For more information, contact ydennig@Sandia.gov or 505-844-3558.

New Mexico Criminal Defense Lawyers Association

Two Chances to Fulfill Ethics Requirements

The New Mexico Criminal Defense Lawyers Association will be hosting two end-of-year CLEs to help members fulfill their ethics/professionalism requirements. "Suppress It! 4th Amendment, Eyewitness ID & Ethics" (4.0 G, 2.0 EP) will be held Dec. 8 in Albuquerque. "Cross Examina-

Board of Bar Commissioners 2017 Election: Electronic Voting Procedures

Nov. 30: Last Chance to Vote!

Voting in the 2017 election for the State Bar of New Mexico Board of Bar Commissioners began Nov. 9 and will close at noon on Nov. 30. There are two open positions in the **First Bar Commissioner District** (Bernalillo County). Three candidates submitted nomination petitions for the two positions, so there is a contested election in that district. There are two open positions in the **Sixth Bar Commissioner District** (Chaves, Eddy, Lea, Lincoln and Otero counties). Three candidates submitted nomination petitions for the two positions, so there is a contested election in that district. There were two open positions in the **Third Bar Commissioner District** (Los Alamos, Rio Arriba, Sandoval and Santa Fe counties). One nomination petition was received from Elizabeth J. Travis, so she is elected by acclamation. The Board will appoint a member from that district to fill the other position at the February meeting. View photos and bios of individuals running contested elections in the Nov. 8 *Bar Bulletin* (Vol. 56, No. 45).

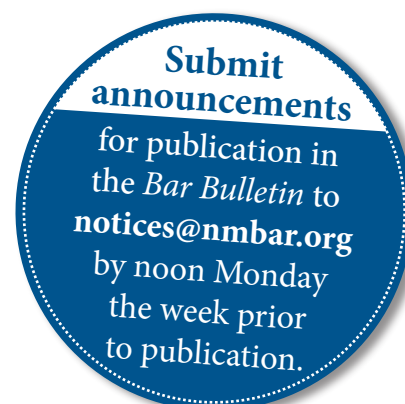
A link to the electronic ballot and instructions was emailed to all members in the First and Sixth Bar Commissioner Districts using email addresses on file with the State Bar. To provide an email address if one is not currently on file or to request a mailed ballot, contact Pam Zimmer at pzimmer@nmbar.org.



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www.nmbar.org/JLAP



tion, Ethics & Professionalism” (4.0 G, 2.0 EP) will be held Dec. 15 in Las Cruces. Civil attorneys are welcome to attend the ethics sessions for either CLE! Come learn about implicit gender bias and how we can correct it, as well as an hour on defender wellness and how we can take better care of ourselves as professionals. Visit www.nmccla.org to register and renew membership dues for 2018 today.

New Mexico Hispanic Bar Association Annual Holiday Fundraiser!

This year’s New Mexico Hispanic Bar Association fundraiser will be held 6 p.m., Dec. 1, at the Downtown Hyatt in Albuquerque. The event once again will offer a festive holiday celebration, including a silent auction and the traditional reverse raffle, with the last three

tickets called winning \$1,000, \$2,000, and \$3,000, respectively. Each ticket is \$100 and admits two. Proceeds from the fundraiser go to community, scholarship and educational initiatives, including but not limited to book and bar scholarships for UNMSOL law students, high school outreach initiatives statewide and sponsorship of the UNM/NMHBA law camp for middle school students. Our work is aimed at promoting higher education in the Hispanic community and contributing to an overall higher quality legal profession. For more information, visit www.facebook.com/pg/NewMexicoHispanicBar/events. To purchase tickets, email a request for tickets to nmhispanicbar@gmail.com, or purchase tickets directly at NMHBA’s paypal page, <https://www.paypal.me/nmhispanicbar/100>.

OTHER NEWS State of New Mexico Workers’ Compensation Administration Notice of Destruction of Records

In accordance with NMAC 11.4.4.9 (Q)-Forms, Filing and Hearing Procedures: Return of Records—the New Mexico Workers’ Compensation Administration will be destroying all exhibits and depositions filed in causes closed in 2011, excluding causes on appeal. The exhibits and depositions are stored at 2410 Centre Ave SE, Albuquerque, NM, 87106 and can be picked up until Nov. 30. For further information, contact the Workers’ Compensation Administration at 505-841-6028 or 1-800-255-7965 and ask for Heather Jordan, clerk of the court. Exhibits and depositions not claimed by the specified date will be destroyed.

Legal Education

November 2017

- | | | |
|--|--|---|
| <p>29 New Mexico Liquor Law for 2017 and Beyond
3.5 G
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 Health Law Symposium (2017)
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 The Basics of Family Law
5.2 G, 1.0 EP (plus an optional 1.0 EP)
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>29 2017 ECL Solo and Small Business Bootcamp Parts I and II
3.4 G 2.7 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 Human Trafficking (2016)
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 Identifying Barriers Implementing Solutions Intersection of Domestic Violence and Immigration
10.2 G
Live Seminar, Albuquerque
University of New Mexico
JEC and IPL
jec.unm.edu</p> |

December 2017

- | | | |
|---|---|--|
| <p>1 Specialized Areas of Law for Lawyers and Paralegals—Annual Paralegal Division CLE
5.0 G, 1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>4 Ethicspalooza: Ethical Issues of Using Social Media and Technology in the Practice of Law (2016)
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>5 “HEMS”—Defining Distribution Standards in Trusts
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>1 Tax and Non-Tax Consequences of Using Trusts for Planning with IRAs and 401(k)s
1.0 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>4 What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics—2016 Edition
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>6 2017 Real Property Institute
6.0 G, 1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>1 Office Leases: Drafting Tips and Negotiating Traps
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>4 28th Annual Appellate Practice Institute (2017)
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>6 Annual Winter Meeting and Seminar
11.0 G, 2.0 EP
Live Seminar, Albuquerque
New Mexico Municipal League
www.nmml.org</p> |
| <p>1 Navajo Law Seminar
6.0 G, 2.0 EP
Live Seminar, Albuquerque
Sutin Thayer and Browne
www.sutinfirm.com</p> | <p>4 Indemnity and Insurance in Real Estate
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>7 Tech Toch, Tech Tock: Social Media and the Countdown to Your Ethical Demise (2016)
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>4 Legal Malpractice Potpourri
1.5 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>5 Trials of the Century III
4.0 G, 2.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>7 Rise of the Machines, Death of Expertise: Skeptical Views of Scientific Evidence
3.5 G, 2.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |

December 2017

- | | | |
|---|--|--|
| <p>7 Law and Policy for Neighborhoods
10.0 G, 1.0 EP
Live Seminar, Santa Fe
Santa Fe Neighborhood Law Center
www.sfnlc.com</p> | <p>11 2017 Ethicspalooza: Civility and Professionalism
1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>14 Trial Know-How! (The Rush to Judgment) 2017 Trial Practice Section Annual Institute
4.0 G, 2.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>8 Current Immigration Issues for the Criminal Defense Attorney (2017 Immigration Law Institute)
5.0 G, 2.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>11 2017 Ethicspalooza: Ethically Managing your Practice
1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>14 Legal Ethics of Trusts
1.0 EP
Live Seminar, Albuquerque
New Mexico Bank and Trust
www.nmb-t.com</p> |
| <p>8 Complying with the Disciplinary Board Rule 17-204
1.0 EP
Live Seminar, Las Cruces
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>11 2017 Ethicspalooza: The Disciplinary System
2.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>14 WCA Winter Seminar
4.0 G, 2.0 EP
Live Seminar, Albuquerque
Workers Compensation
Administration of New Mexico
www.wcaofnm.com</p> |
| <p>8 Suppress It! 4th Amendment, Eyewitness ID and Ethics
4.0 G, 2.0 EP
Live Seminar, Albuquerque
New Mexico Criminal Defense
Lawyers Association
www.nmcdla.org</p> | <p>12 What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics—2016 Edition
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>15 Emerging Problems and Solutions in Environmental Enforcement (2017 Natural Resources, Energy and Environmental Law Institute)
5.5 G, 1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>8 Civil Rights
5.4 G
Live Seminar, Albuquerque
New Mexico Defense Lawyers
Association
www.nmdla.org</p> | <p>12 2017 Family Law Institute Day 1
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>15 Cross Examination, Ethics and Professionalism
4.0 G, 2.0 EP
Live Seminar, Las Cruces
New Mexico Criminal Defense
Lawyers Association
www.nmcdla.org</p> |
| <p>8 Wage Theft in New Mexico
3.0 G, 1.0 WP
Live Seminar, Roswell
New Mexico Hispanic Bar
Association
www.nmhba.net</p> | <p>12 Legal Ethics for In-House Counsel
1.0 EP
Live Seminar, Los Alamos
Los Alamos National Laboratory
www.lanl.gov/source/orgs/lc/</p> | <p>18 Tech Toch, Tech Tock: Social Media and the Countdown to Your Ethical Demise (2016)
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>11 Complying with the Disciplinary Board Rule 17-204
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>13 2017 Probate Institute
6.3 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 2017 Health Law Symposium
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>11 2017 Ethicspalooza: Conflicts of Interest
1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>13 2017 Family Law Institute Day 2
5.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | |

**State Bar Indian Law Section Announces
2017 Attorney Achievement Award Recipient:**

Rosalie "Lisa" Chavez

Rosalie "Lisa" Chavez is member of San Felipe Pueblo and 1987 graduate of the University of New Mexico School of Law. She has dedicated her career to providing legal services for low-income and disenfranchised Native Americans. Chavez' advocacy and leadership have impacted the lives of the Native people she's represented, the communities she's worked in and those that she's worked with as an attorney, mentor and as a friend. On Nov. 3, Chavez retired from New Mexico Legal Aid, but her inspiration will continue on. She received a number of nominations for the award, each one outlining her extraordinary qualities and contributions. Here are just a few of the amazing things her colleagues had to say about her in their nominations:



"This nomination is less about any particular achievement and more about a lifetime of achievement."

"Lisa has changed a lot of lives."

"Lisa has demonstrated extraordinary achievements in Indian law by advancing tribal law and assisting hundreds of Indian individuals gain access to basic rights under tribal, federal and state law."

"Lisa's contributions to the community are countless."

"She is an inspiration to all Native people. . ."

"Lisa's extraordinary body of work on behalf of New Mexico's Pueblo and Tribal communities over the past 30 years has had a lasting and positive impact on many tribal members and their families."

"Lisa has at all times gone above and beyond what duty might have required and has given selflessly to NMLA and the Native American communities."

"Lisa has championed the jurisdiction of Pueblo Communities."

"Lisa's extraordinary legal and cultural knowledge has provided valuable services beyond New Mexico and the pueblos and tribes."

"Her influence can be found in attorneys throughout all of New Mexico and the country."

"Her friendship and social skills have enriched so many of us. . ."

The Indian Law Section will host the Attorney Achievement Award Reception in honor of Lisa from 6–10 p.m., Dec. 7, at the Santa Ana Star Center, VIP Room, 3001 Civic Center Circle NE in Rio Rancho. R.S.V.P. to Delilah Tenorio at dmt@stetsonlaw.com or James Burson at jburson@lagunapueblo-nsn.gov by Dec. 4.

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF ADMISSION

On November 14, 2017:
Grant Davis Chumlea
Rash, Chapman, Schreiber,
Leaverton & Morrison LLP
2112 Rio Grande Street
Austin, TX 78705
512-477-7543
512-474-0954 (fax)
gchumlea@rashchapman.com

On November 14, 2017:
Amber Lynn Dengler
3012 W. Phelps Road
Phoenix, AZ 85053
703-973-7782
amberldengler@gmail.com

On November 14, 2017:
Elizabeth Guerrero-Southard
Chris Pettit & Associates
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210-764-1718 (fax)
elizabeths@pettitlaw.com

On November 14, 2017:
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1700 Louisiana Blvd. NE,
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505-346-3130
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lloyd@hklfirm.com

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Jennifer Lyn Parker
Wheeler Trigg O'Donnell LLP
370 17th Street, Suite 4500
Denver, CO 80202
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On November 14, 2017:
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CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective November 7, 2017:
Nellis Kennedy-Howard
2101 Webster Street,
Suite 1300
Oakland, CA 94612
218-849-4523
nelliskh@gmail.com

Effective November 1, 2017:
Marta L. Nesbitt
U.S. Small Business
Administration
PO Box 2206
Albuquerque, NM 87103
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marta.nesbitt@sba.gov

IN MEMORIAM

As of October 16, 2017:
George J. Nett
675 Mt. Olympus Avenue SE
Ocean Shores, WA 98569

CLERK'S CERTIFICATE OF DISBARMENT

Effective November 6, 2017:
Matthew E. Ortiz
1205 Camino Carlos Rey
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CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective November 7, 2017:
Hon. Patricio M. Serna (ret.)
2321 Brother Abdon Way
Santa Fe, NM 87505

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective November 29, 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		
1-015	Amended and supplemental pleadings	12/31/2017
1-017	Parties plaintiff and defendant; capacity	12/31/2017
1-053.1	Domestic violence special commissioners; duties	12/31/2017
1-053.2	Domestic relations hearing officers; duties	12/31/2017
1-053.3	Guardians ad litem; domestic relations appointments	12/31/2017
1-079	Public inspection and sealing of court records	03/31/2017
1-088	Designation of judge	12/31/2017
1-105	Notice to statutory beneficiaries in wrongful death cases	12/31/2017
1-121	Temporary domestic orders	12/31/2017
1-125	Domestic Relations Mediation Act programs	12/31/2017
1-129	Proceedings under the Family Violence Protection Act	12/31/2017
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		
2-105	Assignment and designation of judges	12/31/2017
2-112	Public inspection and sealing of court records	03/31/2017
2-301	Pleadings allowed; signing of pleadings, motions, and other papers; sanctions	12/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-105	Assignment and designation of judges	12/31/2017
3-112	Public inspection and sealing of court records	03/31/2017
3-301	Pleadings allowed; signing of pleadings, motions, and other papers; sanctions	12/31/2017
Civil Forms		
4-223	Order for free process	12/31/2017

4-402	Order appointing guardian ad litem	12/31/2017
4-602	Withdrawn	12/31/2017
4-602A	Juror summons	12/31/2017
4-602B	Juror qualification	12/31/2017
4-602C	Juror questionnaire	12/31/2017
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
4-941	Motion to restore right to possess or receive a firearm or Ammunition	12/31/2017

Domestic Relations Forms

4A-200	Domestic relations forms; instructions for stage two (2) forms	12/31/2017
4A-201	Temporary domestic order	12/31/2017
4A-209	Motion to enforce order	12/31/2017
4A-210	Withdrawn	12/31/2017
4A-321	Motion to modify final order	12/31/2017
4A-504	Order for service of process by publication in a newspaper	12/31/2017

Rules of Criminal Procedure for the District Courts

5-105	Designation of judge	12/31/2017
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 and Indictment	07/01/2017
5-211	Search warrants	12/31/2017
5-302	Preliminary examination	12/31/2017
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	7-406	Bonds; exoneration; forfeiture	07/01/2017
5-802	Habeas corpus	12/31/2017	7-408	Pretrial release by designee	07/01/2017
Rules of Criminal Procedure for the Magistrate Courts			7-409	Pretrial detention	07/01/2017
6-105	Assignment and designation of judges	12/31/2017	7-504	Discovery; cases within metropolitan court trial jurisdiction	12/31/2017
6-114	Public inspection and sealing of court records	03/31/2017	7-506	Time of commencement of trial	07/01/2017
6-202	Preliminary examination	12/31/2017	7-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
6-203	Arrests without a warrant; probable cause determination	12/31/2017	7-606	Subpoena	12/31/2017
6-207	Bench warrants	04/17/2017	7-703	Appeal	07/01/2017
6-207.1	Payment of fines, fees, and costs	04/17/2017	Rules of Procedure for the Municipal Courts		
6-207.1	Payment of fines, fees, and costs	12/31/2017	8-112	Public inspection and sealing of court records	03/31/2017
6-208	Search warrants	12/31/2017	8-202	Probable cause determination	12/31/2017
6-304	Motions	12/31/2017	8-206	Bench warrants	04/17/2017
6-401	Pretrial release	07/01/2017	8-206.1	Payment of fines, fees, and costs	04/17/2017
6-401.1	Property bond; unpaid surety	07/01/2017	8-207	Search warrants	12/31/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017	8-304	Motions	12/31/2017
6-403	Revocation or modification of release orders	07/01/2017	8-401	Pretrial release	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017	8-401.1	Property bond; unpaid surety	07/01/2017
6-408	Pretrial release by designee	07/01/2017	8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-409	Pretrial detention	07/01/2017	8-403	Revocation or modification of release orders	07/01/2017
6-506	Time of commencement of trial	07/01/2017	8-406	Bonds; exoneration; forfeiture	07/01/2017
6-506	Time of commencement of trial	12/31/2017	8-408	Pretrial release by designee	07/01/2017
6-506.1	Voluntary dismissal and refiled proceedings	12/31/2017	8-506	Time of commencement of trial	07/01/2017
6-703	Appeal	07/01/2017	8-506	Time of commencement of trial	12/31/2017
Rules of Criminal Procedure for the Metropolitan Courts			8-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
7-105	Assignment and designation of judges	12/31/2017	8-703	Appeal	07/01/2017
7-113	Public inspection and sealing of court records	03/31/2017	Criminal Forms		
7-202	Preliminary examination	12/31/2017	9-207A	Probable cause determination	12/31/2017
7-203	Probable cause determination	12/31/2017	9-301A	Pretrial release financial affidavit	07/01/2017
7-207	Bench warrants	04/17/2017	9-302	Order for release on recognizance by designee	07/01/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017	9-303	Order setting conditions of release	07/01/2017
7-208	Search warrants	12/31/2017	9-303A	Withdrawn	07/01/2017
7-304	Motions	12/31/2017	9-307	Notice of forfeiture and hearing	07/01/2017
7-401	Pretrial release	07/01/2017	9-308	Order setting aside bond forfeiture	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017	9-309	Judgment of default on bond	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017	9-310	Withdrawn	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017	9-513	Withdrawn	12/31/2017
			9-513A	Juror summons	12/31/2017
			9-513B	Juror qualification	12/31/2017

9-513C	Juror questionnaire	12/31/2017	13-2401	Legal malpractice; elements	12/31/2017
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017	13-2402	Legal malpractice; attorney-client relationship	12/31/2017
9-701	Petition for writ of habeas corpus	12/31/2017	13-2403	Legal malpractice; negligence and standard of care	12/31/2017
9-702	Petition for writ of certiorari to the district court from denial of habeas corpus	12/31/2017	13-2404	Legal malpractice; breach of fiduciary duty	12/31/2017
9-809	Order of transfer to children's court	12/31/2017	13-2405	Duty of confidentiality; definition	12/31/2017
9-810	Motion to restore right to possess or receive a firearm or ammunition	12/31/2017	13-2406	Duty of loyalty; definition	12/31/2017
Children's Court Rules and Forms			13-2407	Legal malpractice; attorney duty to warn	12/31/2017
10-161	Designation of children's court judge	12/31/2017	13-2408	Legal malpractice; duty to third-party intended - No instruction drafted	12/31/2017
10-166	Public inspection and sealing of court records	03/31/2017	13-2409	Legal malpractice; duty to intended beneficiaries; wrongful death	12/31/2017
10-166	Public inspection and sealing of court records	12/31/2017	13-2410	Legal malpractice; expert testimony	12/31/2017
10-169	Criminal contempt	12/31/2017	13-2411	Rules of Professional Conduct	12/31/2017
10-325	Notice of child's advisement of right to attend hearing	12/31/2017	13-2412	Legal malpractice; attorney error in judgment	12/31/2017
10-325.1	Guardian ad litem notice of whether child will attend hearing	12/31/2017	13-2413	Legal malpractice; litigation not proof of malpractice	12/31/2017
10-570.1	Notice of guardian ad litem regarding child's attendance at hearing	12/31/2017	13-2414	Legal malpractice; measure of damages; general instruction	12/31/2017
10-611	Suggested questions for assessing qualifications of proposed court interpreter	12/31/2017	13-2415	Legal malpractice; collectability - No instruction drafted	12/31/2017
10-612	Request for court interpreter	12/31/2017	Uniform Jury Instructions - Criminal		
10-613	Cancellation of court interpreter	12/31/2017	14-240	Withdrawn	12/31/2017
10-614	Notice of non-availability of certified court interpreter or justice system interpreter	12/31/2017	14-240B	Homicide by vehicle; driving under the influence; essential elements	12/31/2017
Rules of Appellate Procedure			14-240C	Homicide by vehicle; reckless driving; essential elements	12/31/2017
12-202	Appeal as of right; how taken	12/31/2017	14-240D	Great bodily injury by vehicle; essential elements	12/31/2017
12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017	14-251	Homicide; "proximate cause"; defined	12/31/2017
12-205	Release pending appeal in criminal matters	07/01/2017	14-1633	Possession of burglary tools; essential elements	12/31/2017
12-210	Calendar assignments for direct appeals	12/31/2017	14-2820	Aiding or abetting; accessory to crime of attempt	12/31/2017
12-307.2	Electronic service and filing of papers	07/01/2017	14-2821	Aiding or abetting; accessory to felony murder	12/31/2017
12-307.2	Electronic service and filing of papers	08/21/2017	14-2822	Aiding or abetting; accessory to crime other than attempt and felony murder	12/31/2017
12-313	Mediation	12/31/2017	14-4201	Money laundering; financial transaction to conceal or disguise property, OR to avoid reporting requirement; essential elements	12/31/2017
12-314	Public inspection and sealing of court records	03/31/2017	14-4202	Money laundering; financial transaction to further or commit another specified unlawful activity; essential elements	12/31/2017
12-502	Certiorari from the Supreme Court to the Court of Appeals	12/31/2017	14-4203	Money laundering; transporting instruments to conceal or disguise OR to avoid reporting requirement; essential elements	12/31/2017
Uniform Jury Instructions - Civil					
13-24 Appx 1	Part A: Sample fact pattern and jury instructions for malpractice of attorney in handling divorce case	12/31/2017			

Rule-Making Activity <http://nmsupremecourt.nmcourts.gov>

14-4204	Money laundering; making property available to another by financial transaction OR transporting; essential elements	12/31/2017	16-803	Reporting professional misconduct	12/31/2017
Rules Governing Admission to the Bar					
14-4205	Money laundering; definitions	12/31/2017	17-202	Registration of attorneys	07/01/2017
14-5130	Duress; nonhomicide crimes	12/31/2017	17-202	Registration of attorneys	12/31/2017
Rules Governing Professional Conduct					
15-103	Qualifications	12/31/2017	17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service	07/01/2017
15-104	Application	08/04/2017	Rules for Minimum Continuing Legal Education		
15-105	Application fees	08/04/2017	18-203	Accreditation; course approval; provider reporting	09/11/2017
15-301.1	Public employee limited license	08/01/2017	Code of Judicial Conduct		
15-301.2	Legal services provider limited law license	08/01/2017	21-004	Application	12/31/2017
Supreme Court General Rules					
16-100	Terminology	12/31/2017	23-106	Supreme Court rules committees	12/31/2017
16-101	Competence	12/31/2017	23-106.1	Supreme Court rule-making procedures	12/31/2017
16-102	Scope of representation and allocation of authority between client and lawyer	08/01/2017	Rules Governing the New Mexico Bar		
16-106	Confidentiality of information	12/31/2017	24-110	"Bridge the Gap: Transitioning into the Profession" program	12/31/2017
16-108	Conflict of interest; current clients; specific rules	12/31/2017	Rules Governing Review of Judicial Standards Commission Proceedings		
16-304	Fairness to opposing party and counsel	12/31/2017	27-104	Filing and service	07/01/2017
16-305	Impartiality and decorum of the tribunal	12/31/2017	Local Rules for the Thirteenth Judicial District Court		
16-402	Communications with persons represented by counsel	12/31/2017	LR13-112	Courthouse security	12/31/2017
16-403	Communications with unrepresented persons	12/31/2017			
16-701	Communications concerning a lawyer's services	12/31/2017			

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-029

No. S-1-SC-36197 (filed October 5, 2017)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,

v.

LARESSA VARGAS,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

BRIANA H. ZAMORA, District Judge

HECTOR H. BALDERAS

Attorney General

JOHN KLOSS

Assistant Attorney General

Santa Fe, New Mexico

for Petitioner

BENNETT J. BAUR

Chief Public Defender

STEVEN JAMES FORSBERG

Assistant Appellate Defender

Albuquerque, New Mexico

for Respondent

Opinion

Edward L. Chávez, Justice

{1} The United States Supreme Court recently held that (1) a law enforcement officer may require a warrantless alcohol breath test from a person who is arrested for driving while intoxicated (DWI) from alcohol because a breath test is a reasonable search incident to arrest, but (2) an officer cannot require a warrantless blood test unless the officer has probable cause to require the blood test and demonstrates exigent circumstances. *Birchfield v. North Dakota*, ___ U.S. ___, ___, 136 S. Ct. 2160, 2184-86 (2016). Thus, under *Birchfield*, a person who is arrested for DWI may be punished for refusing to submit to a breath test under an implied consent law, but may not be punished for refusing to consent to or submit to a blood test under an implied consent law unless the officer either (a) obtains a warrant, or (b) proves probable cause to require the blood test in addition to exigent circumstances.

{2} In this case, defendant Laressa Vargas consented to and submitted to two breath tests, but refused to consent to a blood test. The arresting officer did not obtain a warrant for a blood test, nor could he do so under New Mexico law, because he did not have probable cause to believe that Vargas had committed a felony or caused death

or great bodily injury to another person while driving a motor vehicle under the influence of alcohol or a controlled substance as required by NMSA 1978, Section 66-8-111(A) (2005). Vargas was convicted of violating NMSA 1978, Section 66-8-102(D)(3) (2010, amended 2016) because she refused to submit to a blood test; she received a sentence of ninety days in jail, with credit for seventy-five days for time served.

{3} The *Birchfield* opinion had not been decided when the Bernalillo County Metropolitan Court entered its judgment convicting Vargas; however, *Birchfield* was published while Vargas's appeal was pending before the New Mexico Court of Appeals. The Court of Appeals applied *Birchfield* and reversed Vargas's conviction for aggravated DWI. See *State v. Vargas*, 2017-NMCA-023, ¶¶ 2, 26, 389 P.3d 1080. We granted the State's petition for writ of certiorari to consider whether the Court of Appeals erred in applying *Birchfield*. *State v. Vargas*, 2016-NMCERT-___ (No. S-1-SC-36197, Feb. 14, 2017). We conclude that the Court of Appeals correctly applied *Birchfield* to the pending appeal because of a person's fundamental right under the Fourth Amendment of the United States Constitution not to be subjected to unreasonable searches, and because *Birchfield* prohibits punishment under implied consent laws based on an arrestee's refusal

to consent to and submit to a warrantless blood test. See *Birchfield*, ___ U.S. at ___, 136 S. Ct. at 2160, 2186.

I. FACTUAL AND PROCEDURAL BACKGROUND

{4} On April 23, 2011 at approximately 1:00 a.m., Bernalillo County Deputy Sheriff Patrick Rael was part of a force conducting a DWI checkpoint on Coors Boulevard in Albuquerque when he encountered Vargas. As Vargas approached the checkpoint, she stopped fifteen to twenty yards before she reached where Deputy Rael was standing, and Deputy Rael waved his flashlight to get her attention to indicate that she should move forward. Vargas then rolled down her window and said "good afternoon," which Deputy Rael found odd, given the time of night.

{5} Deputy Rael immediately noticed the odor of alcohol emanating from both Vargas's person and her vehicle. He also observed that Vargas's eyes were bloodshot and watery. Deputy Rael asked Vargas if she had been drinking, to which she answered that she had not. She explained that she was the designated driver for her passenger, who had been drinking. Deputy Rael described Vargas as "confused" and "nervous."

{6} Deputy Rael requested that Vargas submit to field sobriety tests (FSTs), and Vargas agreed. Vargas performed poorly on the FSTs. At that point Deputy Rael believed that Vargas was intoxicated and could not safely operate a vehicle, so he placed her under arrest.

{7} Deputy Rael read the pertinent provisions of the New Mexico Implied Consent Act to Vargas, after which she agreed to a breath test. Vargas provided two breath test samples, which resulted in readings of 0.04 at 1:33 a.m. and 0.05 at 1:35 a.m. Because he believed that the breath test results were inconsistent with Vargas's signs of impairment, Deputy Rael determined that a blood test was the only other means to confirm Vargas's intoxication, particularly because he suspected that drugs were the cause of her impairment. Deputy Rael then reread the Implied Consent Act to Vargas and explained that he was entitled to ask her for both a breath test and a blood test. He subsequently asked Vargas to submit to a blood test, and she agreed to do so. Deputy Rael wanted to verify Vargas's answer, so he asked her again if she was willing to submit to a blood test. Deputy Rael explained that the possible consequences

of refusing the blood test included an aggravated sentence and license revocation. Vargas refused to take the blood test the second time she was asked, and she was subsequently charged with aggravated DWI.

{8} At the conclusion of the bench trial, the metropolitan court determined that the State had proved beyond a reasonable doubt that Vargas drove while she was under the influence of alcohol to the slightest degree.¹ It also concluded that officers have the discretion to request breath tests, blood tests, or both, and that Vargas's refusal aggravated the underlying DWI. The metropolitan court sentenced Vargas to a term of ninety days in jail for aggravated DWI under Section 66-8-102(D)(3) (2010), which provides that

[a]ggravated driving under the influence of intoxicating liquor or drugs consists of: refusing to submit to chemical testing, as provided for in the Implied Consent Act, and in the judgment of the court, based upon evidence of intoxication presented to the court, the driver was under the influence of intoxicating liquor or drugs.

{9} Vargas subsequently appealed to the Second Judicial District Court and then to the Court of Appeals. After the United States Supreme Court decided *Birchfield*, Vargas raised for the first time on appeal to the Court of Appeals the defense that the warrantless request for the blood test was an unreasonable search under the Fourth Amendment, and that her refusal to submit to it could not be used to prove aggravated DWI.

{10} Although the Court of Appeals concluded that Vargas's constitutional argument was not preserved, it decided the issue on the merits. See *Vargas*, 2017-NMCA-023, ¶¶ 14-15. The Court reversed Vargas's aggravated DWI conviction and remanded the case to the metropolitan court for resentencing on the DWI charge based on Vargas being impaired to the slightest degree pursuant to Section 66-8-102(A). *Id.* ¶¶ 2, 9, 19, 26. The State makes

two arguments before us: (1) *Birchfield* does not apply retroactively, and (2) the Court of Appeals erred in applying *Birchfield* because the issue was not preserved.

II. DISCUSSION

A. *Birchfield* Applies Retroactively

{11} The State's argument that *Birchfield* should not be applied retroactively is not persuasive. In *Teague v. Lane*, the United States Supreme Court established the analysis that courts must follow to determine whether a new rule applies retroactively. See 489 U.S. 288, 299-310 (1989). New Mexico courts have adopted this analysis. See *Kersey v. Hatch*, 2010-NMSC-020, ¶¶ 21, 25, 148 N.M. 381, 237 P.3d 683. "An appellate court's consideration of whether a rule should be retroactively or prospectively applied is invoked only when the rule at issue is in fact a new rule." *State v. Mascareñas*, 2000-NMSC-017, ¶ 24, 129 N.M. 230, 4 P.3d 1221 (internal quotation marks omitted). The *Teague* Court determined that "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301 (emphasis omitted). The new rule "applies to cases pending on direct appeal, as long as the issue was raised and preserved below . . ." *Kersey*, 2010-NMSC-020, ¶ 19 (citing *State v. Nunez*, 2000-NMSC-013, ¶ 114, 129 N.M. 63, 2 P.3d 264). Vargas did not preserve her Fourth Amendment argument in the metropolitan court. Nonetheless, the Court of Appeals properly exercised its discretion to address her unpreserved argument because of the fundamental right to be free from illegal searches and seizures, including warrantless blood tests. See *Vargas*, 2017-NMCA-023, ¶ 15. *Birchfield* announced an expansion of courts' previous understanding of blood tests under the Fourth Amendment. See ___ U.S. at ___, 136 S. Ct. at 2174-76 ("[T]he founding era does not provide any definitive guidance as to whether [breath and blood tests to measure blood alcohol content (BAC)] should be allowed incident to arrest. Lacking such guidance . . . we examine the degree to which [they] intrud[e] upon an individual's privacy and . . . the degree to which [they

are] needed for the promotion of legitimate governmental interests." (fourth through seventh alterations in original) (footnote omitted) (internal quotation marks and citation omitted)). *Birchfield* specifically held for the first time that police officers do not need to obtain a search warrant for a breath test from a subject because a breath test is a search incident to arrest, but officers must obtain a search warrant for a blood test unless probable cause for the blood test and exigent circumstances are present. *Id.* at ___, 136 S. Ct. at 2185. This new rule cannot apply retroactively unless "(1) it is a substantive rule that alters the range of conduct or the class of persons that the law punishes, or (2) it is a watershed rule of criminal procedure." *Kersey*, 2010-NMSC-020, ¶ 31.

{12} The rule recently announced in *Birchfield* fits squarely within the first *Teague* exception to the general principle against retroactive application because the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U.S. at 307 (citation omitted). *Birchfield* bars criminal sanctions previously imposed upon a subject for refusing to submit to warrantless blood tests. See ___ U.S. at ___, 136 S. Ct. at 2185-86. Therefore, *Birchfield* is applicable here.

B. The Court of Appeals Had Broad Discretion to Review Sua Sponte the Unpreserved Fourth Amendment Issue on Appeal

{13} Generally, "[t]o preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked . . ." Rule 12-216(A) NMRA (1993); see also Rule 3-706(I) NMRA ("The Rules of Civil Procedure for the District Courts shall govern the procedure on appeal from the metropolitan court."). During her bench trial, Vargas moved to suppress any indication of her drug use and her refusal of the blood test based on three grounds: (1) Deputy Rael did not perform a drug recognition evaluation, (2) there were no blood results, and (3) the theory upon which the State was prosecuting Vargas

¹ While Section 66-8-102(A) does not provide the exact language of "impaired to the slightest degree," *State v. Sisneros*, 1938-NMSC-049, 42 N.M. 500, 82 P.2d 274 effectively created that standard, and *State v. Gurule*, 2011-NMCA-042, 149 N.M. 599, 252 P.3d 823 reaffirms it. See *Sisneros*, 1938-NMSC-049, ¶ 18 ("A person who has taken a drink of intoxicating liquor is not necessarily under its influence; but if it affects him so that, to the slightest degree, 'he is less able, either mentally or physically or both, to exercise the clear judgment and steady hand necessary to handle as powerful and dangerous a mechanism as a modern automobile with safety to himself and the public,' he is under the 'influence of intoxicating liquor' within the meaning of the statute." (citation omitted)); see also *Gurule*, 2011-NMCA-042, ¶ 7 (stating that a defendant found to be "impaired to the slightest degree" has violated Section 66-8-102(A)).

was ambiguous. The metropolitan court denied Vargas's motion and focused primarily on her third reason in concluding that the State had discretion to prosecute based on either alcohol intoxication, drug-induced intoxication, or both. Importantly, Vargas's motion to suppress was not based on the Fourth Amendment grounds which formed the basis of her argument to the Court of Appeals, and as a result, the metropolitan court's ruling did not apply to the specific constitutional issue on appeal. Therefore, this issue was not properly preserved under Rule 12-216(A) (1993).

{14} However, questions involving "general public interest [or] fundamental error or fundamental rights of a party" are exceptions to the general rule requiring preservation. Rule 12-216(B)(1)-(2) (1993). "[F]reedom from illegal search and seizure is a fundamental right," which is a matter of general public interest, and an appellate court may exercise its discretion to consider an issue involving search and seizure protections even if it is not preserved by a defendant. *State v. Gomez*, 1997-NMSC-006, ¶ 31 n.4, 122 N.M. 777, 932 P.2d 1.

{15} The State's concern with the Court of Appeals's review sua sponte of the merits of Vargas's argument is that it was not provided an opportunity for additional briefing to address the scope and applicability of *Birchfield*, and was therefore inhibited from developing the record to address the circumstances that would support probable cause and exigent circumstances justifying a warrantless blood test. We agree that the Court of Appeals should have asked for additional briefing, particularly to address *Birchfield*, which was decided while the present case was on appeal. Nevertheless, we remind litigants that when an appellate court fails to request supplemental briefing, filing a motion for rehearing is a valid option when the motion is "based upon a point of law . . . not raised, briefed or argued by any party but relied upon by the court in its disposition of the matter . . ." Rule 12-404(A) NMRA (2009). Despite the fact that the Court of Appeals did not ask for additional briefing, the record in this case is adequate to address the proper application of *Birchfield*, and we therefore conclude that the Court of Appeals did not abuse its discretion by addressing the application of *Birchfield*.

C. Vargas Was Unconstitutionally Punished for Refusing to Submit to an Unreasonable Blood Test

{16} We review the merits of Vargas's Fourth Amendment argument de novo. See *State v. Ryon*, 2005-NMSC-005, ¶ 11,

137 N.M. 174, 108 P.3d 1032 ("The legality of a search . . . turns on the question of reasonableness [and we] review the determination of reasonableness de novo").

{17} "The Fourth Amendment, incorporated against state actors [such as police officers] via the Fourteenth Amendment, requires that all searches and seizures be reasonable in their execution." *State v. Leyva*, 2011-NMSC-009, ¶ 9, 149 N.M. 435, 250 P.3d 861 (citations omitted). To identify reasonableness, we balance "public interest and the [subject]'s right to personal security free from arbitrary interference by law officers." *Id.* (internal quotation marks and citation omitted).

{18} Both breath tests and blood tests are searches, with each test implicating varying privacy concerns. *Birchfield*, ___ U.S. at ___, 136 S. Ct. at 2173-74, 2176. Breath tests elicit few privacy concerns; they only reveal a subject's BAC, no sample is left in the possession of the officer which may be used to obtain additional information, there is no great embarrassment associated with this testing, and the tests collect only breath, which we expel at all times. *Id.* at ___, 136 S. Ct. at 2176-78. In contrast to breath, we do not regularly shed blood, and a blood test provides an officer with a sample from which more information than mere BAC can be extracted. *Id.* at ___, 136 S. Ct. at 2178.

{19} The Fourth Amendment permits warrantless breath tests incident to legal arrests because noninvasive breath tests only slightly impact a subject's privacy and because the state has an interest in testing BAC to maintain highway safety and deter drunk driving. *Id.* at ___, 136 S. Ct. at 2184. The *Birchfield* Court held that blood tests bear too heavily on a subject's privacy interests to permit the state to seize warrantless samples at all DWI stops. *Id.* at ___, 136 S. Ct. at 2178. Therefore, when a subject does not consent to such a search, officers must obtain a warrant or establish probable cause and exigent circumstances to justify a warrantless search. See *id.* at ___, 136 S. Ct. at 2185-86 (concluding that drivers do not consent to criminal penalties for refusing invasive blood tests by virtue of driving on public roads). Vargas consented to two breath tests. Deputy Rael subsequently asked Vargas to consent to a warrantless blood draw. Because she refused, Deputy Rael should have assumed that a warrant was necessary, unless probable cause to request the blood test and exigent circumstances obviated the need for a warrant.

{20} Section 66-8-111(A) defines the probable cause that is necessary to obtain a warrant when a person under arrest refuses to consent to a chemical test.

If a person under arrest for violation of an offense enumerated in the Motor Vehicle Code . . . refuses upon request of a law enforcement officer to submit to chemical tests designated by the law enforcement agency as provided in Section 66-8-107 NMSA 1978 [the implied consent provision], none shall be administered except when a municipal judge, magistrate or district judge issues a search warrant authorizing chemical tests as provided in Section 66-8-107 NMSA 1978 upon [the judge] finding in a law enforcement officer's written affidavit that there is probable cause to believe that the person has driven a motor vehicle while under the influence of alcohol or a controlled substance, thereby causing the death or great bodily injury of another person, or there is probable cause to believe that the person has committed a felony while under the influence of alcohol or a controlled substance and that chemical tests as provided in Section 66-8-107 NMSA 1978 will produce material evidence in a felony prosecution.

{21} Deputy Rael had probable cause to believe that Vargas had driven a motor vehicle while under the influence of alcohol or a controlled substance, but he did not have probable cause to believe that Vargas had caused the death or great bodily injury of another person while driving under the influence. Nor did Deputy Rael have probable cause to believe that Vargas had committed a felony while under the influence of alcohol or a controlled substance and that the chemical test would produce material evidence in a felony prosecution. Vargas's arrest occurred at a DWI checkpoint. The State does not contend that she was driving under the influence and caused either death or great bodily injury to another. The State also does not contend that Vargas committed a felony while she was under the influence of alcohol or another substance.

{22} Because Deputy Rael lacked the probable cause required by Section 66-8-111(A) to obtain a warrant, whether exigent circumstances existed is not

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The Basics of Family Law

Thursday, Nov. 30 • 8:30 a.m.–5 p.m.

\$239 Co-sponsoring section members, government and legal services attorneys and Paralegal Division members
\$295 Standard and webcast fee

Co-sponsor: Family Law Section

5.2 G

1.0 EP



Basics of Family Law will cover in-depth practical information for attorneys embarking on a family law practice, currently practicing in the area of family law or looking to add family law to their current practice. The program will discuss the family law case process, relevant statutes and rules, check lists to ensure all steps are being followed in the case, forms, billing models and much more. This program is designed to refine, enhance or offer new skills in the practice of family law. ***This CLE qualifies for a total possible 5.2 General and 2.0 EP. In order to receive 2.0 EP credits, you must attend 4 p.m. session "Complying with Disciplinary Board Rule 17-204." Attendees that have taken the Disciplinary Board Trust Accounting course separately will not be eligible to receive additional ethics/professionalism credit during this program and attendance is optional.***



Specialized Areas of Law for Lawyers and Paralegals—Annual Paralegal Division CLE

Friday, Dec. 1 • 8:30 a.m.–4:15 p.m.

\$189 Paralegal Division members (live or webcast)
\$249 Government and legal services attorneys
\$279 Standard and Webcast Fee

Co-sponsor: Paralegal Division

5.0 G

1.0 EP



Brought to you by the Paralegal Division, this year's annual institute is not only for paralegals, but attorneys alike! Topics include family law matters, immigration law, intellectual property, eDiscovery and much more.



Legal Malpractice Potpourri

Monday, Dec. 4 • 9–10:30 a.m.

\$80 Standard fee
\$95 Webcast fee

Co-sponsor: Lawyers Professional Liability and Insurance Committee

1.5 EP



This CLE program will include a rousing panel discussion with audience participation regarding the following topics: 1) Don't Do It Yourself: Responding to a Disciplinary Complaint; 2) PAC-MAN Policies and the Duty to Settle Within Limits; 3) Proposed Changes to Rule 16-101 Regarding Social Media; and 4) Recent Developments.



Trials of the Century III

Tuesday, Dec. 5 • 8:30 a.m.–4 p.m.

\$265 Government and legal services attorneys and Paralegal Division members
\$295 Standard and Webcast fee

4.0 G

2.0 EP



Learn the science of persuasion from the century's most famous trials! Renowned speaker, Todd Winegar, continues his Trials of the Century series, some of the highest rated CLE in North America, with new trials: The Nuremberg Judges Trial, *U.S. v. Shipp* (the only criminal trial ever held by the U.S. Supreme Court), The Ruby Ridge Trial, *Texas v. Michael Morton* and Darrow's "Massie Honor Killing" trial. Come have a "rip-roaring good time" (*Fulton County Daily Report*, Atlanta) while learning critical persuasion skills from the masters.

Attend this course to learn persuasion in setting like these:

• "Beauty contests" - Convincing the client to give you the case;

• Trials – Persuade the jury and judge;
 • Transactional work - Convince opposing counsel to adopt your language;

• Negotiations and Mediations - Influencing the decisions of others;
 • Clients – Convince them to be reasonable, even to pay their bill.



2017 Real Property Institute

Wednesday, Dec. 6 • 8:30 a.m.–5 p.m.

\$279 Co-sponsoring section members, government and legal services attorneys and Paralegal Division members
\$309 Standard and Webcast fee

Co-sponsor: Real Property, Trust and Estate Section

6.0 G

1.0 EP



Topics include insurance for transactional attorneys, ethics and malpractice, bankruptcy law and more!



Current Immigration Issues for the Criminal Defense Attorney— 2017 Immigration Law Institute

Friday, Dec. 8 • 8:30 a.m.–5 p.m.

\$279 Co-sponsoring section members, government and legal services attorneys and Paralegal Division members
\$309 Standard and Webcast fee

Co-sponsor: Immigration Law Section

5.0 G

2.0 EP



This year's Immigration Law Section annual program will focus on issues relating to immigration, for criminal defense attorneys, or "Crimmigration". This program is designed to help non-immigration attorneys better serve clients and the immigrant community, and bring seasoned immigration attorneys up to speed on recent changes in the practice area. Topics will include an update on the current state of immigration enforcement, analyzing convictions, ethical duties post-conviction, and what to do if your client is detained by ICE. The program will conclude with a discussion on ethical obligations to the immigrant community and issues such as confidentiality and legal access.



Complying with the Disciplinary Board Rule 17-204

Monday, Dec. 11 • 9–10 a.m.

\$55 Standard fee

\$65 Webcast fee

1.0 EP



Using interactive polling software and mock trust transactions, this course will instruct participants on and test their knowledge of the fundamentals of attorney trust accounts in New Mexico, including

(a) the proper operation of such accounts (b) identification of records that must be maintained; (c) best and prohibited practices for operating a trust account and accepting retainers; (d) recording trust transactions in general and client ledgers; and (e) reconciling trust account ledgers with bank statements. The course will take one hour and will include instruction and hands-on participation by attendees.



2017 Ethicspalooza

Monday, Dec. 11 • 10 a.m.–4:45 p.m.

\$180 Full-day Standard fee (5.0 EP)

\$200 Full-day Webcast fee (5.0 EP)

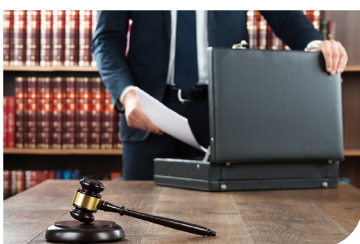
To purchase more than one of the four sessions, priced individually (1.0 or 2.0 EP), please call for more information.

Possible

5.0 EP



This series of ethics courses taught by members of the Disciplinary Board of the New Mexico Supreme Court, Office of Disciplinary Counsel will provide concise, informative, practical and useful information for the ethical practice of law. Plus, for each hour you attend you will receive 1.0 hour of CLE credit. Take one, two, three or all four!



Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct

Thursday, Dec. 12 • 9–11 a.m.

Join us for this morning CLE on the rules of civil procedure, with William D. Slease of the Disciplinary Board of the New Mexico Supreme Court and Ruth Pregoner of Pregoner Baysinger Wideman Sale PC.



1.0 G

1.0 EP



Trial Know-How! (The Rush to Judgment)— 2017 Trial Practice Section Annual Institute

4.0 G

2.0 EP



Thursday, Dec. 14 • 9:30 a.m.–4:30 p.m.

*\$249 Co-sponsoring section members, government and legal services attorneys
and Paralegal Division members
\$279 Standard and Webcast fee*

Co-sponsor: Trial Practice Section

At this CLE, attendees will learn how to fine tune their courtroom strategy, how to employ effective cross examination techniques and how to best handle litigation issues including discovery, voir dire and pro se litigants. Attendees will also learn about ethical obligations and hear from a panel comprised of state and federal judges who will be sharing insight about what litigators should know before appearing in their courtroom.



Emerging Problems and Solutions in Environmental Enforcement

5.5 G

1.0 EP



Friday, Dec. 15 • 9 a.m.–5 p.m.

*\$225 Early bird rate (in-person attendance only; registration must be received by Nov. 15)
\$265 Co-sponsoring section members, government and legal services attorneys and Paralegal
Division members
\$295 Standard and Webcast fee*

Co-sponsor: Natural Resources, Energy and Environmental Law Section

This course will include an overview of recent statutory and regulatory changes in the area of environmental law, implications of such changes for state and federal enforcement, options available to agencies for enforcement of the law examine two local natural resources disasters, an ethics panel and much more!



The Cyborgs are Coming! The Cyborgs are Coming! The Ethical Concerns with the Latest Technology Disruptions

3.0 EP



Tuesday, Dec. 19 • 9 a.m.–12:10 p.m.

*\$129 Government and legal service attorneys and Paralegal Division members
\$159 Standard and Webcast fee*

In this program, the “CLE Performer” Stuart Teicher will get into the deep cuts of the ethical concerns with technology including cutting edge concerns that are shifting the practice of law and causing ethical headaches for sophisticated lawyers.

Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics

3.0 EP



Tuesday, Dec. 19 • 1–4 p.m.

*\$129 Government and legal service attorneys and Paralegal Division members
\$159 Standard and Webcast fee*

Stuart Teicher has traveled the world as a professional legal educator and he’s seen all kinds of bad behavior. Coincidentally, it mirrors a lot of the bad behavior he’s seen as an attorney ethics investigator. Join “the CLE Performer” as he draws parallels between passengers and practitioners and explains key ethics rules that will help every lawyer stay safe in their practice.

Registration and payment must be received prior to the program date. A \$20 late fee will be incurred when registering the day of the program. This fee applies to live registrations and does not apply to live webcasts, webinars or live replays.



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relevant. See *State v. Tywayne H.*, 1997-NMCA-015, ¶ 16, 123 N.M. 42, 933 P.2d 251 (“[W]arrantless searches are only permissible if they fall within an exception to the warrant requirement. Exceptions include . . . probable cause plus exigent circumstances . . .” (citation omitted)). Therefore, Deputy Rael’s warrantless request of Vargas’s blood sample cannot be justified as reasonable. Vargas was warned of potential additional punishment if she refused to submit to what was an unreasonable search. Implied consent laws can no longer provide that a driver impliedly consents to a blood draw.

Birchfield, ___ U.S. at ___, 136 S. Ct. at 2185. We conclude that Vargas cannot be subjected to criminal penalties for refusing to submit to an unreasonable search. *Contra id.*, ___ U.S. at ___, 136 S. Ct. at 2172, 2185-86 (reasoning that if the warrantless search comports with the Fourth Amendment, “it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing”).

III. CONCLUSION

{23} For the foregoing reasons, we affirm the Court of Appeals in reversing Vargas’s conviction for aggravated DWI

and remanding for resentencing on DWI, impaired to the slightest degree.

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

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

JUDITH K. NAKAMURA,

Chief Justice

PETRA JIMENEZ MAES, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

Certiorari Denied, August 16, 2017, No. S-1-SC-36574

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-069

No. A-1-CA-34260 (filed June 28, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ALREE SWEAT,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
DOUGLAS R. DRIGGERS, District Judge

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico
WALTER HART
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

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

Opinion**James J. Wechsler, Judge**

{1} Defendant Alree Sweat appeals his convictions of four counts of burglary of a vehicle, contrary to NMSA 1978, Section 30-16-3(B) (1971). Defendant's primary arguments on appeal are that the district court erred by admitting (1) "grainy" surveillance video footage, and (2) lay witness testimony identifying Defendant as the person pictured on the surveillance video. Defendant also argues that sufficient evidence does not support his convictions and that he was deprived of his constitutional right to a speedy trial.

{2} For the reasons discussed herein, we first hold that the surveillance video footage was relevant and not unfairly prejudicial to Defendant, making it admissible at trial. We additionally hold that the admission of lay witness testimony identifying Defendant as the person pictured on the surveillance video was not error under the circumstances of this case and that Defendant's sufficiency of the evidence and speedy trial arguments lack merit. We therefore affirm.

BACKGROUND

{3} On the morning of May 5, 2013, Las Cruces Police Department (LCPD) Officer

Sean Terry was dispatched to investigate a reported auto burglary at the Super 8 Motel. He was, however, rerouted by dispatch to the Mesilla Valley Hospital because the complainant had left the motel to go to work. He observed that the window of Theresa Graham's white Buick LeSabre (the LeSabre) was pried open and broken. Graham reported that additional evidence was located at the Super 8 Motel. Officer Terry proceeded to the Super 8 Motel, where he discovered a blue Toyota Sienna (the Sienna) with similar damage. Officer Terry photographed the damage to both vehicles. He also viewed surveillance video footage with the manager of the motel and requested a copy of the surveillance video footage from the relevant time period (the surveillance video).

{4} On May 6, 2013, LCPD Detective Michael Rickards received an email message that contained still images captured from the surveillance video. Detective Rickards recognized Defendant as the person pictured. Detective Rickards then viewed the surveillance video and noted that the person pictured was driving a dark-colored pickup truck. With this information, Detective Rickards began an investigation to determine whether Defendant owned or drove such a vehicle. As Detective Rickards

was driving to Defendant's last known address, he saw Defendant standing on the side of the road next to a disabled, dark-colored pickup truck. Detective Rickards obtained the registration information and determined that Defendant owned the vehicle.

{5} Given this information, Detective Rickards implemented a surveillance operation targeting Defendant. Officers stationed themselves at Defendant's house and observed that location until approximately 1:00 a.m.,¹ at which time Defendant left his house in a white Ford Mustang (the Mustang). Defendant drove through the city, ultimately parking at the Comfort Inn. New Mexico State Police Officer Daniel Lazos was assisting with the operation and positioned himself on the north side of the Comfort Inn. He saw Defendant in the northwest part of the parking lot banging on the door frame of a car. Officer Lazos then heard glass breaking, saw Defendant move to another vehicle, and heard more glass breaking. At this time, LCPD Officer Gary Pederson drove into the parking lot and parked his vehicle in close proximity to Defendant. Officer Pederson exited his vehicle and confronted Defendant, who dropped a backpack and fled on foot. Defendant ran directly toward Officer Lazos, but a rock wall separated the two. Defendant spoke to Officer Lazos as he ran by. While running away from Officer Lazos, Defendant passed directly in front of Detective Rickards' vehicle. Detective Rickards identified Defendant and yelled out for Defendant to stop running. The officers searched the area but did not find Defendant.

{6} Crime Scene Photographer and Technician Anthony Martin photographed damage to two vehicles at the Comfort Inn: a silver Toyota Prius (the Prius) and a grey Ford F-250 (the F-250). The Mustang remained at the Comfort Inn.

{7} After being apprehended, Defendant participated in a custodial interview with Detective Rickards, during which they discussed the current location of property missing from the vehicles at the Super 8 Motel. Defendant denied having possession of the property and stated that "I don't remember what I got [from the Super 8 Motel]" and that "Bobby did something with it[.]"

{8} At trial, the State introduced the surveillance video through the testimony of Super 8 Motel manager Dipesh Gandhi. Gandhi

¹ The next day, May 7, 2013.

testified that the surveillance video showed activity in the Super 8 Motel parking lot, including the “breaking of the vehicles” at issue in the case. Defendant objected to the admission of the surveillance video, claiming that, because it was “black-and-white” and “grainy,” the prejudicial effect outweighed the probative value. The district court overruled the objection.

{9} Numerous law enforcement officers testified about their specific involvement in the investigation or the surveillance operation targeting Defendant. During Detective Rickards’ testimony, the State played the surveillance video for the jury, including segments that showed (1) a dark-colored pickup truck pulling into and parking in the Super 8 Motel parking lot; (2) a person peering into the passenger side window of a white vehicle with a flashlight; and (3) a person forcibly entering the LeSabre and the Sienna. As the jury viewed the second segment, the following exchange took place:

[The State:] I’m going to draw your attention to [the portion of the surveillance video] starting with 2:20 [a.m.]. . . . Can you tell from that angle, or did you know who this [person pictured] was?

[Detective Rickards:] Not at this particular moment, no.

[The State:] Okay. Is this part of the video that you watched?

[Detective Rickards:] Yes, it is.

[The State:] When did you start to realize who you thought it was?

[Detective Rickards:] As soon as he came from the passenger side window to this position, I knew immediately it was [Defendant].

Detective Rickards’ testimony on this topic continued as follows:

[The State:] Do you know [Defendant]?

[Detective Rickards:] I do.

[The State:] Does he know you?

[Detective Rickards:] Yes, he does.

[The State:] Does he know you by name?

[Detective Rickards:] Yes, sir, he does.

[The State:] And you knew him before this incident by name?

[Detective Rickards:] Yes, I d[id].

[The State:] So the person you identified on the video, to you, how certain were you that that

was [Defendant]?

[Detective Rickards:] I was certain.

[The State:] How certain?

[Detective Rickards:] 100 percent.

Defendant did not object to either line of questioning. Detective Rickards also testified that Defendant’s physical appearance had changed substantially during the intervening year since the incident, stating specifically that Defendant “was much thinner back then.”

{10} The owner of the Sienna, Michael Henderson, and the driver of the F-250,² Sheridan Hankins, testified that they did not authorize any person to enter the vehicles. The owner of the LeSabre, Graham, and the owner of the Prius, Jay Warren, did not testify.

{11} Defendant moved for a directed verdict on two of the burglary of a vehicle charges at the close of the State’s case, arguing that the State had failed to prove that entries into the LeSabre and the Prius were unauthorized. The district court denied this motion. Defendant was convicted on all four charges. This appeal resulted.

ADMISSIBILITY OF THE SURVEILLANCE VIDEO

{12} Defendant asserts two arguments related to the admissibility of the surveillance video: (1) that the quality of the surveillance video was so poor that it lacked probative value, and (2) that the combined effect of the quality of the surveillance video and Detective Rickards’ testimony opining that Defendant was the person pictured resulted in unfair prejudice to Defendant. These arguments raise evidentiary issues, which we review for abuse of discretion. *State v. Downey*, 2008-NMSC-061, ¶ 24, 145 N.M. 232, 195 P.3d 1244. A district court abuses its discretion if “the evidentiary ruling is clearly contrary to logic and the facts and circumstances of the case.” *Id.* (internal quotation marks and citation omitted).

Probative Value of the Surveillance Video

{13} “Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence[.]” Rule 11-401(A) NMRA. To be relevant, a piece of evidence need not be conclusive as to a defendant’s guilt, particularly when viewed in isolation from other

evidence. *State v. Flores*, 2010-NMSC-002, ¶ 29, 147 N.M. 542, 226 P.3d 641. Instead, it need only have probative value from which a fact at issue may be determined. See *Black’s Law Dictionary* 1397 (10th ed. 2014) (defining “probative” as “[t]ending to prove or disprove”). The fact at issue in the present case is, of course, whether Defendant burglarized two vehicles in the parking lot of the Super 8 Motel during the early morning hours of May 5, 2013.

{14} In *State v. Gonzales*, this Court discussed the evidentiary value of “grainy” surveillance video footage in addressing the defendant’s sufficiency of the evidence argument. 2008-NMCA-146, ¶ 9, 145 N.M. 110, 194 P.3d 725. We held that the evidence was not “worthless,” because a fact-finder could discern probative information, including “body type[], clothing, hair style[]” and other features. *Id.*

{15} The surveillance video in the present case showed that a dark-colored pickup truck pulled into the parking lot of the Super 8 Motel at approximately 2:16 a.m. Approximately five minutes after the dark-colored pickup truck parked, the same camera angle showed a person (1) peering into the passenger-side window of a white vehicle with a flashlight, (2) walking to the dark-colored pickup truck, and (3) driving away. It also showed the person’s face, body type, clothing, and gait. Another camera angle recorded during the same time period showed a person (1) peering into the LeSabre and the Sienna with a flashlight, (2) forcibly entering those vehicles, and (3) removing items from the Sienna. The hat, shirt, and shorts worn by the person pictured in each camera angle appear identical.

{16} Defendant argues that admission of the surveillance video was error because its poor quality negated its “tendency to make the identification of the person in the video more or less probable.” Although identification may be the most obvious use of the surveillance video as evidence, Defendant’s argument does not address all the ways in which the surveillance video had probative value. In addition to showing the pictured person’s body type and gait—information from which a person familiar with the person pictured could make an identification—the surveillance video also showed the pictured person arriving and departing in a dark-colored pickup truck and removing items from the Sienna. Considering inferences to be

²The driver’s employer owned the F-250.

drawn from other admitted evidence—including Defendant’s ownership of a dark-colored pickup truck and Defendant’s statements to Detective Rickards related to the whereabouts of items removed from the Sienna—the content of the surveillance video is probative to a determination as to whether Defendant was the person pictured. The district court’s admission of the surveillance video was not, therefore, “clearly contrary to logic and the facts and circumstances of the case.” *Downey*, 2008-NMSC-061, ¶ 24 (internal quotation marks and citation omitted).

Substantial Risk of Unfair Prejudice

{17} Rule 11-403 NMRA provides, in pertinent part, that “[t]he [district] court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice[.]” Evidence is unfairly prejudicial if it has “an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one.” *State v. Stanley*, 2001-NMSC-037, ¶ 17, 131 N.M. 368, 37 P.3d 85 (internal quotation marks and citation omitted). Emotional bases include those “best characterized as sensational or shocking, provoking anger, inflaming passions, or arousing overwhelmingly sympathetic reactions, or provoking hostility or revulsion or punitive impulses, or appealing entirely to emotion against reason.” *Id.* (internal quotation marks and citation omitted).

{18} Defendant argues that the probative value of the surveillance video is outweighed by a substantial risk of unfair prejudice because Detective Rickards’ identification of Defendant as the person pictured “was the only evidence of identity for the charges related to the Super 8 Motel.” As discussed above, the evidence indicated that Defendant (1) owned a dark-colored pickup truck similar to the one pictured in the surveillance video, and (2) was previously in possession of items removed from the Sienna. The surveillance video is not, therefore, the only evidence related to Defendant’s involvement in the incident.

{19} Other than his assertion as to the nature of the evidence against him, Defendant has not articulated the manner in which the combined effect of the surveillance video and Detective Rickards’ testimony had “an undue tendency to suggest [a] decision on an improper basis[.]” *Id.* ¶ 17 (internal quotation marks and citation omitted); see *State v. Pitner*, 2016-NMCA-102, ¶ 13, 385 P.3d 665 (declining to review

unclear or undeveloped arguments). “The purpose of Rule 11-403 is not to guard against any prejudice whatsoever, but only against the danger of unfair prejudice.” *State v. Otto*, 2007-NMSC-012, ¶ 16, 141 N.M. 443, 157 P.3d 8 (alteration, internal quotation marks, and citation omitted). Because we discern no substantial risk of unfair prejudice, the district court’s admission of the surveillance video was not “clearly contrary to logic and the facts and circumstances of the case.” *Downey*, 2008-NMSC-061, ¶ 24 (internal quotation marks and citation omitted).

LAY WITNESS IDENTIFICATION OF A DEFENDANT ON SURVEILLANCE VIDEO

{20} Defendant next argues that the district court’s admission of testimony by Detective Rickards in which he identified Defendant as the person pictured in the surveillance video was reversible error. Defendant did not object to Detective Rickards’ testimony at trial. We therefore review for plain error. Plain error review applies to evidentiary issues not preserved at trial. Rule 11-103(E) NMRA. It only applies, however, if the allegedly erroneous testimony “affected the substantial rights of the accused” and “constituted an injustice that created grave doubts concerning the validity of the verdict.” *State v. Contreras*, 1995-NMSC-056, ¶ 23, 120 N.M. 486, 903 P.2d 228 (internal quotation marks and citation omitted).

{21} Photographic evidence, including surveillance videos, is admissible at trial under the “silent witness” theory. *State v. Imperial*, 2017-NMCA-040, ¶¶ 29, 31, ___ P.3d ___, cert. denied (No. 36,300, Mar. 9, 2017). The theoretical underpinning of the “silent witness” theory is that the photograph “speaks for itself[.] and is substantive evidence of what it portrays[.]” *State v. Henderson*, 1983-NMCA-094, ¶ 8, 100 N.M. 260, 669 P.2d 736. Defendant claims that—because the surveillance video speaks for itself—Detective Rickards’ testimony “invaded the province of the jury” by opining that Defendant was the person pictured rather than simply allowing the jury to view the surveillance video and draw its own conclusion. Defendant further argues that Detective Rickards’ testimony was not helpful in that it provided no basis for concluding that Detective Rickards was more likely to correctly identify Defendant from the surveillance video than the jury. These arguments raise issues of first impression in New Mexico, although this Court has

previously implied that a lay witness may give an opinion as to the identity of a person pictured on video. See, e.g., *State v. Dombos*, 2008-NMCA-035, ¶¶ 1, 5-6, 143 N.M. 668, 180 P.3d 675 (affirming the defendant’s conviction for criminal sexual penetration when the victim testified that the arm and sweater pictured on a video of the assault belonged to her husband).

{22} Rule 11-701 NMRA pertains to opinion testimony by lay witnesses and provides, in pertinent part, that “[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is . . . helpful . . . to determining a fact in issue[.]” See Rule 11-701(B). As recently stated by the Illinois Supreme Court in a factually similar case, “[l]ay opinion identification testimony is helpful to a determination of whether the individual depicted in a surveillance recording is the defendant where there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.” *People v. Thompson*, 2016 IL 118667, ¶ 41, 49 N.E.3d 393 (internal quotation marks and citation omitted). The *Thompson* court identified five factors that it deemed “relevant to a determination of whether a lay witness is more likely than the jury to identify the defendant correctly.” *Id.* ¶ 43. These factors are (1) “the witness’s general level of familiarity with the defendant’s appearance”; (2) “the witness’s familiarity with the defendant’s appearance at the time the surveillance photograph was taken or whether the defendant was dressed in a manner similar to the individual depicted”; (3) “whether the defendant disguised his [or her] appearance at the time of the offense”; (4) “whether the defendant had altered his [or her] appearance prior to trial”; and (5) “the degree of clarity of the surveillance recording and the quality and completeness of the subject’s depiction in the recording.” *Id.* ¶¶ 44, 46-48. The existence of even one of these factors “indicates [that] there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.” *Id.* ¶ 49 (internal quotation marks and citation omitted). We agree with the *Thompson* court’s approach and adopt it for our analysis of this case.

{23} In *Thompson*, the defendant was charged with procurement of anhydrous ammonia—a component of methamphetamine—in violation of state law. *Id.* ¶ 4. The theft was captured on surveillance video, which was played for the jury and

showed a white male with thinning hair carrying a bucket and hose while wearing a grey t-shirt and black, baggy pants. *Id.* ¶ 8. The Hamilton County Sheriff's Department created still images from the surveillance video and circulated those images among other law enforcement agencies. *Id.* ¶ 9. Officer Brian Huff of the Mt. Vernon Police Department viewed the still image and identified the defendant. *Id.* ¶ 23. Officer Huff testified at trial that despite the blurriness of the image, "he recognized [the] defendant because he 'had previous dealings with him.'" *Id.* Although the *Thompson* court applied "precautionary procedures" that rendered Officer Huff's testimony inadmissible,³ it concluded that Officer Huff's testimony was otherwise admissible because his previous interactions with the defendant rendered him "more likely to correctly identify [the] defendant than the jury." *Id.* ¶¶ 59, 65.

{24} Defendant does not argue that he is entitled to the precautionary procedures applied in *Thompson*. Instead, he argues simply that Detective Rickards' identification was not helpful to the jury and, therefore, the jury must draw its own conclusion from the surveillance video itself. This argument fails to consider the five *Thompson* factors. First, Defendant himself describes the quality of the surveillance video as "grainy" and of "poor quality." Second, with respect to his familiarity with Defendant, Detective Rickards testified that the two have had "countless interactions," including an incident in which they were involved in a traffic accident. Finally, with respect to alterations in Defendant's appearance, Detective Rickards testified that Defendant "was much thinner" at the time of the incidents. These considerations render admissible Detective Rickards' testimony opining that Defendant is the person pictured on the surveillance video. Because Detective Rickards' testimony was admissible under the circumstances, it does not constitute plain error as argued by Defendant.

SUFFICIENCY OF THE EVIDENCE

{25} Defendant additionally argues that sufficient evidence does not support his

convictions for burglary of a vehicle. He asserts this argument in three parts: (1) as to the incident at the Super 8 Motel, (2) as to the incident at the Comfort Inn, and (3) as to the LeSabre and the Prius.

{26} Our review of whether sufficient evidence supports a conviction is a two-step process. *Gonzales*, 2008-NMCA-146, ¶ 5. "[W]e view the evidence in the light most favorable to the verdict, and then we must make a legal determination of 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." *Id.* (internal quotation marks and citation omitted). This Court "may neither reweigh the evidence nor substitute [our] judgment for that of the jury." *State v. Sutphin*, 1988-NMSC-031, ¶ 23, 107 N.M. 126, 753 P.2d 1314. Furthermore, "[c]ontrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

The Super 8 Motel

{27} Defendant claims that the evidence at trial was not sufficient to support his convictions because: (1) the dark-colored pickup truck in the video did not belong to him; (2) the person pictured on the surveillance video was not him; and (3) the LCPD did not recover any stolen property. The first and second claims raise purely factual questions, which are beyond the scope of our review. See *Sutphin*, 1988-NMSC-031, ¶ 23 ("A reviewing court may neither reweigh the evidence nor substitute its judgment for that of the jury."). The third is a contrary evidence claim, which cannot form the basis of a reversal. See *Rojo*, 1999-NMSC-001, ¶ 19 ("Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts.").

{28} The surveillance video showed a dark-colored pickup truck enter the Super 8 Motel parking lot at approximately 2:16

a.m. It then showed a person—identified by Detective Rickards as Defendant—forcibly entering the LeSabre and the Sienna and removing items from the Sienna. When asked by Detective Rickards about the items taken from the Sienna during a custodial interview, Defendant responded "I don't remember what I got" and that "Bobby did something with it." Such evidence is sufficient to support Defendant's convictions with respect to the Super 8 Motel charges.

The Comfort Inn

{29} Defendant claims that the evidence at trial was not sufficient to support his convictions because: (1) he was at home in bed at the time of the incident and (2) he loaned the Mustang to a friend that evening. Both claims point to contrary evidence, which cannot form the basis of a reversal. See *id.* ¶ 19 ("Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts.").

{30} Officer Lazo testified that, after following Defendant to the Comfort Inn parking lot, he witnessed Defendant forcibly entering the F-250 and the Prius. Detective Rickards testified that Defendant abandoned the Mustang in the parking lot and fled the parking lot on foot, passing directly in front of Detective Rickards' vehicle. Such evidence is sufficient to support Defendant's convictions with respect to the Comfort Inn charges.

The LeSabre and the Prius

{31} Defendant additionally claims that the jury instructions as given placed a burden on the State to present evidence that proved ownership of the LeSabre for Count 1 and the Prius for Count 3. We disagree.

UJI 14-1630 NMRA provides, in pertinent part:

For you to find the defendant guilty of burglary [as charged in Count _____], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

³ In *Thompson*, the defendant argued, and the Illinois Supreme Court addressed, whether law enforcement officers should be prohibited from offering identification testimony based on prior interactions with criminal defendants because "a complete and uninhibited cross-examination regarding the witness's familiarity is not possible since questions could reveal information about the defendant's criminal past and unfairly cause the jury to focus on that." *Id.* ¶ 55. The *Thompson* court concluded that a defendant's ability to engage in "uninhibited cross-examination" is a question of trial tactics and, therefore, does not implicate a defendant's right to confront witnesses. *Id.* ¶¶ 55-56. However, it applied a set of "precautionary procedures" that require the trial court to (1) allow the defendant to examine the officer outside the presence of the jury, (2) limit the officer's testimony to how long he or she knew the defendant and how frequently they interacted, and (3) instruct the jury that it need not give any weight to the officer's testimony and should not draw any inferences from the fact that the witness is a law enforcement officer. *Id.* ¶ 59.

1. The defendant entered a [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] without authorization; [the least intrusion constitutes an entry.]

Id. (footnotes omitted). The district court modified UJI 14-1630 and instructed the jury as follows:

For you to find [D]efendant guilty of burglary as charged in Count 1, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [D]efendant entered a vehicle (2000 Buick La Sabre (sic)) owned by Theresa Graham without authorization; the least intrusion constitutes an entry[.] and

For you to find [D]efendant guilty of burglary as charged in Count 3, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [D]efendant entered a vehicle (2011 Toyota Prius) owned by Jay Warren without authorization; the least intrusion constitutes an entry[.]

{32} Although the jury instructions as given technically included ownership of the vehicles by specific persons as elements of the crimes, we have previously rejected the argument that the erroneous addition of a statutory element to a jury instruction creates an additional essential element under the applicable statute. *See State v. Carpenter*, 2016-NMCA-058, ¶ 15, 374 P.3d 744 (holding that “the sufficiency of the evidence should be assessed against the elements of the charged crime. If the jury instruction requires the jury to find guilt on those elements . . . the defendant has been accorded the procedure that this Court has required to protect the presumption

of innocence” (alterations, internal quotation marks, and citation omitted) (quoting *Musacchio v. United States*, ___ U.S. ___, 136 S. Ct. 709, 713, 715 (2016)).

{33} Although the erroneous addition in the present case was a factual rather than a statutory element, we find the analysis articulated in *Carpenter* persuasive. Section 30-16-3(B) prohibits the unauthorized entry of “any vehicle.” (Emphasis added.) Defendant “was properly charged with the statutory elements” of burglary, and the jury instructions gave Defendant “a meaningful opportunity to defend . . . against those charges[.]” *Carpenter*, 2016-NMCA-058, ¶ 16. The district court’s erroneous addition of the owners’ names to the jury instructions given did not, therefore, create an additional element to be proved beyond a reasonable doubt.

SPEEDY TRIAL

{34} Finally, Defendant argues that the delay between his indictment and his trial violated his constitutional right to a speedy trial. Although Defendant made a demand immediately after his indictment, he never asserted a violation of his right to a speedy trial prior to trial. This Court discussed such a circumstance in *State v. Valdez*, from which we quote liberally:

[The d]efendant also contends that he was denied his sixth amendment right to a speedy trial. Determination of whether a defendant has been denied his constitutional right to a speedy trial requires weighing four factors: length of the delay, reason for the delay, assertion of the right, and prejudice to the defendant. The principal stumbling block for [the] defendant is his failure to raise his constitutional claim in the district court.

....

Because [the] defendant did not raise the constitutional claim

until this appeal, there were no district court proceedings to develop fully the facts relating to the *Barker [v. Wingo]*, 407 U.S. 514 (1972)] factors, and the district court had no opportunity to weigh them. . . .

Although [the] defendants and their counsel are allowed considerable leeway in delaying their demand for a speedy trial before the trial court, the issue must be raised at some point. A complete failure to raise it in the trial court, as was the case here, precludes our consideration of the issue on appeal, for the simple reason that there is nothing to review. There is no decision of the district court weighing the factors considered and no record from which we could independently evaluate the government’s conduct.

1990-NMCA-018, ¶¶ 14-15, 109 N.M. 759, 790 P.2d 1040 (internal quotation marks and citations omitted). Our Supreme Court has similarly declined to consider speedy trial claims “absent a ruling by the district court.” *State v. Collier*, 2013-NMSC-015, ¶ 41, 301 P.3d 370. “If a defendant does not raise a constitutional speedy trial issue before the district court, there is nothing for an appellate court to review.” *Id.* Because Defendant did not invoke a ruling on the issue in the district court, we do not address his speedy trial argument.

CONCLUSION

{35} For the foregoing reasons, we affirm.

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

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

TIMOTHY L. GARCIA, Judge

Certiorari Denied, August 18, 2017, No. S-1-SC-36576

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-070

No. A-1-CA-33847 (filed June 28, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

GORDON LEONG,
Defendant-Appellant.**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

BRETT R. LOVELESS, District Judge

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for Appellant**Opinion****M. Monica Zamora, Judge**

{1} Gordon Leong (Defendant) was convicted of forgery (make or alter), contrary to NMSA 1978, Section 30-16-10(A) (1) (2006); forgery (issue or transfer), contrary to Section 30-16-10(A)(2); conspiracy to commit forgery (issue or transfer), contrary to NMSA 1978, Section 30-28-2(A) (1979); and making a false affidavit (perjury), contrary to NMSA 1978, Section 66-5-38 (1978), a fourth degree felony pursuant to NMSA 1978, Section 30-25-1(B) (2009). On appeal, Defendant raises four issues: (1) whether admission of an affidavit of residency with an affixed photocopy of Defendant's driver's license was in error when the driver's license photograph and the signature on the affidavit were not properly authenticated; (2) whether Defendant's act of signing his name on an affidavit of residency, which contained a false statement, constituted forgery (make or alter); (3) whether the district court erred in failing to include the specific language, "knowing it to be a false writing" in the instruction for forgery (issue or transfer); and (4) whether it was error to admit testimony on the conspiracy charge from two witnesses whose statements were not in furtherance of a

conspiracy. We reverse in part and affirm in part.

I. BACKGROUND

{2} Defendant was charged with 386 counts relating to driver's license applications with the Motor Vehicle Department (MVD), and ultimately tried on 74 of those counts. The jury convicted Defendant of one count each of: (1) forgery (make or alter), (2) forgery (issue or transfer), (3) conspiracy to commit forgery (issue or transfer), and (4) perjury. All four convictions were based on events that occurred on February 16, 2010, and involved an MVD form titled "Affidavit of New Mexico Residency [(the Affidavit)] by a Relative, Friend, Employer or Other," signed by Defendant and which included a photocopy of Defendant's driver's license in the top right corner of the affidavit, in connection with the driver's license application of Tian F. Guo.

{3} On January 21, 2010, Defendant signed the Affidavit asserting that he was Guo's friend and that Guo lived with him at the Warren House Apartments at 7601 Lomas Boulevard Northeast, Apartment 69. The Affidavit included a copy of Defendant's driver's license. By submitting the Affidavit, Defendant was verifying that Guo was a New Mexico resident. Defendant provided the Affidavit to

MVD thereby allowing Guo to obtain a New Mexico driver's license. MVD issued a driver's license for Guo based, in part, on this affidavit of residency. The onsite manager for the apartments testified that she executed a lease with Defendant and that Defendant was the only one allowed to live in that apartment between August 2009 and April 2010. At sentencing, the district court merged the convictions for forgery (make or alter) and perjury.

II. DISCUSSION**A. The Affidavit**

{4} Defendant claims error in the admission of the Affidavit, arguing that it was not properly authenticated under Rule 11-901 NMRA. "We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse." *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72.

{5} When authenticating an item of evidence, Rule 11-901(A) requires sufficient evidence be presented to show that the item is what the proponent claims it to be. Rule 11-901 provides various examples of what would be necessary to satisfy the requirement of authentication of evidence. Under Rule 11-901, sufficient evidence for authentication of a document can be provided by presenting the "[t]estimony of a [person] with knowledge[.]" by submitting evidence that the document is filed in a public office as authorized by law, or by submitting evidence that the document is "a purported public record or statement . . . from the office where items of this kind are kept." Rule 11-901(B)(1), (7)(b).

{6} The State presented testimony from Mark Lucero, a manager with MVD with fifteen years of experience. Lucero testified that the Affidavit was the type of document that is kept in the regular course of business at MVD. Defense counsel attempted to elicit testimony from Lucero that copying a driver's license was not a typical practice with MVD. In response, Lucero testified that affidavits from different offices may or may not include a copy of a license because MVD offices have different policies and procedures, but it was his belief that an agent would have verified an affiant's driver's license in some manner. Lucero explained that when a person signs an affidavit of residency for another, as in this case, the MVD employee would ask for a driver's license or other form of identification for verification. A copy of the identification document would be made, and some agents would keep the copy

separate from the affidavit, while other agents would put them together. Lucero agreed that an agent would “essentially card the person” who is vouching for a driver’s license applicant. The district court found that Lucero had knowledge about the practices and procedures of MVD and that he provided testimony that a driver’s license copy is made when one person is vouching for the residency of another.

{7} Defendant argues that the State should have done more to properly authenticate the Affidavit, including having an expert compare signatures and conducting a handwriting analysis. Defendant argues that Lucero worked in only one office and did not have sufficient knowledge of procedures at other MVD offices. As the State points out, however, Lucero processed 5,000 or more applications for foreign nationals, and he had personally assisted Defendant in dealing with other driver’s license applications for foreign nationals. Lucero testified that whether or not a copy of a driver’s license was attached or separate, a driver’s license copy would be made of the person vouching for the applicant. {8} Lucero’s testimony established that he was a “person with knowledge” of the policies and procedures at MVD and that the Affidavit was a record from an MVD office in which documents such as the Affidavit are kept. Lucero’s testimony was sufficient to lay a foundation that the document was what it was purported to be. We hold that the district court did not abuse its discretion in allowing admission of the Affidavit.

B. Forgery

{9} The main issue in this case is whether entering false information into a genuine affidavit amounts to forgery—in other words, whether forgery is committed when a defendant lies about a fact to which they are attesting in an affidavit. In the Affidavit, completed and signed by Defendant under penalty of perjury, Defendant declared that he was a friend of Guo and that Guo lived at 7601 Lomas Boulevard Northeast, Apartment 69 in Albuquerque, New Mexico. Defendant, the affiant, produced his driver’s license, a copy of which was made and attached to the Affidavit. Guo did not, in fact, live at the address as attested to by Defendant in the Affidavit. The Affidavit was the basis for Defendant’s convictions for forgery (make or alter) and forgery (issue or transfer).

{10} On appeal, the parties are in disagreement as to whether or not the Affidavit falls under our forgery statute. This raises an issue of statutory interpretation,

which we review de novo. *See State v. Herrera*, 2001-NMCA-007, ¶ 6, 130 N.M. 85, 18 P.3d 326. “Our primary goal when interpreting statutory language is to give effect to the intent of the [L]egislature.” *State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284. “We do this by giving effect to the plain meaning of the words of [the] statute, unless this leads to an absurd or unreasonable result.” *State v. Marshall*, 2004-NMCA-104, ¶ 7, 136 N.M. 240, 96 P.3d 801; *see* NMSA 1978, § 12-2A-2 (1997) (“Unless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar and common usage.”). {11} “Forgery consists of: (1) falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud; or (2) knowingly issuing or transferring a forged writing with intent to injure or defraud.” NMSA 1978, § 30-16-10 (2006). “Forgery has been defined as a crime aimed primarily at safeguarding confidence in the genuineness of documents relied upon in commercial and business activity. Though a forgery, like false pretenses, requires a lie, it must be a lie about the document itself: the lie must relate to the genuineness of the document.” *State v. Baca*, 1997-NMSC-018, ¶ 5, 123 N.M. 124, 934 P.2d 1053.

{12} According to Defendant, his conduct in including false information in a sworn affidavit could only have supported a charge of perjury and not forgery. In 1906 our Supreme Court discussed the difference between the crime of forgery and the crime of perjury in a case involving a defendant who was indicted under a law similar to our current forgery statute. *See Territory v. Gutierrez*, 1906-NMSC-003, ¶ 8, 13 N.M. 312, 84 P. 525. In *Gutierrez*, the defendant, a notary public, made a certificate of acknowledgment of a written instrument, which contained false information. *See id.* ¶ 4. The applicable law in that case prohibited any person from falsely making, altering, forging, or counterfeiting any public record or certificate with intent to injure or defraud any person. *Id.* ¶ 3. The Court, referring to a variety of sources, determined that a forgery statute punishes those who falsely make an affidavit, whereas a perjury statute punishes those who make and certify a false affidavit. *See id.* ¶¶ 8-9. Thus, if a person includes false statements in an affidavit that the person signs under oath, that person has made and certified a false

affidavit, which cannot be the basis for a forgery conviction.

{13} The discussion in *Gutierrez* is in accordance with authorities from other jurisdictions. In *Martenev v. United States*, 216 F.2d 760, 763 (10th Cir. 1954), the Tenth Circuit Court of Appeals held that the word “falsely” when applied to the making or altering of a writing in support of a charge of forgery does not refer to the contents of the writing or to the falsity of that content, but pertains to the genuineness of the writing itself. As stated by the United States Supreme Court in *Gilbert v. United States*, 370 U.S. 650, 658 (1962), where the “falsity” is found in the rendition of the facts, there is no forgery. Thus, when it is intended that a document that contains blank spaces be filled in, such as the MVD affidavit in this case, filling in those blanks is not considered an alteration. *See* 4 Am. Jur. 2d *Alteration of Instruments* § 37, at 25 (1995); *see also Lucero-Carrera v. Holder*, 349 F. App’x 260, 263 (10th Cir. 2009) (defining “forgery” at common-law as false making of a document that is not what it purports to be, as opposed to a document that is genuine but contains false representations); *United States v. Barber*, 39 F.3d 285, 289 (10th Cir. 1994) (determining that the defendant committed forgery when he created false court documents and signed the judge’s name on them before presenting them to another with the intent to deceive); *United States v. Glasener*, 81 F. 566, 568 (S.D. Cal. 1897) (stating that one may falsely make an affidavit in which every sentence is true; or may make an affidavit in which every sentence is false but only the false making of an affidavit constitutes forgery); *De Rose v. People*, 171 P. 359, 360 (Colo. 1918) (clarifying that to “falsely make” a writing refers to the paper itself being falsely made and not to the truth of the statements contained in the writing; a false statement in a writing that is genuine, “by which another person is deceived,” is not forgery); *Reese v. State*, 378 A.2d 4, 7 (Md. Ct. Spec. App. 1977) (distinguishing between false contents in a genuine document and false making of a spurious document and noting that no amount of false information or statements will make a genuine instrument into a false instrument); *Ford v. State*, 2011 WY 122, ¶ 16, 259 P.3d 1178, 1184 (Wyo. 2011) (referring to the Model Penal Code commentary on forgery, which explains that “[t]he prohibited conduct is drafted so as to focus the offense upon falsity as to genuineness or

authenticity, rather than upon the falsity of any statement contained in a legitimate document” (emphasis, internal quotation marks, and citation omitted)).

{14} The State claims that *Gutierrez* was distinguished in *State v. Cowley*, 1968-NMCA-011, 79 N.M. 49, 439 P.2d 567. The State also claims that the Affidavit in this case was merely a form and not an “official certificate.” We agree that this Court in *Cowley*, a case involving the physical alteration of a genuine credit card invoice, distinguished the facts of that case from those in *Gutierrez*, a case involving a notary public inserting false statements into a genuine certificate of acknowledgment. See *Cowley*, 1968-NMCA-011, ¶¶ 3-4, 10. However, *Cowley* did not overturn *Gutierrez* and is not applicable under the facts of this case. As noted in *Gutierrez* and supported by a multitude of out-of-state legal authority, when a genuine document or writing contains false information, there is no basis for a charge of forgery. See 1906-NMSC-003, ¶ 8.

{15} Defendant claims that the evidence was insufficient to support his convictions. “The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.” *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). We view the evidence in the light most favorable to the verdict, and we indulge all inferences and resolve all conflicts in the evidence in favor of the verdict. See *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176.

{16} Having established the legal requirement of the statute, we turn to Defendant’s argument that the evidence was insufficient to support his convictions. Defendant did not make or manufacture a false document. Instead, he used a genuine MVD affidavit form and signed it with his actual name. The only portion of the Affidavit that was false was the information that Defendant inserted into the affidavit form. Based on our discussion, we hold that there was insufficient evidence to support Defendant’s conviction for forgery (make or alter). We therefore reverse Defendant’s conviction.

{17} We note that, for the charge of forgery (make or alter), the jury was instructed that Defendant “made a false endorsement to a writing.” The jury instructions did not include any reference to “falsely making or altering,” which is the focus of the arguments made on appeal and is the language from the forgery statute. See § 30-28-10(A)(1). Our Supreme Court, in discussing different interpretations of the forgery statute, noted that a writing signed with a defendant’s genuine signature is not a false endorsement and cannot support a conviction of forgery. See *State v. Carbajal*, 2002-NMSC-019, ¶ 7, 132 N.M. 326, 48 P.3d 64. Therefore, to the extent Defendant’s forgery conviction was based on the claimed false endorsement, it cannot stand.

{18} The State also relied on the Affidavit to support Defendant’s conviction for forgery (issue or transfer). For the reasons discussed, we hold that there was also insufficient evidence to support the forgery (issue or transfer) conviction, and we reverse that conviction as well.

C. Conspiracy to Commit Forgery

{19} Defendant was convicted of conspiracy to commit forgery for providing Guo with an affidavit of residency containing false information. “Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state.” NMSA 1978, § 30-28-2(A) (1979). Defendant bases his objection to the conviction on the admission of statements made by his alleged co-conspirators, Alex Cheung and Tim Cheung (the Cheungs). The State contends that the conspiracy conviction was “with regard to his forgery (issue or transfer) with . . . Guo,” not the Cheungs. Forgery (issue or transfer) consists of “knowingly issuing or transferring a forged writing with intent to injure or defraud.” Section 30-16-10(A)(2). To the extent that Guo and Defendant conspired to commit any act, it was to commit the act of issuing or transferring an affidavit that contained false information in order to obtain a license for Guo. As is clear from our preceding discussion, they did not conspire to issue or transfer a forged affidavit for that purpose. Therefore, Defendant’s conspiracy conviction, as charged and prosecuted by the State cannot stand. *State v. Foulenfont*, 1995-NMCA-028, ¶¶ 1, 11-12,

119 N.M. 788, 895 P.2d 1329 (upholding a dismissal of burglary and conspiracy to commit burglary charges where, as a matter of law, the defendant did not commit burglary).

D. Perjury

{20} Defendant was convicted of “making false affidavit perjury” under the Motor Vehicle Code. NMSA 1978, § 66-5-38 (1978). The only attack Defendant makes with respect to this conviction is an implied one. By arguing that the Affidavit should not have been admitted, Defendant appears to be attacking the validity of his perjury conviction. As discussed in this opinion, we have determined that the Affidavit was properly admitted. Therefore, Defendant’s perjury conviction is supported by the evidence.

{21} The State points out that the district court merged Defendant’s convictions for perjury and forgery for purposes of sentencing and argues that if the forgery conviction is reversed this Court has the authority to remand “for entry of judgment on the lesser included offense” of perjury. Remand for entry of judgment is not necessary because the perjury conviction, which was merged with the conviction for forgery was not vacated when the convictions were merged solely for sentencing. Both offenses are fourth degree felonies. See §§ 30-25-1(B), 30-16-10(B); *Ball v. United States*, 470 U.S. 856, 864-65 (1985) (recognizing that merging a conviction for sentencing purposes does not vacate the merged conviction or the collateral consequences that result from a conviction). Because Defendant has already been convicted of perjury, we remand solely for resentencing on that count.

III. CONCLUSION

{22} For the foregoing reasons, we reverse Defendant’s convictions for forgery (make or alter), forgery (issue or transfer), and conspiracy to commit forgery (issue or transfer). We affirm Defendant’s conviction for perjury. We remand to the district court for resentencing consistent with this opinion.

{23} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

JONATHAN B. SUTIN, Judge

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Joel joined our firm in September. He earned his J.D. from Brooklyn Law School in 2012, and an LL.M in Bankruptcy Studies from St. John's University School of Law. Joel, born and raised in New Mexico, recently relocated back to Albuquerque after practicing bankruptcy law in New York for the past four years. Joel will focus on business reorganizations, collections and business disputes.



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For more advertising information, contact:
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New Mexico Ethics Watch (nmethicswatch.org) is seeking to hire an Executive Director. NMEW is a non-partisan organization founded in 2016 dedicated to promoting ethics and accountability in government and public life. NMEW advances its mission through research, litigation, policy advocacy, and media outreach. The Executive Director of NMEW is responsible for managing all of the affairs of the organization, including day-to-day matters, long term strategic planning, and fundraising. Virtually all matters involving NMEW require the Executive Director's control or input. The Executive Director must demonstrate a wide variety of skills and the ability to multitask. The ideal candidate shall have significant experience with and knowledge of the interaction between statutes concerning government ethics, ethical codes of conduct, and the role of government agencies overseeing ethical conduct in New Mexico. Experience with nonprofit management, fundraising, and development is a plus. Excellent research, writing, and communications skills are a must. To apply, please send a resume and cover letter to contact@nmethicswatch.org.

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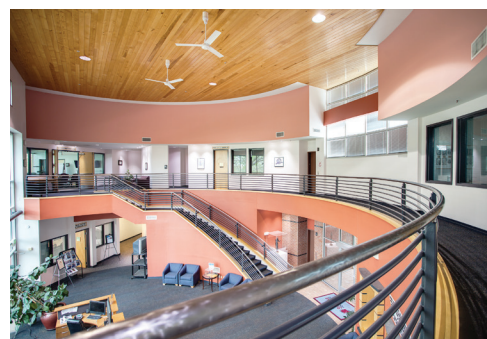
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