Official Publication of the State Bar of New Mexico

Bar Bulletin

February 21, 2018 • Volume 57, No. 8

Cabezon Wilderness, by Richard Prather

InArt Gallery, Santa Fe

Inside This Issue

—SPECIAL INSERT—
YLD In Brief

132ND BIRTHDAY Celebration

You're Invited!

The State Bar is proud of the tremendous dedication and service that our membership has given to the legal profession and the public. We hope you will join us for this important celebration.

State Bar President Wesley O. Pool and Chief Justice Judith K. Nakamura will honor attorneys celebrating 25 and 50 years of service.

Distinguished guests from the New Mexico Supreme Court, New Mexico Court of Appeals and the UNM School of Law have been invited to attend. Participants in Entrepreneurs in Community Lawyering, the State Bar's legal incubator program, will be in attendance to meet members of the State Bar, share the developments of ECL and discuss the launch of their solo practices.

Friday, Feb. 23

Ceremony at 4 p.m. • Reception to follow

State Bar Center, 5121 Masthead NE, Albuquerque

STATE BAR of NEW MEXICO

Visit **www.nmbar.org/BirthdayParty** to R.S.V.P.
Direct questions to Breanna Henley at bhenley@nmbar.org

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address@nmbar.org • www.nmbar.org

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27
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Bosque Farms Community Center,
Bosque Farms, 1-800-876-6657

28
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque,
505-797-6094

March

7
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6–8 p.m., State Bar Center, Albuquerque,
505-797-6022

9
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10 a.m.–1 p.m.,
Bernalillo County Metropolitan Court,
Albuquerque, 505-841-9817

About Cover Image and Artist: Richard Prather creates atmospheric landscapes. The challenge to capture the subtle nuances of shadow and light drives his pursuit in painting the canyons and mountains of the Southwest. Prather is largely self-taught having started painting in the late 70s while in college. In addition to more than 30 years of studying and painting on his own, he credits the many workshops from some of the very best plein air artists working today with having the largest impact on the quality of his work. Prather is a signature member of the Oil Painters of America, The Plein Air Painters of New Mexico and the Outdoor Painters Society. After a career as a life scientist the Environmental Protection Agency, Prather and his wife Sharla moved to Placitas where they currently reside with their two dogs Belle and Louie. To view more of his work, visit www.richardprather.com.

Notices

Court News

New Mexico Supreme Court Compilation Commission

Official 2018 New Mexico Rules Annotated Now Available

The *Official 2018 New Mexico Rules Annotated* three-volume set is now available exclusively from the New Mexico Compilation Commission. The 2018 edition contains the complete library of annotated court rules governing practice in the New Mexico courts, local rules, forms and jury instructions, including the 212 new and amended rules effective through 1/15/18. Order a set now for $90, plus shipping and tax, by calling the Compilation Commission at 505-827-4821 or Conway Greene at 866-240-6550.

Judicial Standards Commission

Seeking Commentary on Proposed Amended Rules

The Commission has completed a comprehensive review and revision of its procedural rules. Commentary on the proposed amendments is requested from the bench, bar and public. To be fully considered by the Commission, comments must be received by March 16 and may be sent either by email to rules@nmjsc.org or by mail to Judicial Standards Commission, PO Box 27248, Albuquerque, NM 87125-7248. To download a copy of the proposed amended rules, visit nmjsc.org/recent-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.

Professionalism Tip

In all matters: "My Word is My Bond."

First Judicial District Court

Notice of Judge Assignment

Pro Tem Judge Sarah M. Singleton has been assigned to preside over criminal cases assigned to Division 5 from Feb. 26–May 25 or until a newly assigned judge takes office, whichever occurs first. This assignment is in the interest of judicial efficiency, pursuant to NMSC Rule 23-109, the chief judge rule. This reassignment is effective upon Judge Attrep vacating her position from Division 5 and is under the terms agreed to by Judge Singleton and the First Judicial District Court.

Second Judicial District Court

Destruction of Tapes

Pursuant to the judicial records retention and disposition schedules, the Second Judicial District Court will destroy tapes of proceedings associated with the following civil and criminal cases:

1. d-202-CV-1992-00001 through d-202-CV-1992-11403
2. d-202-CV-1993-00001 through d-202-CV-1993-11714
3. d-202-CV-1994-00001 through d-202-CV-1994-10849
4. d-202-CV-1995-00001 through d-202-CV-1995-11431
5. d-202-CV-1996-00001 through d-202-CV-1996-12005
6. d-202-CV-1997-00001 through d-202-CV-1997-12024
7. d-202-CR-1983-36058 through d-202-CR-1983-37557
8. d-202-CR-1984-37558 through d-202-CR-1984-39151
9. d-202-CR-1985-39152 through d-202-CR-1985-40950
10. d-202-CR-1986-40951 through d-202-CR-1986-42576

Attorneys who have cases with proceedings on tape and wish to have duplicates made should verify tape information with the Special Services Division 505-841-7401 from 10 a.m.–2 p.m., Monday through Friday. Aforementioned tapes will be destroyed after March 31.

Third Judicial District Court

Notice of Right to Excuse Judge

On Feb. 9, Gov. Susana Martinez appointed Jeanne Quintero to fill the vacant position in Division VIII of the Third Judicial District Court. Effective Feb. 26, all pending domestic relations and domestic violence cases previously assigned to the Honorable Conrad Perea, District Judge, Division III, shall be reassigned to Honorable Jeanne Quintero. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days from March 14 to excuse Judge Quintero.

U.S. District Court for the District of New Mexico

Proposed Amendments to Local Rules of Criminal Procedure

Proposed amendments to the Local Rules of Criminal Procedure of the U.S. District Court for the District of New Mexico are being considered. The proposed amendments are to D.N.M.LR-Cr. 47.8, Timing and Restrictions on Responses and Replies. A redlined version (with proposed additions underlined and proposed deletions stricken out) and a clean version of these proposed amendments are posted on the Court's website at www.nmd.uscourts.gov. Members of the bar may submit comments by email to localrules@nmcourt.fed.us or by mail to U.S. District Court, Clerk's Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, Attn: Local Rules, no later than March 12, 2018.

U.S. Magistrate Judge Vacancy

The Judicial Conference of the U.S. has authorized the appointment of a part-time U.S. Magistrate Judge for the District of New Mexico at Roswell, N.M. This authorization is contingent upon the appointment of incumbent Magistrate Judge Joel Carson as a circuit judge to the U.S. Tenth Circuit Court of Appeals. The current annual salary of the position is $48,195 (potentially increasing to $56,607 on April 1 pending final approval by the Judicial Conference of the U.S.), commensurate with the annual caseload for this position. The term of office is four years. The U.S. Magistrate Judge Application form and the full public notice with application instructions are available from the Court's

website at www.nmd.uscourts.gov or by calling 575-528-1439. Applications must be submitted no later than April 3.

State Bar News

Attorney Support Groups

- March 5, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- March 12, 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 available. Dial 1-866-640-4044 and enter code 7976003#.
  March 19, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is 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.

Alternative Methods of Dispute Resolution Committee

Call for Articles for ADR Issue of *New Mexico Lawyer*

The ADR Committee seeks articles relating to the theme of the 2018 ADR Institute: "ADR Across the Spectrum" for publication in the July issue of the New Mexico Lawyer, a insert in the *Bar Bulletin* focused on a specific area of law, published four times a year. Abstracts should be at least 300 words and should be submitted to Mary Jo Lujan at maryjo.lujan@state.nm.us by March 9. The Committee will choose the abstracts and contact the authors following the submission deadline. Articles for the *New Mexico Lawyer* are approximately 1,500 words.

Animal Law Section

Animal Talk: Tethering

During the 2007 Legislative Session, the New Mexico House of Representatives issued House Memorial 19 which requested that the Department of Public Safety study the public safety and humane implications of persistently tethering dogs. Join the Animal Law Section at noon, March 2, at the State Bar Center for an Animal Talk covering an overview of a 2008 report that was produced by DPS to the Consumer and Public Affairs Committee as a result of House Memorial 19, current statutes and ordonnances in N.M. addressing tethering and a comparison of N.M. laws to other states, and efforts in community education on dog behavior, outreach and alternatives to tethering.

Appellate Practice Section

Luncheon with New Appellate Mediator

Join the Appellate Practice Section for a brown bag lunch at noon, March 2, at the State Bar Center with guest Bonnie Stepleton, appellate mediator for the New Mexico Court of Appeals. The lunch is informal and is intended to create an opportunity for appellate practitioners to learn more about the work of the Court. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. to Carmela Starace at cstarace@icloud.com.

Board of Editors

Call for Articles for Criminal Law Issue of *New Mexico Lawyer*

The *New Mexico Lawyer* is published four times a year and each issue focuses on a specific area of law. The Board of Editors has chosen criminal law as the topic of the next issue of the *New Mexico Lawyer*, to be published in May. The Board seeks abstracts for articles that address criminal law issues in New Mexico. Abstracts should be at least 300 words. Abstract submissions must include the abstract, the author's full name and address and a brief biography of the author. The deadline for submissions is Feb. 23. Send submissions to Director of Communications Evann Kleinschmidt at ekleinschmidt@nmbar.org. The Board of Editors will choose the abstracts and notify authors in March. Articles for the *New Mexico Lawyer* are approximately 1,500 words. For more information about the publication or the call for abstract submissions, visit www.nmbar.org/NewMexicoLawyer or contact Evann.

Seeking Applications for Open Positions

The State Bar Board of Editors has open positions. The Board of Editors meets at least four times a year to review articles submitted to the *Bar Bulletin* and the *New Mexico Lawyer*. This volunteer board reviews submissions for suitability, edits for legal content and works with authors as needed to develop topics or address other concerns. The Board is also responsible for planning for the future of the State Bar's publications. The Board of Editors should represent a diversity of backgrounds, ages, geographic regions of the state, ethnicity, gender and areas of legal practice and preferably have some experience in journalism or legal publications. The State Bar president, with the approval of the Board of Bar Commissioners, appoints members of the Board of Editors, often on the recommendation of the current Board. Those interested in being considered for a two-year term should send a letter of interest and résumé to Director of Communications Evann Kleinschmidt at ekleinschmidt@nmbar.org. Apply by Feb. 23.

Young Lawyers Division

Address Changes

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

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

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

UNMSOL Summer Fellowship Open Now

The YLD offers two $3,000 summer fellowships to UNM School of Law students who are interested in working in public interest law or the government sector. The fellowship awards are intended to provide the opportunity for law students to work for public interest entities or in the government sector in an unpaid position. To be eligible, applicants must be a current law student in good standing. Applications for the fellowship must include: 1) a letter of interest that details the student's interest in public interest law or the government sector; 2) a résumé; and 3) a written offer of employment for an unpaid legal position in public interest law or the government sector for the summer. Applications containing offers of employment that are contingent upon the successful completion of a background check will not be considered unless verification of the successful completion of the background check is also provided. Email applications to Breanna Henley at bhenley@nmbar.org by 5 p.m., March 23 for consideration.

UNM School of Law

Law Library Hours

Through May 12

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.

Free CLE: Balancing the Scales

State Bar members and UNM law students are invited to attend a screening of the documentary "Balancing the Scales" followed by a moderated discussion with New Mexico attorney and executive coach Elizabeth Phillips from 5-7:30 p.m., March 1, at the UNM School of Law. The documentary delves into the challenges women lawyers have faced historically and still face today, including the additional hurdles faced by women lawyers of color, and illustrates how U.S. culture has accepted less than full equality for women and how few women lawyers have really broken the glass ceiling. Explore how the intersectionality of gender and race creates additional challenges and what impact we can have on the profession. Dinner will be served beginning at 5 p.m. and the program begins at 5:30 p.m. This program has been approved by MCLE for 2.0 EP, sponsored by the UNM School of Law. Dinner is provided by the Committee on Women and the Legal Profession and the UNMSOL Women's Law Caucus. Special thank you to New Mexico PBS for supplying a copy of the film and permitting this special showing. R.S.V.P. to Laura Castille at lcastille@cuddymccarthy.com by Feb. 28.

The Board Governing the Recording of Judicial Proceedings
A Board of the Supreme Court of New Mexico

Expired Court Reporter Certifications

The following list includes the names and certification numbers of those court reporters whose New Mexico certifications expired as of Dec. 31, 2017.

Name	CCR CCM No.	City, State
Castaneda, Amber	8	Chino, Calif.
Clark, Karen	277	Marana, Ariz.
Cortez, Melissa	5	Rio Rancho, N.M.
Drum, Amy	49	Albuquerque, N.M.
Farrell, Joanne M.	507	Petaluma, Calif.
Ford, Janet	25	Silver City, N.M.
Kornegay, Danna	515	Garland, Texas
Rinaudo, Kelli Ann	512	Pacific Grove, Calif.
Rose, Shannon	117	Las Vegas, Nevada
Valenzuela, Margaret	96	El Paso, Texas
Walker, Madelyn	15	Quemado, N.M.

Other Bars

Albuquerque Lawyers Club

David Campbell to Speak at March Luncheon

The Albuquerque Lawyers Club invites members of the legal community to its March 7 meeting and luncheon. David Campbell, director of the Albuquerque Planning Department, is the featured speaker and will discuss "Enchanted Homecoming: A Retired Diplomat and Lawyer Looks at Albuquerque." Judge Nan Nash will introduce Campbell. The lunch meeting will be held at noon, March 7, at Seasons Restaurant, located at 2031 Mountain Road, NW, Albuquerque. The event is free to members, $30 non-members in advance and $35 at the door. For more information, e-mail ydennig@yahoo.com or call 505-844-3558.

American Bar Association

Section of Litigation Appellate Practice Regional Meeting 2018: Colorado

The American Bar Association Section of Litigation presents "Appellate Practice Regional Meeting 2018: Colorado at the U.S. Supreme Court with Solicitor General Fed Yarger" on March 6 in Denver. Registration is $55 for section members, $120 for non-section members and $25 for government attorneys and students. Visit http://ambar.org/ltappellate for more information or to register.

New Mexico Criminal Defense Lawyers Association

Free Federal Practice CLE

Jeff Carson, retired operations manager for the Bureau of Prisons, returns to NMCDLA's "Prisons, Pimps and Prejudices: Federal Practice CLE" (6.0 G) on Feb. 23 in Albuquerque to give attorneys the inside scoop on everything to know about the BOP. Also on` the agenda for this seminar is sex trafficking 101, the DOJ and the new war on drugs, implicit bias and a federal case law update. Visit www.nmcdla.org to register and renew membership dues for 2018.

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For more information, contact Stormy Ralstin, sralstin@nmbar.org or 505-797-6050.

Legal Education

February

21 **Sophisticated Choice of Entity, Part II**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Drafting Waivers of Conflicts of Interests**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct (2017)**
1.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **The Ethics of Lawyer Advertisements Using Social Media (2017)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **2017 Family Law Institute Day 1**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

March

1 **Introduction to the Practice of Law in New Mexico (Reciprocity)**
4.5 G, 2.5 EP
Live Seminar, Albuquerque
New Mexico Board of Bar Examiners
www.nmexam.org

1 **Service Level Agreements in Technology Contracting**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

2-4 **Taking and Defending Depositions (Part 1of 2)**
31.0 G, 4.5 EP
Live Seminar,
Albuquerque
UNM School of Law
goto.unm.edu/despositions

6 **Successor Liability in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

7 **Family Feuds in Trusts: How to Anticipate & Avoid**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Drafting Professional and Personal Services Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **33rd Annual Bankruptcy Year in Review Seminar**
6.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **Fiduciary Duties in Closely-held Companies: What Owners Owe the Business & Other Owners**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Role of LLCs in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Current Immigration Issues for the Criminal Defense Attorney (2017 Immigration Law Institute)**
5.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Civility and Professionalism (2017 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **New Mexico Liquor Law for 2017 and Beyond (2017)**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **2017 Appellate Practice Institute**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct (2017)**
1.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **2017 Mock Meeting of the Ethics Advisory Committe**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **How to Practice Series: Probate and Non-Probate Transfers**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23-25 **Taking and Defending Depositions (Part 2 of 2)**
31.0 G, 4.5 EP
Live Seminar,
Albuquerque
UNM School of Law
goto.unm.edu/despositions

26 **Trial Know-How! (The Rush to Judgment- 2017 Trial Practice Section Annual Institute)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Legal Malpractice Potpourri (2017)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Conflicts of Interest (2017 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Federal and State Tax Updates (2017 Tax Symposium)**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Lawyer Ethics When Clients Won't Pay Fees**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Structuring For-Profit/Non-Profit Joint Ventures**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Cybersluth: Conducting Effective Internet Research (2017)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **The Ethics of Using Lawyer Advertisements Using Social Media (2017)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

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

28 **Everything You Need to Know About Breastfeeding Law: Rights and Accommodations**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Convincing the Jury: Trial Presentation Methods and Issue**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Abuse and Neglect Case in Children's Court**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **What's the Dirtiest Word in Ethics?**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

April

3 **Drafting Employment Agreements, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

4 **Drafting Employment Agreements, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Business Law Institute**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Health Law Symposium**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

Opinions

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

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

Effective February 9, 2018

PUBLISHED OPINIONS

A-1-CA-35001	A Morga v. Fedex Ground	Affirm	02/06/2018
A-1-CA-35518	Nationstar v. S O'Malley	Reverse/Remand	02/06/2018

UNPUBLISHED OPINIONS

A-1-CA-35007	State v. M Girard	Affirm	02/05/2018
A-1-CA-34797	State v. M McCoy	Reverse/Remand	02/06/2018
A-1-CA-34902	State v. J Head	Affirm	02/06/2018
A-1-CA-35356	State v. I Martinez	Affirm	02/06/2018
A-1-CA-36357	B Price v. JP Morgan	Affirm	02/06/2018
A-1-CA-34992	State v. A Martinez	Affirm	02/07/2018
A-1-CA-35384	State v. T Silver	Affirm	02/07/2018
A-1-CA-34276	State v. J Vargas	Affirm	02/08/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS AND CHANGE OF ADDRESS

Effective January 31, 2018:
Shannon Lane Chapman
1613 Flint Court
Lakeway, TX 78734
202-257-8858
slchap02@gmail.com

Effective January 26, 2018:
LeNatria Holly Jurist
The Jurist Law Group, PLLC
PO Box 90014
14031 Coveney Drive (77090)
Houston, TX 77290
832-375-1710
lenatria@thejuristlawgroup.com

CLERK'S CERTIFICATE OF ADMISSION

On February 6, 2018:
Patricia Feghali
1241 Martin Drive
Cincinnati, OH 45202
513-746-5520
pfeghali@gmail.com

On February 6, 2018:
Katharine Anna Moisan
Tjornehoj & Hack LLC
230 Main Street
Longmont, CO 80501
303-682-2351
katie@thlawgroup.com

On February 6, 2018:
Lindsay Stuart
7209 Villa Tulipan, NE
Albuquerque, NM 87113
720-955-3321
1987lindsay.stuart@gmail.com

CLERK'S CERTIFICATE OF WITHDRAWAL AND CHANGE OF ADDRESS

Effective February 1, 2018:
Megan Aline Hopper-Rebegea
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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective February 21, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

There are no pending 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
5-802	Habeas corpus	12/31/2017

Rules of Criminal Procedure for the Magistrate Courts

6-105	Assignment and designation of judges	12/31/2017
6-114	Public inspection and sealing of court records	03/31/2017
6-202	Preliminary examination	12/31/2017
6-203	Arrests without a warrant; probable cause determination	12/31/2017
6-207	Bench warrants	04/17/2017
6-207.1	Payment of fines, fees, and costs	04/17/2017
6-207.1	Payment of fines, fees, and costs	12/31/2017
6-208	Search warrants	12/31/2017
6-304	Motions	12/31/2017
6-401	Pretrial release	07/01/2017
6-401.1	Property bond; unpaid surety	07/01/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-403	Revocation or modification of release orders	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017
6-408	Pretrial release by designee	07/01/2017
6-409	Pretrial detention	07/01/2017
6-506	Time of commencement of trial	07/01/2017
6-506	Time of commencement of trial	12/31/2017
6-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
6-703	Appeal	07/01/2017

Rules of Criminal Procedure for the Metropolitan Courts

7-105	Assignment and designation of judges	12/31/2017
7-113	Public inspection and sealing of court records	03/31/2017
7-202	Preliminary examination	12/31/2017
7-203	Probable cause determination	12/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
7-208	Search warrants	12/31/2017
7-304	Motions	12/31/2017
7-401	Pretrial release	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017
7-406	Bonds; exoneration; forfeiture	07/01/2017
7-408	Pretrial release by designee	07/01/2017
7-409	Pretrial detention	07/01/2017
7-504	Discovery; cases within metropolitan court trial jurisdiction	12/31/2017
7-506	Time of commencement of trial	07/01/2017
7-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
7-606	Subpoena	12/31/2017
7-703	Appeal	07/01/2017

Rules of Procedure for the Municipal Courts

8-112	Public inspection and sealing of court records	03/31/2017
8-202	Probable cause determination	12/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
8-207	Search warrants	12/31/2017
8-304	Motions	12/31/2017
8-401	Pretrial release	07/01/2017
8-401.1	Property bond; unpaid surety	07/01/2017
8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
8-403	Revocation or modification of release orders	07/01/2017
8-406	Bonds; exoneration; forfeiture	07/01/2017
8-408	Pretrial release by designee	07/01/2017
8-506	Time of commencement of trial	07/01/2017
8-506	Time of commencement of trial	12/31/2017
8-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
8-703	Appeal	07/01/2017

Criminal Forms

9-207A	Probable cause determination	12/31/2017
9-301A	Pretrial release financial affidavit	07/01/2017
9-302	Order for release on recognizance by designee	07/01/2017
9-303	Order setting conditions of release	07/01/2017
9-303A	Withdrawn	07/01/2017
9-307	Notice of forfeiture and hearing	07/01/2017
9-308	Order setting aside bond forfeiture	07/01/2017

9-309	Judgment of default on bond	07/01/2017
9-310	Withdrawn	07/01/2017
9-513	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
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
9-701	Petition for writ of habeas corpus	12/31/2017
9-702	Petition for writ of certiorari to the district court from denial of habeas corpus	12/31/2017
9-809	Order of transfer to children's court	12/31/2017
9-810	Motion to restore right to possess or receive a firearm or ammunition	12/31/2017

Children's Court Rules and Forms

10-161	Designation of children's court judge	12/31/2017
10-166	Public inspection and sealing of court records	03/31/2017
10-166	Public inspection and sealing of court records	12/31/2017
10-166	Public inspection and sealing of court records	01/15/2018*
10-169	Criminal contempt	12/31/2017
10-325	Notice of child's advisement of right to attend hearing	12/31/2017
10-325.1	Guardian ad litem notice of whether child will attend hearing	12/31/2017
10-570.1	Notice of guardian ad litem regarding child's attendance at hearing	12/31/2017
10-611	Suggested questions for assessing qualifications of proposed court interpreter	12/31/2017
10-612	Request for court interpreter	12/31/2017
10-613	Cancellation of court interpreter	12/31/2017
10-614	Notice of non-availability of certified court interpreter or justice system interpreter	12/31/2017

**The 2018 amendment to Rule 10-166 suspends the amendments approved by the Court effective December 31, 2017..*

Rules of Appellate Procedure

12-202	Appeal as of right; how taken	12/31/2017
12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017
12-205	Release pending appeal in criminal matters	07/01/2017
12-210	Calendar assignments for direct appeals	12/31/2017
12-307.2	Electronic service and filing of papers	07/01/2017
12-307.2	Electronic service and filing of papers	08/21/2017
12-313	Mediation	12/31/2017
12-314	Public inspection and sealing of court records	03/31/2017
12-502	Certiorari from the Supreme Court to the Court of Appeals	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
13-2401	Legal malpractice; elements	12/31/2017
13-2402	Legal malpractice; attorney-client relationship	12/31/2017
13-2403	Legal malpractice; negligence and standard of care	12/31/2017
13-2404	Legal malpractice; breach of fiduciary duty	12/31/2017
13-2405	Duty of confidentiality; definition	12/31/2017
13-2406	Duty of loyalty; definition	12/31/2017
13-2407	Legal malpractice; attorney duty to warn	12/31/2017
13-2408	Legal malpractice; duty to third-party intended - No instruction drafted	12/31/2017
13-2409	Legal malpractice; duty to intended beneficiaries; wrongful death	12/31/2017
13-2410	Legal malpractice; expert testimony	12/31/2017
13-2411	Rules of Professional Conduct	12/31/2017
13-2412	Legal malpractice; attorney error in judgment	12/31/2017
13-2413	Legal malpractice; litigation not proof of malpractice	12/31/2017
13-2414	Legal malpractice; measure of damages; general instruction	12/31/2017
13-2415	Legal malpractice; collectability – No instruction drafted	12/31/2017

Uniform Jury Instructions – Criminal

14-240	Withdrawn	12/31/2017
14-240B	Homicide by vehicle; driving under the influence; essential elements	12/31/2017
14-240C	Homicide by vehicle; reckless driving; essential elements	12/31/2017
14-240D	Great bodily injury by vehicle; essential elements	12/31/2017
14-251	Homicide; "proximate cause"; defined	12/31/2017
14-1633	Possession of burglary tools; essential elements	12/31/2017
14-2820	Aiding or abetting; accessory to crime of attempt	12/31/2017
14-2821	Aiding or abetting; accessory to felony murder	12/31/2017

14-2822	Aiding or abetting; accessory to crime other than attempt and felony murder	12/31/2017
14-4201	Money laundering; financial transaction to conceal or disguise property, OR to avoid reporting requirement; essential elements	12/31/2017
14-4202	Money laundering; financial transaction to further or commit another specified unlawful activity; essential elements	12/31/2017
14-4203	Money laundering; transporting instruments to conceal or disguise OR to avoid reporting requirement; essential elements	12/31/2017
14-4204	Money laundering; making property available to another by financial transaction OR transporting; essential elements	12/31/2017
14-4205	Money laundering; definitions	12/31/2017
14-5130	Duress; nonhomicide crimes	12/31/2017

Rules Governing Admission to the Bar

15-103	Qualifications	12/31/2017
15-104	Application	08/04/2017
15-105	Application fees	08/04/2017
15-301.1	Public employee limited license	08/01/2017
15-301.2	Legal services provider limited law license	08/01/2017

Rules of Professional Conduct

16-100	Terminology	12/31/2017
16-101	Competence	12/31/2017
16-102	Scope of representation and allocation of authority between client and lawyer	08/01/2017
16-106	Confidentiality of information	12/31/2017
16-108	Conflict of interest; current clients; specific rules	12/31/2017
16-304	Fairness to opposing party and counsel	12/31/2017
16-305	Impartiality and decorum of the tribunal	12/31/2017
16-402	Communications with persons represented by counsel	12/31/2017
16-403	Communications with unrepresented persons	12/31/2017
16-701	Communications concerning a lawyer's services	12/31/2017
16-803	Reporting professional misconduct	12/31/2017

Rules Governing Discipline

17-202	Registration of attorneys	07/01/2017
17-202	Registration of attorneys	12/31/2017
17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service	07/01/2017

Rules for Minimum Continuing Legal Education

18-203	Accreditation; course approval; provider reporting	09/11/2017

Code of Judicial Conduct

21-004	Application	12/31/2017

Supreme Court General Rules

23-106	Supreme Court rules committees	12/31/2017
23-106.1	Supreme Court rule-making procedures	12/31/2017

Rules Governing the New Mexico Bar

24-110	"Bridge the Gap: Transitioning into the Profession" program	12/31/2017

Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	07/01/2017

Local Rules for the Second Judicial District Court

LR2-308	Case management pilot program for criminal cases	01/15/2018
LR2-308	Case management pilot program for criminal cases	01/15/2018*

*The Court approved amendments to LR2-308 on December 4, 2017, to be effective January 15, 2018, and approved additional amendments on January 9, 2018, also to be effective January 15, 2018.

Local Rules for the Thirteenth Judicial District Court

LR13-112	Courthouse security	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.

Certiorari Denied, August 30, 2017, No. S-1-SC-36544

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-001

No. A-1-CA-33623 (filed June 7, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
FRANK YAZZIE,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BENJAMIN CHAVEZ, District Judge

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BENNETT J. BAUR
Chief Public Defender
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for Appellant

Opinion

Timothy L. Garcia, Judge

{1} On appeal, Defendant challenges the district court's imposition of a habitual offender enhancement to his sentence following a violation of his probation. Defendant raises two issues on appeal. First, Defendant argues that he was not subject to enhancement at the time of the probation violation because he had completed his sentence as to that particular conviction under his plea agreement. Second, Defendant argues that the district court erred in not applying the 2002 amendment to the habitual offender statute, NMSA 1978, § 31-18-17 (1993, amended 2002 and 2003), limiting the time period that the district court may consider prior felonies. We affirm the district court's ruling regarding Defendant's probation violation and its application of the habitual offender statute.

BACKGROUND

{2} On April 2, 2002, Defendant Frank Yazzie, also known as Paul Throckmorton, entered into a repeat offender plea and disposition agreement (the plea agreement) by which he agreed to plead no contest to one count of third degree aggravated battery causing great bodily harm (Count 1), and one count of fourth degree aggravated assault with a deadly weapon (Count 2), for offenses occurring on or about September 19, 2001. Pursuant to the plea agreement, all other crimes for which he had been charged were dismissed.

{3} In pertinent part, the terms of the plea agreement provided that, as to sentencing, Defendant would receive a three-year sentence on Count 1 and a one-and-one-half-year sentence on Count 2. These sentences were to be served consecutively. Under the terms of the plea agreement, the State also filed a supplemental information charging Defendant as the same person convicted of the following felony offenses, to which Defendant admitted his identity: (1) aggravated assault on September 7, 1977, in Coconino County Superior Court, Arizona (two counts); (2) interstate transportation of a stolen motor vehicle and interstate transportation of stolen property (traveler's checks) on May 6, 1983, in the United States District Court for the District of New Mexico (four counts); (3) assaulting, resisting, or impeding a Department of Veteran Affairs law enforcement officer on June 19, 1992, in the United States District Court of New Mexico (one count). As a result of Defendant's admission regarding his prior felonies, the sentence on Count 2 received a habitual offender enhancement of eight years of mandatory incarceration. The plea agreement further stipulated that three years of Defendant's underlying sentence for Counts 1 and 2 would be suspended but was silent as to which specific count the suspended sentence related. This gave Defendant an initial incarceration exposure of at least eight years and up to nine and one-half years.

{4} Finally, the plea agreement stated that if the district court accepted the agreement, Defendant could also "be ordered to serve a period of probation." If Defendant later violated his probation, "he [could] be incarcerated for the balance of the sentence and have an [additional] eight . . . year habitual enhancement apply to Count 1; thus [as to] Count 1[, D]efendant could be incarcerated for up to eleven . . . years with two . . . years of parole if probation is violated."

{5} The district court accepted the plea agreement and sentenced Defendant consistent with its terms on June 28, 2002. The district court entered a judgment, partially suspended sentence, and commitment (the judgment and sentence), which stipulated that Defendant was to be imprisoned for the term of:

> three . . . years as to Count 1, one-and-one-half . . . years . . . as to Count 2, enhanced by eight . . . years pursuant to the habitual offender statute, all to run consecutive with each other for a total of twelve and one-half . . . years, of which three . . . years [were] suspended, for an actual sentence of imprisonment of nine and one-half . . . years.

The district court further imposed three years of probation and two years of parole following Defendant's release from incarceration. At the sentencing hearing, the district court explained that Defendant would serve probation concurrent with parole. Defendant also received pre-sentence confinement credit. Similar to the plea agreement, neither the district court's remarks at the sentencing hearing nor the judgment and sentence is clear as to which count the three-year suspension of Defendant's sentence was intended to apply towards.

{6} Defendant was released from prison and began serving his three-year term of probation on March 19, 2011—running concurrently during the first two years with his term of parole. Defendant had served the bulk of his probation when the State alleged that Defendant violated the conditions of his probation and filed a motion to revoke his probation on December 16, 2013. Defendant and the State appeared before the district court for a probation revocation hearing on February 4, 2014. At the probation revocation hearing, the State filed a supplemental information in open court charging Defendant as a habitual offender on the basis of his prior felony convictions. Prior to the hearing, Defendant filed a motion to preclude the State's proposed enhancement of Defendant's sentence, arguing that Defendant had completed his sentence as to Count 1, the un-enhanced third degree aggravated battery offense, and had already served an eight-year enhancement on Count 2 and therefore, the State was precluded from seeking enhancement of the aggravated battery offense.

{7} Following the presentation of evidence, the district court found that the State had satisfied its burden of demonstrating that Defendant had violated his probation. The court then addressed Defendant's motion. Following argument by the parties, the district court ruled that Defendant had prior felony convictions that supported enhancement based upon the supplemental information filed by the State, as well as the plea agreement and the judgment and sentence. The court denied Defendant's motion to preclude enhancement of his sentence and enhanced Defendant's aggravated battery conviction on Count 1 by eight years but suspended any remaining time on the underlying charge that was still being served. This appeal followed.

DISCUSSION

{8} Defendant makes two arguments on appeal. First, Defendant argues that at the time he violated probation, he had completed his sentence, as well as any parole or probation time, as to Count 1 and was not subject to enhancement as a habitual offender as to Count 1. Second, Defendant argues that when the State filed its supplemental information in February 2014, it could not rely on prior convictions more than ten years old because the 2002 amendment to the habitual offender statute limited the time frame for prior felony convictions to ten years. *See* § 31-18-17(D)(1) (2002).

{9} To the extent our analysis requires interpretation of the plea agreement, "[appellate courts] construe the terms of [a] plea agreement according to what [the d]efendant reasonably understood when he entered the plea." *State v. Fairbanks*, 2004-NMCA-005, ¶ 15, 134 N.M. 783, 82 P.3d 954 (internal quotation marks and citation omitted). "A plea agreement is a unique form of contract whose terms must be interpreted, understood, and approved by the district court." *State v. Gomez*, 2011-NMCA-120, ¶ 9, 267 P.3d 831. If the language in the written agreement is ambiguous, it is the district court's task to resolve that ambiguity with the parties. *Id*. If the district court failed to resolve the ambiguity and no extrinsic evidence is introduced that would resolve it, then we "may rely on the rules of construction, construing any ambiguity in favor of the defendant. Under such circumstances, we review the terms of [a] plea agreement de novo." *Id.* (internal quotation marks and citation omitted). To the extent that our analysis requires interpretation of the judgment and sentence, we review de novo "the district court's interpretation and application of the sentencing law[.]" *State v. Brown*, 1999-NMSC-004, ¶ 8, 126 N.M. 642, 974 P.2d 136.

I. Defendant Was Subject to an Additional Eight-Year Habitual Offender Enhancement at the Tim He Violated Probation

{10} New Mexico provides for increasing the basic sentence for those who have been determined to be habitual offenders. *See* § 31-18-17. "[T]he jurisdiction of a [district] court to enhance a felony sentence under the habitual offender statute expires once a defendant has completed service of that sentence." *State v. Lovato*, 2007-NMCA-049, ¶ 6, 141 N.M. 508, 157 P.3d 73. "This jurisdictional limitation is founded upon principles of double jeopardy: once a sentence has been served, a defendant's punishment for the crime has come to an end . . . and further punishment for that crime under any enhancement provision would violate the prohibition on double jeopardy." *Id.* ¶ 6 (alteration, internal quotation marks, and citation omitted).

{11} Such double jeopardy concerns are only implicated if the defendant has an objectively reasonable expectation of finality in the sentence. *See State v. Redhouse*, 2011-NMCA-118, ¶ 10, 269 P.3d 8 ("Increasing a defendant's sentence after a defendant begins serving the sentence implicates double jeopardy concerns if a defendant's objectively reasonable expectations of finality in the original sentencing proceedings are violated."). Defendant must establish that the district court did not have jurisdiction to impose the additional enhancement by proving two things: (1) that Defendant had an expectation of finality in his original sentence, and (2) that the expectation was reasonable. *See State v. Trujilllo*, 2007-NMSC-017, ¶ 11, 141 N.M. 451, 157 P.3d 16.

{12} A defendant's service of a sentence may include the period of incarceration and any parole or probation that follows. *State v. Freed*, 1996-NMCA-044, ¶ 8, 121 N.M. 569, 915 P.2d 325. As such, a defendant does not have a reasonable expectation of finality in a sentence while serving probation or parole for the underlying conviction. *See State v. Villalobos*, 1998-NMSC-036, ¶ 12, 126 N.M. 255, 968 P.2d 766 ("We think the law and policy underlying the probation process prevent a reasonable expectation of finality in a probation sentence, even after the suspended sentence period.").

{13} Defendant argues that because he had served his nine and one-half years of incarceration and two years of parole, he had a reasonable expectation of finality in the original judgment and sentence unless he violated his sentence as to Count 1, which he did not do because he had completed his probation on Count 1 at the time of the violation. Defendant's argument is based in part on his reading of NMSA 1978, Section 31-21-10(D) (1997) (imposing a two-year parole period for a third degree felony), and *State v. Utley*, 2008-NMCA-080, ¶ 10, 144 N.M. 275, 186 P.3d 904 (holding that when the district court did not direct the order in which consecutive sentences were to be served, this Court would construe the third degree felony sentence to be served last, prior to the imposed two-year parole period). Defendant argues that under Section 31-21-10(D) (1997) and *Utley*, a portion of Defendant's incarceration must have been served as to Count 1 as the district court imposed a two-year parole period, which can only be logically imposed as to Count 1, the third degree felony. He further argues that given the absence in the plea agreement and the judgment and sentence as to how much of Count 1 would be served in prison, "the most natural reading is . . . he would serve half his sentence on Count 1 in prison, and . . . all of the sentence on Count 2 would be suspended." We agree that under

Utley and Section 31-21-10(D) (1997), Defendant was required to have served a period of incarceration on Count 1 in conjunction with his two years of parole following release. However, if we were to adopt Defendant's interpretation of the judgment and sentence—that he served half of Count 1 in prison and the district court suspended all of Count 2—the result would be a fragmented probationary period, and such fragmentation was not provided for in either the plea agreement or the judgment and sentence.

{14} Instead, with regard to probation, the plea agreement stated that if the district court accepted the agreement, "[Defendant] may also be ordered to serve a period of probation." Defendant further agreed that if he "later violate[d] that probation, he may be incarcerated for the balance of the sentence and have an eight . . . year habitual enhancement apply to Count 1[.]" Under the judgment and sentence, three years of Defendant's total sentence was suspended and "Defendant [was] ordered to be placed on supervised probation for three . . . years following release from custody[.]" It follows that Defendant would have expected to serve a three-year period of probation and be subject to additional enhancement of the sentence imposed for Count 1 during the entire period of his probation. *See Freed*, 1996-NMCA-044, ¶ 11 (rejecting the defendant's argument that he had an objectively reasonable expectation of finality where "[h]e signed a plea agreement that specifically and clearly informed him that if he violated the conditions of his probation, he would be subject to an additional enhancement and an additional three years of incarceration"). Because neither the plea agreement nor the judgment and sentence structured Defendant's sentence such that the time served on probation corresponded with a particular conviction, Defendant had no reasonable expectation of finality as to Count 1 or any limitation on the enhancement of Count 1 prior to the completion of his entire three-year period of probation.

{15} Finally, we reject Defendant's argument that the rule of lenity should apply. "The rule of lenity applies when insurmountable ambiguity persists about the statute's scope after statutory interpretation or when we are unable to discern legislative intent." *State v. Contreras*, 2002-NMCA-031, ¶ 14, 131 N.M. 651, 41 P.3d 919 (internal quotation marks and citations omitted). However, Defendant does not argue that any statute in particular is ambiguous, and we will not guess as to Defendant's meaning. *See State v. Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (noting that this Court will "not review unclear or undeveloped arguments [that] require us to guess at what [a] part[y's] arguments might be").

{16} For the foregoing reasons, we hold that the district court's interpretation and application of sentencing law was without error and that the district court retained jurisdiction to enhance Count 1 when Defendant violated his probation. *See Villalobos*, 1998-NMSC-036, ¶ 12 (recognizing that a defendant does not have a reasonable expectation of finality in a sentence while serving probation for the underlying conviction); *State v. Sanchez*, 2001-NMCA-060, ¶ 23, 130 N.M. 602, 28 P.3d 1143 (stating that where the language of the plea agreement is clear and provides for additional enhancement of a defendant's sentence, the district court is without discretion in imposing that sentence).

II. The 2002 Amendment to the Habitual Offender Enhancemen Statute Does Not Apply to Defendant

{17} Prior to 2002, the imposition of the habitual offender statute was mandatory in all cases in which there was a prior felony conviction, regardless of the date of the prior conviction. *See* § 31-18-17 (1993). In 2002, the Legislature amended the habitual offender statute (the 2002 amendment) to exclude prior felonies from consideration for habitual offender enhancement when the sentence and any period of probation or parole in the prior felony was completed ten or more years before the current conviction. Section 31-18-17(D) (2002). To determine whether the 2002 amendment is applicable to a case, we look to the date the amendment took effect, July 1, 2002. *See State v. Shay*, 2004-NMCA-077, ¶ 1, 136 N.M. 8, 94 P.3d 8. In *Shay*, this Court held that the amendment applies when the district court sentences a defendant for the underlying crime after July 1, 2002, if the supplemental information charging the habitual offender status is also filed on or after July 1, 2002. *Id.* ¶ 23. Although Defendant argues that *Shay* supports his position regarding whether the 2002 amendment should apply to the supplemental information filed on February 5, 2014, we are unpersuaded. Instead, *State v. Ortega* controls the present case. 2004-NMCA-080, 135 N.M. 737, 93 P.3d 758.

{18} In *Ortega*, the defendant was convicted and sentenced for the underlying crime prior to the effective date of July 1, 2002. *Id.* ¶¶ 3-5. Prior to July 1, 2002, the defendant negotiated a plea agreement to drop certain charges in exchange for a partially suspended sentence that included a period of probation. *Id.* ¶¶ 3-4. The defendant later violated the terms of his probation and was sentenced to a term that included the habitual offender enhancement that had been held in abeyance during the original sentencing. *Id.* ¶¶ 5, 7. This Court rejected the defendant's argument that the 2002 amendment should apply for two reasons. First, because a probation violation, standing alone, is not a crime that can trigger an independent sentence, any "additional enhancement at the time of the probation violation relates to the district court's [original] sentence for the underlying crimes before the 2002 amendment to the habitual offender statute took effect." *Id.* ¶ 8. Second, the defendant and the state reached a bargained-for agreement under which the defendant waived any existing or future objection, and the subsequent change to the existing statute would upset the parties' expectations. *Id.* ¶ 9. Like the defendant in *Ortega*, Defendant entered into the plea agreement, under which he waived his rights to objection and appeal, and was sentenced prior to July 1, 2002. Defendant then violated probation and, under *Ortega*, is subject to enhancement under the habitual offender statute as it existed at the time of his original judgment and sentence. *See id.* ¶ 16 (specifying that the 2002 amendment did not apply to sentencing for a probation violation where the defendant's original sentence was imposed prior to the date of the 2002 amendment).

{19} Finally, Defendant argues that *Ortega* conflicts with this Court's more recent opinion in *State v. Triggs*, 2012-NMCA-068, ¶ 9, 281 P.3d 1256. In *Triggs*, the defendant violated parole and pursuant to the terms of a plea agreement, the district court enhanced the defendant's sentence for seven offenses not previously enhanced and ordered them to be served consecutively. *Id.* ¶ 1. This Court held that the district court had the discretion to run habitual offender sentences concurrently. *Id.* ¶ 17. This Court reasoned that this discretion stems from the principle that the original judgment does not bind the judge who revokes parole, stating, "enhanced sentences are new sentences and . . . in imposing the new enhanced sentences, the [district] court's arrangement of the manner in which the new enhanced sentences

were to be served was not limited by the arrangement for serving the regular sentences." *Id.* (alteration, internal quotation marks, and citation omitted). This Court further relied on the basic principle that district courts have the discretion, where there are multiple sentences, to impose sentences concurrently or consecutively. *Id.* ¶ 20.

{20} We see no conflict between *Ortega* and *Triggs*. *Triggs* reaffirms the discretion of the district court in determining the manner in which a defendant will serve multiple sentences. 2012-NMCA-068, ¶ 20. Enhanced sentences may be new—in that they are newly imposed after the original sentence for a probation violation—but this does not strip a newly imposed sentence of its relationship to the original sentence, the grounds for which the sentence is being enhanced. *See Ortega*, 2004-NMCA-080, ¶ 8 (noting that "the additional enhancement at the time of the probation violation relates to the district court's [original] sentence for the underlying crimes"). We therefore see no conflict in the application of the principles established in *Ortega* and *Triggs*.

{21} In this case, Defendant's original 2002 sentence as to Count 1 held the specific eight-year habitual offender enhancement in abeyance, only to be imposed upon a subsequent violation of probation. The district court therefore had continuing jurisdiction to impose the enhancement under the habitual offender statute until Defendant had an objectively reasonable expectation of finality of his sentence as to Count 1, including his subsequent three-year term of probation. Per *Ortega*, the district court did not err in considering all of Defendant's prior felonies in enhancing Defendant's sentence as a habitual offender. 2004-NMCA-080, ¶ 8.

CONCLUSION

{22} For the foregoing reasons, we affirm the district court's enhancement of Defendant's sentence after he violated his conditions of probation.

{23} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

J. MILES HANISEE, Judge

STATE BAR of NEW MEXICO
YOUNG LAWYERS DIVISION

YLD *in brief*

SPRING 2018

The Official Newsletter of the
State Bar of New Mexico Young Lawyers Division

Message from the YLD Chair

According to the American Bar Association, there were about 5,500 active lawyers in New Mexico in 2017. Approximately 1 out of every 3 lawyers in New Mexico is a young lawyer. You are a young lawyer if you are 36 and under or have been in practice five years or less. I have a question for the approximately 1,700 New Mexican young lawyers. How are you doing?

Law school debt, only a few job prospects, and little free time outside of work are just a few challenges faced by young lawyers. When I graduated, I wasn't sure exactly what the YLD was doing for me and I discussed it with a colleague of mine. His advice: do something about it. As a result, I became involved with the YLD and have had rewarding experiences that I would have completely missed out on had I not caught the YLD bug at a Constitution Day event. Now, six years later, I challenge you to do the same.

Is there something the YLD can do that would make being a lawyer in New Mexico better? What changes would you make? The YLD has done and continues to do some amazing things.

We have a great mentorship program though the University of New Mexico Law School. Come volunteer and remind law students that there is a light at the end of the tunnel. Or give a mock interview and pepper them with questions you wish someone had prepared you for.

If networking isn't really your thing, come to one of the great public service projects the YLD puts on. For example, the Wills for Heroes program is a great event where simple wills are created for first responders. Or if you want to work with a younger crowd, give a presentation to fifth graders about the Constitution during the Constitution Day activities.

If you just need a healthy break from work and stress, we will be putting on a few Fit2Practice events this year after the success of last years programming. Come learn tips to manage stress or pound it out on the pavement at a 5k run/walk.

If you can't seem to find an activity that interests you, make one! For example, the YLD chair for 2017, Tomas Garcia, saw an opportunity to unite young lawyers from the southwest at a regional conference and put in the time and work to hold the third annual ABA YLD Mountain West States Regional Summit right here in Albuquerque.

Over the next year the YLD will be holding too many events to mention here. But I do want to thank those that make it possible including all the attorneys, paralegals, firms, practice sections, and State Bar staff. The YLD will be posting events on a regular basis on our new social media outlets on Facebook, Instagram and Twitter @NewMexicoYLD.

Without a strong legal community none of these events would be possible. So, come to an event, drop me a line or take up the mantle of leadership. You have an amazing opportunity as a New Mexico Young Lawyer to shape the future of your career and of the legal community.

Sean M FitzPatrick

Sean M. FitzPatrick
sfitzpatrick@fitzpatricklawllc.com

Meet the Board

Sean M. FitzPatrick
Chair
Director-at-Large, Position 3

Sean FitzPatrick is a graduate of UNM School of Law and currently practices plaintiff's civil litigation in Albuquerque, N.M. through his firm FitzPatrick Law, LLC. FitzPatrick worked as a prosecutor in Farmington, N.M. litigating a variety of felony and misdemeanor cases for a few years after law school. FitzPatrick is excited to bring new programing to the State Bar of New Mexico as the chair of the Young Lawyers Division including the Fit2Practice program and a new social medial presence to connect lawyers to State Bar activities. FitzPatrick continues to serve in many of the YLD programs as either a member or as co-chair of the program including Wills for Heroes, Veterans Legal Clinic, and the UNM School of Law Mentorship Program. Outside of work, you can find FitzPatrick running, biking, or participating in other type 2 fun activities with his wife Eva.

Sonia Raichur Russo
Chair-elect
Director-at-Large, Position 4

Sonia Raichur Russo is a law clerk to the Honorable Gregory J. Fouratt, U.S. Magistrate Judge for the District of New Mexico. She previously served as the law clerk to the Honorable Henry M. Bohnhoff of the New Mexico Court of Appeals. This year for the New Mexico YLD, Russo will co-chair Home Safe Home, the local implementation of the American Bar Association Young Lawyers Division's ("ABA YLD's") 2017-2019 public service project; Constitution Day; and Law Camp. At the national level, Russo is the ABA YLD's Public Service Coordinator, and ABA President Linda Klein appointed Russo to serve on the Standing Committee on Gun Violence from 2016 to 2018. Russo earned her Bachelor of Arts degree in Political Science from Brown University and her law degree from Boston College Law School. At her law school commencement ceremony, Russo was awarded the Susan Grant Demarais Award for Excellence in Clinical Work for her work as a student attorney in the BC Law Prosecution Clinic. Her interests include travel, tennis, and myriad visual and performing arts.

Allison Block-Chavez
Vice Chair
Director-at-Large, Position 1
ABA House of Delegates Representative

Allison Block-Chavez, is an attorney at Aldridge, Hammar, Wexler & Bradley, PA, in Albuquerque, where her law practice focuses on real estate, business transactions, creditors' rights, adult guardianships and conservatorships, estate planning, and probate matters. Block-Chavez graduated from the University of New Mexico School of Law and served as the judicial law clerk for Chief Judge Michael E. Vigil of the New Mexico Court of Appeals. In addition to serving on the board for the Young Lawyers Division, she also serves on the board for the Elder Law Section of the State Bar of New Mexico. She is New Mexico's young lawyer delegate to the ABA House of Delegates.

Shasta N. Inman
Director-at-Large, Position 2

Shasta N. Inman is in solo practice, serving as guardian ad litem in abuse and neglect cases and handling adult guardianship and family law matters. She earned her law degree and a Master of Arts in Gender & Women's Studies from the University of Arizona, James E. Rogers College of Law. Before moving to Albuquerque in December 2016, Inman clerked for the Hon. Peter Hochuli at the Pima County Juvenile Court in Tucson. She is very excited to join the YLD and Children's Law Section boards this year, after serving as YLD liaison to the Children's Law Section last year. In her spare time, she enjoys playing video and board games, and hanging out with her rabbit, Peanut Bunny.

Meet the Board

Billy J. Jimenez
Director-at-Large, Position 5
ABA YLD District #23
Representative

Billy J. Jimenez is an associate at the Adams+Crow Firm, where he practices in the area of civil litigation, environmental law, and construction law. He currently serves as the ABA YLD District #23 Representative and is also holds Director-at-Large, Position 5 on the New Mexico YLD Board. As the ABA District Representative, he attends board meetings of the State Bar of Arizona YLD, the Maricopa County Bar Association YLD, and the Pima County Bar Association YLD. During his time with the New Mexico YLD, he has been actively involved with Wills for Heroes, Law Day Call-in, Constitution Day, and the NMHBA's Annual Law Camp. Jimenez is also a board member with the Albuquerque Center for Hope and Recovery, and is the President of the Albuquerque Collegiate Charter School Foundation Board. He received his law degree from UNM and was recipient of the MALSA 3L of the Year award and Clinical Legal Education Association Outstanding Student Award.

Mariah McKay
Region 1 Director
Eleventh Judicial District

Mariah McKay is currently an Assistant District Attorney for the Eleventh Judicial District Attorney's Office, Division One, in Farmington, New Mexico. Before coming to the District Attorney's Office, McKay was a Staff Attorney for DNA-People's Legal Services, as well as the Victims of Crime Act (VOCA) project manager. McKay attended law school at American University Washington College of Law, in Washington, DC. While in DC, McKay participated in both government and private sector internships. In Farmington, McKay is an active member of the San Juan County Sexual Assault/ Domestic Violence Community Coordinated Response Team. As a native of Wyoming, McKay is happy to be back in the West and looks forward to serving San Juan County in any way that she can.

Kaitlyn A. Luck
Region 2 Director
First, Fourth, Eighth and 10th judicial districts

Kaitlyn Luck, a Texas native, is an associate attorney at Montgomery & Andrews, P.A. where she practices in the areas of civil litigation and administrative law. While in law school at Texas Tech University, she was published in and served as a Comment Editor on the Texas Tech Administrative Law Journal. She currently serves as a commissioner of the New Mexico Commission on Access to Justice and participates in the Wills for Heroes and Homeless Legal Clinics in Albuquerque and Santa Fe. In her free time, she enjoys hiking and snowboarding with her fiancé and dogs.

Anna Casey Martin
Region 3 Director
Fifth and Ninth judicial districts

Anna C. Martin is a Hobbs, N.M. native. She earned her Bachelor in Business Administration degree from New Mexico State University, her Masters of Science in Personal Financial Planning from Texas Tech University and her law degree from Texas Tech University School of Law. She is an associate at Sanders, Bruin, Coll & Worley PA in Roswell. Martin is a civil litigation attorney who primarily focuses her practice on family law and estate planning. She has been the Region 3 Director since March of 2015. Martin is an active member of the Chaves County Bar Association, was the 2015 Chaves County Law Day Chair, participates in Big Brothers Big Sisters and is a 2014 Roswell Leadership graduate.

Meet the Board

Erinna "Erin" Marie Atkins
Region 4 Director
Third, Sixth and Twelfth judicial districts and Sierra County

Erinna Atkins is an attorney in Alamogordo, where she practices law with her father, S. Bert Atkins. Specializing in criminal defense and children's law, she works in public defender and indigent defense cases in Otero County. She proudly serves as the Guardian ad Litem in abuse and neglect cases and mental health guardianships. Atkins is active in her local community and currently serves as the vice-chair of the Legal Education Committee for NMSU-Alamogordo, a commissioner for the NM Commission for Community Volunteerism, as a board member for the Young Lawyer's Division, the Children's Law Section, the Twelfth Judicial District Pro Bono Committee, and a state-wide non-profit service organization, as well as the substitute Adult Drug Court judge. Atkins was awarded the 2016 Young Lawyer of the Year Award for the Twelfth Judicial District and is a 2009 graduate of the University of New Mexico School of Law.

Darin Kyle McDougall
Region 5 Director
Second and Thirteenth judicial districts and Catron, Socorro and Torrance counties

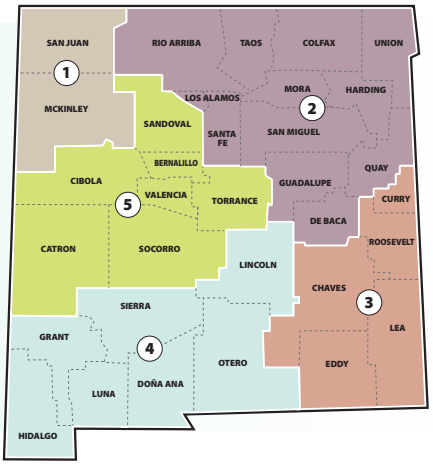
Darin Kyle McDougall graduated from the University of New Mexico School of Law in 2015. Prior to graduation, McDougall began work in indigent criminal defense through clinical and practical programs at the School of Law. Upon graduating, he chose to serve the community through his work at the Law Offices of the Public Defender. Currently he is an Associate Attorney at the Law Offices of Lynda Latta specializing in family law and criminal defense. McDougall has served as the Region 5 Director on the New Mexico Young Lawyers Division board since January 2017. He is a member of various Bar sections and is involved in volunteer legal clinics. McDougall also co-chairs several YLD programs that do outreach to law students such as the Mock Interview, Law Student Mentorship, and Speed Networking programs. McDougall is also the Chair of the YLD's Law-Day Essay contest.

Tomas J. Garcia
Immediate Past Chair

Tomas J. Garcia is the immediate past chair of the Young Lawyers Division. He is a litigation associate at Modrall Sperling in Albuquerque. Garcia coordinates the YLD's Summer Fellowships Program and the Annual Public Service Project in Outlying Areas. Garcia is a fellow of the American Bar Foundation and he is a member of the Diversity and Inclusion Committee for the American Bar Association's Litigation Section. An Albuquerque native, Garcia received his law degree from Georgetown University Law Center, his master's degree from the Kennedy School of Government at Harvard University, and his bachelor's degree from Yale University.

Young Lawyers Divion Region Map

- Region 1 — 11th Judicial District
- Region 2 — First, Fourth, Eighth and 10th judicial districts
- Region 3 — Fifth and Ninth judicial districts
- Region 4 — Third, Sixth and 12th judicial districts and Sierra County
- Region 5 — Second and 13th judicial districts and Catron, Socorro and Torrance counties



Certiorari Denied, October 20, 2017, No. S-1-SC-36626

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-002

No. A-1-CA-34615 (filed July 28, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
FABIAN LOPEZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY
STEPHEN K. QUINN, District Judge

HECTOR H. BALDERAS
Attorney General
LAURA E. HORTON
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

BENNETT J. BAUR
Chief Public Defender
J.K. THEODOSIA JOHNSON
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Timothy L. Garcia, Judge

{1} Defendant, Fabian Lopez, was convicted of aggravated battery with a deadly weapon, following a workplace altercation. Defendant raises multiple issues on appeal, including whether the over two hundred day delay between conviction and sentencing violated due process. As an issue of first impression, we conclude that Defendant failed to show prejudice and that no due process violation occurred. On Defendant's remaining arguments raised on appeal, we hold that there is no reversible error. As such, we affirm Defendant's conviction.

BACKGROUND

{2} In February 2011, Saul Montano (Victim or Mr. Montano) and Defendant both worked at the Midway Dairy in Portales, New Mexico. Defendant speaks very little Spanish and Mr. Montano speaks very little English. On February 13, 2011, the two men engaged in an altercation which seemingly resulted from their limited proficiency in the language spoken by the other party. While the two men were working, they began verbally arguing and at first, Jesus Acosta, a witness to the altercation, believed the two men were just kidding around. Mr. Acosta testified that a third person was mistranslating what Defendant and Mr. Montano were saying to each other. Defendant testified that he believed that Mr. Montano was gay and was trying to come on to him, saying "open [your] butt hole." Mr. Montano testified that he said to Defendant "make way asshole" while trying to get by him in the dairy. Defendant became furious and he yelled at Mr. Montano that he was not gay. The two men went outside and both men testified that the other threw the first punch. They scuffled for a few minutes and Defendant ended up on the ground. Defendant testified that he had his shirt over his head, which caused him to panic. Mr. Montano admitted that he was going to continue to punch Defendant, but Defendant pulled a knife out of his boot. Defendant then stabbed Mr. Montano one time in his upper leg near his buttocks.

{3} State Police Agent Noe Alvarado was dispatched to the home of Mr. Montano, where he was receiving medical attention from paramedics. Agent Alvarado then went to the dairy to speak with Defendant, where Defendant's wife gave Agent Alvarado the knife used in the altercation. Defendant admitted to Agent Alvarado that he had an argument with and then stabbed Mr. Montano.

PROCEDURAL HISTORY

{4} Defendant was arrested and then released on bond on February 16, 2011, and remained out on bond during the entirety of the proceedings. A preliminary hearing was held in Roosevelt County Magistrate Court on April 13, 2011. On April 14, 2011, the State filed a criminal information charging Defendant with aggravated battery with a deadly weapon, pursuant to NMSA 1978, Section 30-3-5(A), (C) (1969), and attached a list of witnesses for trial, including Agent Alvarado and Mr. Montano. On June 24, 2011, the State filed a second witness list adding Mr. Acosta with his address as the Midway Dairy in Portales.

{5} A hearing was held on August 19, 2011, regarding Defendant's motion for discovery. The State notified the district court that discovery had been available on the database since April 28, 2011. Defendant filed a motion to suppress Mr. Montano's testimony on September 9, 2011, claiming the State failed to produce the "alleged victim" for an interview. The district court held a hearing on Defendant's motion on December 9, 2011. The State argued that it had set up two courtesy interviews with Mr. Montano but that he did not show up to either. The district court instructed Defendant to subpoena Mr. Montano and if then he did not appear, it would consider suppressing his testimony. Defendant issued a subpoena for an interview with Mr. Montano at his New Mexico address on December 16, 2011. However, service was not completed because Mr. Montano had moved to Buckeye, Arizona, a fact noted in the State's supplemental witness list filed on December 13, 2011.

{6} Trial was scheduled for September 18, 2012, but Defendant filed a motion to continue that setting, agreeing to waive time until the next setting. Defendant's motion was granted. Defendant renewed the motion to suppress Mr. Montano's testimony on September 18, 2012. Trial was rescheduled for October 17, 2012. At the docket call on October 9, 2012, Defendant realized that the December 2011 subpoena was served to Mr. Montano's prior address. The State and Defendant filed a joint motion to continue the October 2012 trial

setting in an attempt to get Mr. Montano to New Mexico for an interview, agreeing that the delay in time would count against the State.

{7} On May 13, 2013, Defendant did not appear for the scheduled docket call and a bench warrant was issued. The bench warrant was later quashed, and Defendant notified the district court that his son had been in the hospital. At the hearing, defense counsel indicated that she had interviewed Mr. Montano by phone. On October 17, 2013, Defendant filed a motion to continue the next scheduled pretrial conference, agreeing to waive the time limits until the next setting. The trial was again rescheduled for March 26, 2014.

{8} Following a jury trial, Defendant was convicted of aggravated battery with a deadly weapon on March 26, 2014. The district court ordered a pre-sentence report from adult probation on October 20, 2014. A supplemental criminal information was filed by the State, and the district court sentenced Defendant as a habitual offender, pursuant to NMSA 1978, Section 31-18-17 (2003) with one year to serve and three years suspended. This appeal followed.

ANALYSIS

{9} Defendant makes the following arguments: (1) the delay in holding Defendant's sentencing hearing violated Defendant's right of due process; (2) defense counsel provided ineffective assistance of counsel by failing to assert Defendant's right to a speedy trial; (3) the district court erred in allowing the witness, Mr. Acosta, to testify because the State failed to disclose his address; and (4) the district court made several errors that denied Defendant a fair trial, including holding the trial at the Yam Theater and admitting certain testimony by Agent Alvarado as well as the photographs of the knife used in the altercation. Finally, Defendant argues that the cumulative impact of the errors at trial was so prejudicial that he was denied a fair trial and reversal is required.

I. Due Process in Delayed Sentencing

{10} The New Mexico appellate courts have on several occasions analyzed cases where defendants have faced delays in the imposition of a sentence or in the enforcement of a sentence. *See e.g., State v. Calabaza*, 2011-NMCA-053, ¶¶ 19-22, 149 N.M. 612, 252 P.3d 836 (analyzing whether the thirteen-month delay between this Court's mandate to the district court and the eventual sentencing violated the defendant's right to a speedy trial and due process); *State v. Brown*, 2003-NMCA-110, ¶ 9, 134 N.M. 356, 76 P.3d 1113 (involving a case where the defendant argued that "his right to a speedy trial was violated by a delay of twenty months from the time this Court reversed one of his trafficking convictions and remanded the case for re-sentencing until [the d]efendant was actually re-sentenced"). In *State v. Todisco*, the defendant argued that such a delay violated his right to a speedy trial under the Sixth Amendment of the United States Constitution and this Court, relying on past guidance from the United States Supreme Court, assumed that the Sixth Amendment right to a speedy trial extended to the sentencing phase of a criminal proceeding. 2000-NMCA-064, ¶ 16, 129 N.M. 310, 6 P.3d 1032 (citing to *Pollard v. United States*, 352 U.S. 354, 361 (1957)). This Court then "[assumed] without deciding, that the [Sixth Amendment] speedy trial right [can be applied to delays in] sentencing proceedings" and applied the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972) to analyze the defendant's claim of an excessive delay in the trial court's imposition of a sentence. *Todisco*, 2000-NMCA-064, ¶¶ 16, 19.

{11} In *Calabaza*, this Court reasoned that, although the *Barker* factors may be valid considerations when the issue addressed is speedy sentencing, we did "not believe the guidelines [were] . . . specifically applicable in the speedy enforcement context." *Calabaza*, 2011-NMCA-053, ¶ 11. The defendant in *Calabaza*, in addition to speedy trial claims, also argued a violation of due process in the delay that occurred in the imposition of his sentence. *Id.* ¶ 12. This Court, in looking to similar cases where there was a delay not in the sentence hearing itself but in the imposition of a defendant's sentence, looked to the "totality of the circumstances." *Id.* ¶ 19. These circumstances include the following:

> the length of the delay and the nature of the defendant's circumstances at the time the state attempts to enforce the sentence, as well as whether the delay arose from a negligent mistake on the part of the [district] court or from deliberate or grossly negligent action, whether the defendant bears any responsibility for the delay, and whether the defendant has attempted to remedy the delay without success.

Id. ¶ 18. In *Calabaza*, we determined that any prejudice to the defendant in the delay of the imposition of his sentence was outweighed by other factors, including the district court's determination that the defendant be allowed to serve the time imposed in a community custody program. *Id.* ¶ 22.

{12} In *Betterman v. Montana*, the United States Supreme Court recently held that a defendant's right to a speedy trial under the Sixth Amendment does not extend beyond the time of conviction. 578 U.S. ___, 136 S. Ct 1612, 1617 (2016).[1] However, the United States Supreme Court did recognize that, similar to the pre-arrest stage of a criminal proceeding, due process serves as a protection against exorbitant delays, including "tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* at 1612. After conviction, "a defendant's due process right to liberty, while diminished, is still present. He retains an interest in a sentence proceeding that is fundamentally fair." *Id.* at 1617. Because the defendant in *Betterman* did not raise a due process challenge on appeal, the Court expressed no opinion on how the defendant may have fared under the more "pliable [due process] standard." *Id.* at 1618. The United States Supreme Court offered limited dicta considerations that might be applied in analyzing a defendant's claims of due process violations related to delays in sentencing. It proposed considering factors somewhat similar to the *Barker* factors applied in a speedy trial analysis. *Betterman*, 136 S. Ct at 1618 n.12. These similar factors included: "[the] length of and reasons for the delay, the defendant's diligence in requesting expeditious sentencing, and prejudice." *Id.* In a concurring opinion, Justice Sotomayor also noted that "the *Barker* factors capture many of the concerns posed in the sentencing delay context[,] and . . . because the *Barker* test is flexible, it will allow courts to take account of any difference between trial and sentencing delays." *Betterman*, 136 S. Ct. at 1619 (Sotomayor, J., concurring). However, as recognized in Justice Thomas's concurrence, the *Barker* factors "may not necessarily translate to the delayed sentencing context." *Betterman*, 136 S. Ct. at 1618 (Thomas, J., concurring). Instead, "[t]he Due Process Clause can be satisfied where a [s]tate has adequate procedure to redress an improper deprivation of liberty or property." *Id.*

{13} Following *Betterman*, at least one federal district court has chosen to use the *Barker* factors in analyzing claims of delayed sentencing under a due process analysis. *See Deck v. Steele*, 4:12 CV 1527 CDP, 2017 WL 1355437, *58, __ F. Supp. 3d __ (E.D. Mo. Apr. 13, 2017). Other jurisdictions, including Montana and the Federal Sixth Circuit Court of Appeals, have rejected the *Barker* factors and instead have looked to the due process analysis set out in *United States v. Lovasco*, 431 U.S. 783 (1977), to address " '[a]ny undue delay' before or after the period protected by the Sixth Amendment," which would include delays in sentencing as well as delays in the imposition of a sentence. *See United States v. Sanders*, 452 F.3d 572, 574, 577-580 (6th Cir. 2006) (quoting *United States v. McDonald*, 456 U.S. 1, 7 (1982)); *State v. Betterman*, 2015 MT 39, ¶ 29, 378 Mont. 182, 342 P.3d 971, *aff'd*, 136 S. Ct. 1609. Under this alternative analysis, the question of whether a delay in sentencing violates a defendant's due process rights would be answered by looking to: "(1) the reasons for the delay; and (2) what prejudice the defendant has suffered as a result of the delay." *Sanders*, 452 F.3d at 580. We agree with the Sixth Circuit Court of Appeals that the "*Lovasco* [due process] framework is well-suited to analyze whether such a delay has occurred." *Sanders*, 452 F.3d at 580. Under this framework, appellate courts are to determine only "whether the action complained of violates those fundamental conceptions of justice which lie at the base of civil and political institutions, and which define the community's sense of fair play and decency." *Id.* (omission and internal quotation marks omitted) (quoting *Lovasco*, 431 U.S. at 790).

{14} Defendant argues that the two-hundred-and-nine-day delay between conviction and sentencing violated his right to due process. Although we believe *Lovasco*'s due process framework is the most suitable analysis for a delay in sentencing claim, under any framework—*Barker*, *Lovasco*, or a totality of the circumstances test—the burden uniformly remains on the defendant to prove that the delay in sentencing was prejudicial. *See Lovasco*, 431 U.S. at 790 (stating that "proof of prejudice is generally a necessary but not [a] sufficient element of a due process claim"); *Barker*, 407 U.S. at 530 (including as the final factor in the balancing test "prejudice to the defendant"); *Calabaza*, 2011-NMCA-053, ¶¶ 22-23 (holding that there was no violation of due process where the defendant suffered no prejudice). In this case, Defendant does not argue that significant prejudice occurred and we identify none from our review of the record.

{15} After the return of the jury's verdict, the district court ordered a pre-sentence report, which was completed on June 18, 2014. The district court was not in Portales, New Mexico for two weeks because it presided over a murder trial in Tucumcari, New Mexico sometime in May or June. The district court judge was then on medical leave for six weeks at the end of July. The district court sent notice on October 2, 2014, for the sentencing hearing to take place on October 20, 2014. Defendant obtained a copy of the pre-sentence report on October 16, 2014, and filed a motion to dismiss on October 22, 2014. Throughout the delay, Defendant was out on bond, was employed, and even requested further time at sentencing to get his affairs in order. The district court granted an additional two weeks before remand, sentenced Defendant to the mandatory habitual offender time, and suspended the rest of his sentence.

{16} Although Defendant argues that he was prejudiced because he was not provided the pre-sentence report earlier, the district court was in control of the report and both parties were required to obtain a copy from the district court. Defendant did not identify any material issue that arose at his sentencing hearing because of the delay in receiving his pre-sentencing report. As such, Defendant did not meet his burden of proof under either theory, and we conclude that there was no violation of Defendant's right to due process under the Fourteenth Amendment in the delay that occurred prior to his sentencing hearing.[2] *See Betterman*, 136 S. Ct. at 1615 (recognizing that "[i]t would be an unjustified windfall, in most cases, to remedy sentencing delay by vacating validly obtained convictions").

II. Ineffective Assistance of Counsel

{17} We review de novo "the legal issues involved with claims of ineffective assistance of counsel" and "defer to the findings of fact of the [district] court if substantial evidence supports the court's findings." *State v. Crocco*, 2014-NMSC-016, ¶ 11, 327 P.3d 1068. "Criminal defendants are entitled to reasonably effective assistance of counsel under the Sixth Amendment of the United States Constitution." *Id.* ¶ 12 (internal quotation marks and citation omitted). For a successful claim of ineffective assistance of counsel, a defendant must show that his attorney erred and that this error prejudiced the defendant. *State v. Arrendondo*, 2012-NMSC-013, ¶ 38, 278 P.3d 517. The "prejudice" element of an ineffective assistance of counsel claim is not satisfied when the defendant only proves that a particular act or omission by his counsel was prejudicial to his defense; instead, the defendant must show a "reasonable probability" that but for the attorney's objectively unreasonable conduct, the result of the proceedings would have been different. *State v. Brazeal*, 1990-NMCA-010, ¶ 23, 109 N.M. 752, 790 P.2d 1033 (internal quotation marks and citation omitted).

{18} "When an ineffective assistance claim is first raised on direct appeal, we evaluate the facts that are part of the record." *Crocco*, 2014-NMSC-016, ¶ 14 (internal quotation marks and citation omitted). However,

"[t]he record is frequently insufficient to establish whether an action taken by defense counsel was reasonable or if it caused prejudice." *Arrendondo*, 2012-NMSC-013, ¶ 38. Thus, the appellate courts prefer "that these claims be brought under habeas corpus proceedings so that the defendant may actually develop the record with respect to defense counsel's actions." *Id.* The "appellate court[s] may remand a case for [a full] evidentiary hearing if the defendant makes a prima facie case of ineffective assistance [of counsel]." *Crocco*, 2014-NMSC-016, ¶ 14 (internal quotation marks and citation omitted). A prima facie case of ineffective assistance of counsel is made where: "(1) it appears from the record that counsel acted unreasonably; (2) the appellate court cannot think of a plausible, rational strategy or tactic to explain counsel's conduct; and (3) the actions of counsel are prejudicial." *State v. Herrera*, 2001-NMCA-073, ¶ 36, 131 N.M. 22, 33 P.3d 22 (internal quotation marks and citation omitted).

{19} Defendant argues that because defense counsel failed to assert Defendant's right to a speedy trial and move to dismiss the charges, there exists a prima facie showing of ineffective assistance of counsel. Recently in *State v. Castro*, this Court determined that a prima facie case for ineffective assistance of counsel was established under the facts that included defense counsel's failure to ever assert the defendant's speedy trial rights, pro forma or otherwise. 2016-NMCA-085, ¶¶ 46, 48, 381 P.3d 694. However, this case is easily distinguished from *Castro*.

{20} In *Castro*, defense counsel never asserted the defendant's right to a speedy trial at any time during the nearly four years that his case was pending. *Id.* ¶ 46. In the present case, although it appears from the record that defense counsel failed to assert Defendant's right to a speedy trial at every available juncture, defense counsel made one pro forma assertion to the magistrate court of Defendant's Sixth Amendment right and several mentions of the lengthy time line of the case to the district court. Furthermore, in *Castro* this Court specifically discussed defense counsel's failure to communicate with his client, focusing his efforts on receiving payment for past work, and his several motions to withdraw. *Id.* ¶ 48.The defendant in *Castro* also presented an affidavit attesting to his desire to assert his speedy trial right. *Id.* The record before us presents no such facts or assertions by Defendant. It is not disputed that defense counsel for Defendant may have asserted Defendant's right to a speedy trial more vigorously and could have requested a speedy trial ruling from the district court during the three years it took to bring this simple aggravated battery case to trial. *See State v. Leon*, 2013-NMCA-011, ¶ 20, 292 P.3d 493 (recognizing a presumption of counsel's ineffectiveness when constitutional rights are implicated and counsel fails to preserve a defendant's right to appeal). However, we note that defense counsel's action did not rise to the level of unreasonableness identified in *Castro*.

{21} In addition, we agree with the State that there is plausible and rational strategy for defense counsel's conduct. Here, defense counsel was diligent in moving to have the testimony of the Victim suppressed after he twice failed to attend scheduled interviews. Although Defendant's defense counsel ultimately interviewed Mr. Montano over the phone because he had moved to Arizona, it is possible that defense counsel hoped that Mr. Montano would either continue to elude her or fail to appear altogether for trial, requiring the State to drop the charges. Furthermore, because defense counsel was diligent, on multiple occasions, in asserting Defendant's argument regarding the State's failure to provide access to Mr. Montano, we see no reason to doubt her competency to vigorously represent Defendant at trial. Taking into account defense counsel's level of competency with regard to preparation for trial as well as the other plausible explanation for failing to more vigorously assert Defendant's speedy trial right, based upon the facts known to this Court, we agree that defense counsel was likely making specific, reasoned decisions in her representation of Defendant in this case. *See Castro*, 2016-NMCA-085, ¶ 50 (finding "no rational or strategic basis" for the defense counsel's failure to act regarding the assertion or preservation of the defendant's right to a speedy trial). Where a plausible, rational strategy for defense counsel's conduct exists, as is the case here, Defendant has failed to establish a prima facie case for ineffective assistance of counsel, and we need not reach the issue of whether Defendant was prejudiced. *See Crocco*, 2014-NMSC-016, ¶ 24 (explaining that the defendant did not establish a prima facie claim of ineffective assistance based on defense counsel's failure to move to suppress evidence where the assertion would likely have been groundless as the record did not show any constitutionally-protected privacy interest was violated by the warrantless entry by police).

{22} We decline to remand this case for an evidentiary hearing on whether defense counsel provided ineffective assistance of counsel. We note that Defendant is entitled to pursue an ineffective assistance of counsel claim further by filing a petition for habeas corpus. *See State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61 ("If facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition[.]").

III. Testimony of Jesus Acosta

{23} We review the district court's decision regarding discovery issues for an abuse of discretion. *State v. Desnoyers*, 2002-NMSC-031, ¶ 25, 132 N.M. 756, 55 P.3d 968, *abrogated on other grounds as recognized by State v. Forbes*, 2005-NMSC-027, ¶ 6, 138 N.M. 264, 119 P.3d 144. "In order to find an abuse of discretion, we must conclude that the decision below was against logic and not justified by reason." *State v. Duarte*, 2007-NMCA-012, ¶ 14, 140 N.M. 930, 149 P.3d 1027 (internal quotation marks and citation omitted).

{24} Defendant argues that the district court erred in allowing Mr. Acosta to testify because the address provided on the State's witness list was insufficient. Rule 5-501(A)(5) NMRA states that the State shall disclose to the defendant a "written list of the names and addresses of all witnesses which the prosecutor intends to call at the trial[.]" The State has a continuing duty under Rule 5-505(A) NMRA to disclose "additional material or witnesses which [the prosecutor] would have been under a duty to produce or disclose [by] . . . promptly giv[ing] written notice to the other party . . . of the existence of the additional material or witnesses." The assessment of sanctions for a violation of discovery "depends upon the extent of the [g]overnment's culpability weighed against the amount of prejudice to the defense." *State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25 (omission, internal quotation marks, and citation omitted). "The exclusion of witnesses is a severe sanction [and] . . . like outright dismissal of a case, the exclusion of witnesses should not be imposed except in extreme cases, and only after an adequate hearing to determine the reasons for the violation and the prejudicial effect on the opposing party." *Id.* ¶ 21.

{25} The State did not fail to disclose the witness's identity or act in bad faith to conceal his whereabouts. The State filed an updated witness list on June 24, 2011, including the name of Mr. Acosta and an address at the Midway Dairy. The prosecutor for the State located Mr. Acosta only thirty-six hours prior to trial after searching for him. Defendant was then given the opportunity to interview Mr. Acosta in person prior to his testimony. Given that Mr. Acosta was the only witness to the events between Defendant and Mr. Montano, it would have been an extreme sanction to exclude his testimony where there is no evidence that the State failed to timely disclose his identity, the State searched to locate him for an interview, and Defendant was ultimately able to interview him prior to his testimony. As a result, we hold that the district court did not abuse its discretion by refusing to exclude the testimony of Mr. Acosta. *See State v. Le Mier*, 2017-NMSC-017, ¶ 17, 394 P.3d 959 ("As an appellate court, we necessarily operate with imperfect information about the proceedings we review, and our assessment of the propriety of the decision to impose or not to impose witness exclusion must reflect this reality.").

IV. Defendant Was Afforded a Fair Trial

A. Courtroom

{26} Defendant argues that the location of his trial, the Yam Theater, did not afford him a fair trial because the proceedings lacked the necessary decorum. However, Defendant does not argue violations of due process or equal protection and "[a] general claim of denial of a fair trial cannot provide a basis for relief." *State v. Smith*, 1979-NMSC-020, ¶ 9, 92 N.M. 533, 591

P.2d 664. Furthermore, Defendant does not cite to any specific facts in the record pointing to how the location was unconstitutional and "[w]e will not search the record for facts, arguments, and rulings in order to support generalized arguments." *Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104. Finally, Defendant does not argue that the location limited public access and thereby, denied him a right to a public trial as afforded by the Sixth Amendment to the United States Constitution.

{27} Instead, Defendant cites to several cases from other jurisdictions where courts have determined that an alternative trial location denied those defendants a fair trial. *See Roberts v. State*, 158 N.W. 930, 932 (Neb. 1916) (identifying specific facts during a trial held in a theater where the bailiff announced that the "regular show will be to[]morrow; matinee in the afternoon and another performance at 8:30" (internal quotation marks and citation omitted)); *People v. Rose*, 368 N.Y.S.2d 387, 391 (N.Y. Cty. Ct. 1975) (holding that selecting a room permeated with religious symbols was prejudicial to the defendant as it was inconsistent with prohibitions against the establishment of religion); *State v. Jaime*, 233 P.3d 554, 555 (Wash. 2010) (holding that a trial in a jail was inherently prejudicial to the defendant). However, none of these cases are sufficiently similar to Defendant's case. The trial was held at the Yam Theater out of necessity because the ducts at the courthouse were being cleaned. There are no facts argued by Defendant that the case lacked the proper solemnity of a criminal trial. Furthermore, unlike the cases presented by Defendant, the theater did not cause the trial to become a spectacle or "show" and it was not full of religious symbols. The district court further referred to the theater as a courtroom. Finally, Defendant failed to identify to any facts that would lead us to conclude that the location was so uninviting as to limit public access.

{28} For the foregoing reasons, we will not try to guess at Defendant's legal argument or attempt to search for facts that could support such an argument. Holding Defendant's trial at Yam Theater did not deny Defendant a fair trial. *See People v. Terry*, 222 P.2d 95, 584 (Dist. Ct. Cal. App. 1950) ("In the absence of some showing to the contrary[,] the mere fact of holding a session of court in a room other than a regular court room is entirely insufficient to warrant a conclusion, that the trial was secret and violative of the rights of [the] defendant").

B. Evidentiary Arguments

{29} Defendant argues that two evidentiary errors denied him a fair trial: (1) the chain of custody of the knife that was admitted at trial through a photograph, and (2) Mr. Montano's statement to Agent Alvarado that Defendant was the one who stabbed him. Defense counsel cites to *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, 428 P.2d 982 and *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655, 712 P.2d 1 in advocating Defendant's position.

{30} "We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse." *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize [the ruling] as clearly untenable or not justified by reason." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citations omitted).

1. Photograph of the Knife

{31} Defendant, on appeal, challenges the chain of custody of the knife that was admitted at trial through a photographic exhibit. "In order to admit real or demonstrative evidence, the evidence must be identified either visually or by establishing custody of the object from the time of seizure to the time it is offered into evidence." *State v. Rubio*, 2002-NMCA-007, ¶ 16, 131 N.M. 479, 39 P.3d 144 (internal quotation marks and citation omitted). "The State is not required to establish the chain of custody in sufficient detail to exclude all possibility of tampering." *Id.* Photographic evidence, a form of demonstrative evidence, "must fairly and accurately represent the depicted subject in order to satisfy the foundation requirement for authentication of photographs." *State v. Mora*, 1997-NMSC-060, ¶ 53, 124 N.M. 346, 950 P.2d 789, *abrogated on other grounds as recognized by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683. Photographic evidence is admissible "when a sponsoring witness can testify that it is a fair and accurate representation of the subject matter, based on that witness's personal observation." *State v. Henderson*, 1983-NMCA-094, ¶ 8, 100 N.M. 260, 669 P.2d 736.

{32} Defendant's argument on appeal, challenging the adequacy of the State's proof of the chain of custody of the knife, was minimally developed in his brief in chief. Generally, this Court is under no obligation "to review an argument that is not adequately developed." *Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701. Even if we interpret Defendant's argument to be that in failing to establish the chain of custody of the knife, the State did not establish the admission of the photograph of the knife, "[q]uestions concerning a possible gap in the chain of custody affects the weight of the evidence, not its admissibility." *State v. Peters*, 1997-NMCA-084, ¶ 26, 123 N.M. 667, 944 P.2d 896. The only questions therefore are whether the knife was relevant to the case and whether the State laid a proper foundation for admission of the photograph of the knife.

{33} At trial, Defendant objected to the State's admission of the photograph of the knife (Exhibit 2), the same knife that was given to Agent Alvarado by Defendant's wife. Defendant does not argue that the knife given to Agent Alvarado by Defendant's wife was not relevant to the stabbing incident between Defendant and the Victim. As to the foundation for the photograph of the knife, Agent Alvarado testified to the following facts: (1) while interviewing Defendant after the incident, Agent Alvarado requested the knife from Defendant;(2) Agent Alvarado was then able to retrieve the knife from Defendant's wife; (3) the photograph offered by the State was a picture of the knife he received from Defendant's wife; and (4) the photograph was "a fair and accurate depiction of the knife" that he received. For the purposes of the photograph, this testimony is sufficient to lay the foundation for the authentication of a photograph. *See State v. Henderson*, 1983-NMCA-094, ¶ 8, 100 N.M. 260, 669 P.2d 736 (recognizing that photographic evidence is admissible under the pictorial theory where the sponsoring witness testifies "that it is a fair and accurate representation of the subject matter, based on that witness's personal observation"). Under the circumstances in this case, the district court did not abuse its discretion in admitting the photograph of the knife. *See id.*

2. Testimony of Agent Alvarado

{34} Agent Alvarado testified that Mr. Montano told him that Defendant stabbed him. Defense counsel did not object. "In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon."

State v. Montoya, 2015-NMSC-010, ¶ 45, 345 P.3d 1056 (internal quotation marks and citation omitted). This Court reviews unpreserved evidentiary matters for plain error. *State v. Contreras*, 1995-NMSC-056, ¶ 23, 120 N.M. 486, 903 P.2d 228. "The plain-error rule, however, applies only if the alleged error affected the substantial rights of the accused. We must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *Id.* (internal quotation marks and citations omitted); *see* Rule 11-103(E) NMRA (permitting a court to "take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved").

{35} Defendant argues that Agent Alvarado's testimony that Mr. Montano told him that it was Defendant who stabbed him violated his confrontation rights under the Confrontation Clause. However, the testimony did not affect Defendant's substantial rights in the present case. The fact that Defendant was the individual who stabbed Mr. Montano was not in dispute. Mr. Montano testified to the fact that Defendant stabbed him and was subject to cross-examination by Defendant. Defendant also testified that, during the fight, he was swinging the knife at Mr. Montano and hit him. As such, Agent Alvarado's testimony was simply cumulative evidence that corroborated the testimony of both Defendant and the Victim. As such, Agent Alvarado's testimony does not implicate a violation of the confrontation clause and any error that may have occurred would be harmless. *See State v. Serna*, 2013-NMSC-033, ¶ 22, 305 P.3d 936 (reviewing improperly admitted evidence for non-constitutional harmless error). By its nature, harmless error would not be sufficiently prejudicial to establish grave doubts in the minds of the jury and therefore would not rise to a level sufficient to establish plain error. *See State v. Lopez*, 2009-NMCA-044, ¶ 15, 146 N.M. 98, 206 P.3d 1003 (recognizing that, to support reversal, the prejudicial nature of the evidence must have "likely contributed to the jury's verdict or, instead, was not prejudicial because it constituted harmless error").

V. Cumulative Error

{36} "Cumulative error requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial." *State v. Martin*, 1984-NMSC-077, ¶ 17, 101 N.M. 595, 686 P.2d 937. "The doctrine cannot be invoked if no irregularities occurred or if the record as a whole demonstrates that a defendant received a fair trial[.]" *Id.* (citations omitted). Having now determined that the only evidentiary error occurring in this case was one minor instance of harmless error, we also hold that there was no cumulative error. *See State v. Duffy*, 1998-NMSC-014, ¶ 60, 126 N.M. 132, 967 P.2d 807 (reasoning that no cumulative error exists where, after addressing each error claimed by the defendant, our Supreme Court determined that there was either no error or only harmless error), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110.

CONCLUSION

{37} For the foregoing reasons, we affirm Defendant's conviction.

{38} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

JULIE J. VARGAS, Judge

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[1]The United States Supreme Court reserved "the question [of] whether the Speedy Trial Clause applies to bifurcated proceedings in which, at the sentencing stage, facts that could increase the prescribed sentencing range are determined[,]" for example capital cases. *Betterman*, 136 S. Ct. at 1613 n.2. The Court also reserved the question related to renewed prosecution following successful appeal, when the defendant again had a presumption of innocence. *Id.* Neither question is raised here nor does Defendant make any arguments of this nature.

[2]Defendant did not assert a statutory claim under Rule 5-701(B) NMRA that states: "A sentencing hearing shall begin within ninety (90) days from the date the trial was concluded or the date a plea was entered[,]" unless good cause is shown.

Certiorari Granted, October 10, 2017, No. S-1-SC-36638

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-003

No. A-1-CA-34518 (filed July 31, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOHN FARISH,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
CHRISTINA P. ARGYRES, District Judge

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Opinion

J. Miles Hanisee, Judge

{1} Defendant John Farish appeals from the district court's on-record affirmance of his convictions in metropolitan court for driving a vehicle with defective equipment, pursuant to NMSA 1978, Section 66-3-801(A) (1991), and driving under the influence (DUI), pursuant to NMSA 1978, Section 66-8-102 (2010). Defendant argues that the officer who stopped his vehicle lacked reasonable suspicion to support the stop. We affirm.

BACKGROUND

{2} At approximately 1:30 a.m. on April 13, 2012, Defendant was stopped by Bernalillo County Sheriff's Deputy Peter Martinez on Montaño Road near Fourth Street in Albuquerque, New Mexico. The basis for the stop was that Deputy Martinez believed Defendant was violating Section 66-3-801(A) by driving a vehicle with defective equipment, specifically an improperly functioning left taillight. [1] Defendant's left taillight consisted of two bulbs: a larger upper bulb, and a smaller lower bulb. While the lower bulb was lit, the upper bulb was not. After first observing Defendant's vehicle, Deputy Martinez followed Defendant for approximately one-quarter mile, during which time he also "observed some driving behaviors that were possible for someone who might be under the influence." Specifically, he observed Defendant swerve within the lane twice in a manner that nearly drove over the lane markings, though he never saw Defendant leave the lane or touch the markings. Deputy Martinez testified that there were no other violations of law and that his only basis for stopping Defendant was the perceived taillight violation. Upon making contact with Defendant, Deputy Martinez noticed that Defendant had bloodshot, watery eyes and the smell of alcohol coming from his facial area. Deputy Martinez then initiated a DUI investigation, and Defendant was subsequently charged with DUI (first offense) and operating a vehicle with defective equipment.

{3} Prior to trial, Defendant requested and the metropolitan court held an evidentiary hearing on the question of reasonable suspicion. After Deputy Martinez testified to the above-cited facts, Defendant argued that the charges against him should be dismissed because the testimony indicated that Defendant had two taillights that were in "working condition," meaning that Deputy Martinez lacked reasonable suspicion of a violation of either Section 66-3-801(A) (providing, among other things, that it is a misdemeanor to operate a vehicle "which . . . is not at all times equipped with such lamps and other equipment in proper condition and adjustment as is required by [NMSA 1978, §§ 66-3-801 to -887 (1978, as amended through 2017)]," or Section 66-3-805(A) (setting forth specific requirements for tail lamps), and that there was no other reasonable basis for the stop. Defendant argued that "the light, maybe a bulb, being out was not reason enough to pull over [Defendant.]" Alternatively, Defendant argued that the stop was pretextual. The State argued that Deputy Martinez had reasonable suspicion because part of Defendant's left taillight was not lit, meaning it was not "in proper condition" as required by Section 66-3-801(A). The State also argued that Defendant failed to meet his burden of establishing that the stop was pretextual.

{4} The metropolitan court found that Deputy Martinez had reasonable suspicion to stop Defendant's vehicle based on Deputy Martinez's observation that part of Defendant's taillight was not illuminated. It reasoned that "[one] light not working out of a two-part light would still be a defective equipment [violation]" under Section 66-3-801, i.e., it was a per se violation. The metropolitan court further found that there was no testimony elicited to support Defendant's argument that the stop was pretextual and therefore denied Defendant's motion to dismiss on that basis as well. Defendant was subsequently convicted of DUI (first offense) and driving a vehicle with defective equipment.

{5} In his on-record appeal to the district court, Defendant argued that the trial court misapplied Section 66-3-801 because "a plain reading of [Section 66-3-801] indicates that defective equipment is defined in [S]ections 66-3-801 through 66-3-887[,]" making it necessary to "analyze [S]ection 66-3-805(A), which defines functioning tail lamps[.]" Section 66-3-805(A) provides that "[e]very motor vehicle . . . shall be equipped with at least two tail lamps mounted on the rear" and that such lamps "shall emit a red light plainly visible from a distance of [500] feet to the rear[.]"

According to Defendant, Deputy Martinez failed to articulate facts that would support reasonable suspicion that Defendant had violated Section 66-3-805(A) because Deputy Martinez conceded that he was, at all times, within 500 feet of the rear of Defendant's vehicle, thus making any suspected violation speculative rather than reasonable. The district court agreed with Defendant that "there can be no violation of Section 66-3-801 with respect to defective tail[]lights without reference to Section 66-3-805" and concluded that "to the extent Deputy Martinez relied on Section[s] 66-3-801 [and -805(A)] for a per se violation, the [district c]ourt agrees the officer made a mistake of law." However, the district court construed Section 66-3-805(C) as providing an independent basis supporting the existence of reasonable suspicion. According to the district court, Section 66-3-805(C) requires that "if a tail lamp is wired to be lighted, it must be lit when it is dark." Thus, reasoned the district court, because Deputy Martinez articulated facts that would support the conclusion that Defendant violated Section 66-3-805(C) because the upper, larger portion of one of Defendant's taillights was not lighted at 1:30 a.m. when it would have been dark, there was reasonable suspicion to stop Defendant. Accordingly, the district court affirmed Defendant's convictions. Defendant now appeals to this Court.

STANDARDS OF REVIEW

Statutory Interpretation

{6} "Statutory interpretation is an issue of law, which we review de novo." *State v. Duhon*, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50. "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 begin the search for legislative intent by looking first to the words chosen by the Legislature and the plain meaning of the Legislature's language." *State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064 (internal quotation marks and citation omitted). "If the language of the statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *State v. Chavez*, 2016-NMCA-016, ¶ 7, 365 P.3d 61 (internal quotation marks and citation omitted), *cert. granted*, 2016-NMCERT-001, 370 P.3d 474.

Reasonable Suspicion

{7} "[W]e determine constitutional reasonableness de novo." *State v. Dopslaf*, 2015-NMCA-098, ¶ 7, 356 P.3d 559, *cert. denied*, 2015-NMCERT-008, 369 P.3d 368. "The appellate courts will find reasonable suspicion if the officer is aware of specific articulable facts, together with rational inferences from those facts, that when judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." *Id.* ¶ 8 (internal quotation marks and citation omitted). "A police officer may stop a vehicle if he has an objectively reasonable suspicion that the motorist has violated a traffic law." *State v. Vandenberg*, 2002-NMCA-066, ¶ 17, 132 N.M. 354, 48 P.3d 92, *rev'd on other grounds*, 2003-NMSC-030, 134 N.M. 566, 81 P.3d 19. "The subjective belief of the officer does not in itself affect the validity of the stop; it is the evidence known to the officer that counts, not the officer's view of the governing law." *State v. Hubble*, 2009-NMSC-014, ¶ 8, 146 N.M. 70, 206 P.3d 579 (internal quotation marks and citation omitted). "[I]f an officer mistakenly believes that certain conduct violates one statute, but that conduct in fact violates a different statute, reasonable suspicion exists to stop the suspect despite the officer's mistake of law." *State v. Moseley*, 2014-NMCA-033, ¶ 15, 320 P.3d 517. "[W]e can ignore [an officer's] inappropriate reference to [the wrong statute] in the citation [he] prepare[s]. If his observations provided reasonable grounds to believe that another statute was being violated, . . . the stop was valid, regardless of his incorrect understanding of the law." *State v. Munoz*, 1998-NMCA-140, ¶ 9, 125 N.M. 765, 965 P.2d 349.

DISCUSSION

{8} Defendant argues that both courts below erred in construing the requirements of the New Mexico Motor Vehicle Code, NMSA 1978, §§ 66-1-1 to -8-141 (1978, as amended through 2016), specifically Section 66-3-805(A) and (C) (tail lamps), and in determining whether the facts of this case gave rise to reasonable suspicion that Defendant was operating a vehicle in violation thereof. The State argues that Deputy Martinez's testimony supported a conclusion that he had reasonable suspicion to investigate a potential equipment violation under either Sections 66-3-805(A) or (C). The State also challenges the district court's conclusion that "there can be no violation of Section 66-3-801 with respect to defective tail[]lights without reference to Section 66-3-805" and argues that Section 66-3-801(A) provided an independent basis for a violation because Defendant's left taillight was "in such unsafe condition as to endanger any person." We consider the parties' arguments in turn and, ultimately, whether the facts in the record support the conclusion that Deputy Martinez had reasonable suspicion that Defendant was committing a traffic violation by driving a vehicle with a malfunctioning taillight.

Section 66-3-805(A)

{9} Defendant argues that there are insufficient facts to support a finding that Deputy Martinez had reasonable suspicion that Defendant violated Section 66-3-805(A) by driving a vehicle with a left taillight in which the larger upper bulb was not working. In order to have such reasonable suspicion, the officer must be able to articulate facts that would support a reasonable inference that the subject vehicle's taillights failed to "emit a red light plainly visible from a distance of [500] feet to the rear." Section 66-3-805(A); *see Dopslaf*, 2015-NMCA-098, ¶ 8. Here, Deputy Martinez conceded that he was never 500 feet or more away from Defendant's vehicle and that his opinion that Defendant's vehicle would not be visible at a distance of 500 feet was "an assumption based off of prior inciden[ts he has] had viewing vehicles." Both the metropolitan court and the district court agreed that Deputy Martinez's testimony failed to establish facts that would support reasonable suspicion of a violation based on Section 66-3-805(A). We, too, conclude that Deputy Martinez's speculative testimony as to whether Defendant's left taillight would or would not have been visible from 500 feet away is insufficient to establish reasonable suspicion. *See State v. Martinez*, 2015-NMCA-051, ¶ 15, 348 P.3d 1022 ("The constitutionality of a stop premised upon reasonable suspicion cannot be based upon speculation or conjecture."), *cert. granted*, 2015-NMCERT-005, 367 P.3d 441.

Section 66-3-805(C)

{10} Defendant next argues that the district court improperly affirmed his convictions based on its interpretation of Section 66-3-805(C) as providing an alternative basis for finding that Deputy Martinez had reasonable suspicion that Defendant was violating the law. Section 66-3-805(C) provides, in its entirety:

> Either a tail lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of [50] feet to the rear. Any tail lamp or tail lamps,

> together with any separate lamp for illuminating the rear registration plate, shall be so wired as to be lighted whenever the headlamps or auxiliary driving lamps are lighted.

Divorcing the provision's second sentence from the first, the district court construed the second sentence to "mean that if a tail lamp is wired to be lighted, it must be lit when it is dark." Applying its interpretation of Section 66-3-805(C) to the facts, the district court noted that Deputy Martinez "articulated facts to support a reasonable suspicion [that] Defendant violated Section 66-3-801 because his tail[]lights were not lit as required by Section 66-3-805(C)."

{11} We conclude that the district court erred in interpreting Section 66-3-805(C). "When expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Starko, Inc. v. N.M. Human Servs. Dep't*, 2014-NMSC-033, ¶ 35, 333 P.3d 947 (internal quotation marks and citation omitted). Read in its entirety, Section 66-3-805(C) deals primarily, if not exclusively, with illumination of the rear registration plate. The first sentence requires that the license plate be visible 50 feet away. The second sentence, requiring any tail lamp or lamps to "be so wired as to be lighted" in conjunction with headlamps, can best be understood as further requiring that the tail lamps and rear registration plate area illuminate simultaneously with headlamps. Because the gravamen of Section 66-3-805(C) is directed toward the license plate being illuminated and there was no testimony whatsoever regarding whether or not Defendant's license plate was, or any indication that the requisite wiring was unlinked to the headlamps, the district court improperly relied upon Section 66-3-805(C) to find that Deputy Martinez had reasonable suspicion of a violation based solely upon a partial failure of one taillight to fully illuminate.

{12} At this juncture of the analysis, Defendant appears to argue that our inquiry ends and reversal is required because Deputy Martinez failed to articulate facts sufficient to support the existence of reasonable suspicion that Defendant had violated Section 66-3-805(A) or (C) and because there is no independent basis for a taillight violation under Section 66-3-801(A). We disagree and next consider the State's contention that defective taillights could constitute a violation of Section 66-3-801(A) even absent a per se violation of Section 66-3-805.

Section 66-3-801(A)

{13} The State directs us to *Munoz*, where this Court construed Section 66-3-801(A) as "providing three alternative ways that a vehicle would be covered" by the statute:

> (1) it is in such unsafe condition as to endanger any person, (2) it does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as is required by Sections 66-3-801 through 66-3-887, or (3) it is equipped in any manner that is in violation of those sections.

Munoz, 1998-NMCA-140, ¶ 10 (internal quotation marks omitted). Given our previous analysis regarding Section 66-3-805—the only one of the sections referenced in the second and third alternatives under Section 66-3-801(A) applicable to taillights—we need only examine what constitutes a violation under the first alternative. Discussing the requirement that vehicles be safe, the *Munoz* Court stated that "it is a misdemeanor to drive on the highway a vehicle that is in such unsafe condition as to endanger any person." *Id.* (internal quotation marks omitted). While references to the equipment requirements of Sections 66-3-801 to -887 in the second and third alternatives establish what could be considered per se violations, *Munoz* explains that the language referring to vehicles "in such unsafe condition as to endanger any person" establishes an alternative way of violating the statute even where a vehicle's equipment is otherwise compliant with Sections 66-3-801 to -887. *Munoz*, 1998-NMCA-140, ¶ 10 (internal quotation marks omitted). Thus, Section 66-3-801 penalizes drivers who drive "a vehicle that is in an unsafe condition, regardless of whether it is being driven unsafely at the time. . . . It is the risk of harm, not its realization[,] that counts." *Munoz*, 1998-NMCA-140, ¶ 12. We understand Section 66-3-801(A) to effectively declare that a vehicle not equipped in compliance with the requirements of Sections 66-3-801 to -887 is "unsafe" as a matter of law, and to also allow for situations where properly-equipped vehicles may nonetheless be considered "unsafe" where specific facts establish that the vehicle's "unsafe condition . . . endanger[s] any person." Section 66-3-801(A); *see, e.g.*, *Munoz*, 1998-NMCA-140, ¶ 11 (explaining that "not all windshield cracks obscure the driver's vision, at least not enough to constitute a safety hazard. But when they do constitute such a hazard, one who drives the vehicle creates a danger to the public that is prohibited by Section 66-3-801"). We thus agree with the State that the district court was incorrect to conclude that there can be no violation of Section 66-3-801(A) with respect to taillights without reference to Section 66-3-805. The question then becomes whether the facts in this case support an independent finding of a violation of Section 66-3-801(A) based on the "unsafe condition" provision.

{14} The State argues that Deputy Martinez articulated a "general safety concern" that other drivers would not be able to see Defendant's vehicle when approaching from the rear because of Defendant's partial taillight malfunction. The State points to Deputy Martinez's testimony that he was concerned about the taillight not working properly "due to visibility," meaning that he thought the taillight was "not a large enough light to give other drivers proper awareness of the vehicle." This, the State claims, was sufficient evidence to support a finding that Defendant's vehicle was "in such unsafe condition as to endanger any person" in violation of Section 66-3-801(A), thereby supporting the conclusion that Deputy Martinez had reasonable suspicion to stop Defendant. We disagree.

{15} When asked to describe the traffic in the area at the time, Deputy Martinez stated, "[t]here were a few other vehicles, not within the immediate area, but there were a few other vehicles on the road. It was light but very little traffic, but there were other vehicles on the roadway." Deputy Martinez neither testified that he could not see Defendant's vehicle nor articulated facts from which it could be inferred that Deputy Martinez believed that either he, Defendant, or any other person was "endangered" by the condition of the left taillight. As with the insufficiency of Deputy Martinez's assumption that he would not have been able to see Defendant's taillights had he been more than 500 feet away, his testimony regarding what the State describes to be a "general safety concern" does not meet the constitutional requirement of a *particularized* suspicion to support its reasonableness. *See State v. Jason L.*, 2000-NMSC-018, ¶ 20, 129 N.M. 119, 2 P.3d 856 ("A reasonable suspicion is a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law."). While we agree with the State

that it is possible for a vehicle's partially-malfunctioning taillight to give rise to reasonable suspicion of a violation of Section 66-3-801(A)'s "unsafe condition" provision without reference to Section 66-3-805, we disagree that the factual record of this case supports that conclusion. *See State v. Anaya*, 2008-NMCA-020, ¶ 19, 143 N.M. 431, 176 P.3d 1163 (considering whether there was sufficient evidence to support reasonable suspicion of a violation of New Mexico's turn signal statute, Section 66-7-325(A), which requires the use of a turn signal "in the event any other traffic may be affected by [the vehicle's] movement[,]" and concluding that while "there could be cases in which the officer's vehicle could be considered affected traffic, . . . [i]n our case, the facts as articulated by the officer do not support violation of the turn signal law"), *abrogated on other grounds by Dopslaf*, 2015-NMCA-098.

Whether Any Other Provision of the Motor Vehicle Code Provided a Reasonable Basis for the Stop

{16} "Our obligation as a reviewing court is to objectively judge the circumstances known to the officer to determine whether from the circumstances a reasonable person would believe that criminal activity occurred or was occurring." *State v. Goodman*, 2017-NMCA-010, ¶ 14, 389 P.3d 311. As a reviewing court, we consider the facts in the record, which Defendant does not dispute, and determine whether they could support reasonable suspicion of a violation of the Motor Vehicle Code on other grounds. *See Hubble*, 2009-NMSC-014, ¶ 29 (explaining that the reviewing court must still determine "if there were other facts surrounding the officer's decision to conduct the traffic stop that could provide the objective grounds for reasonable suspicion"); *State v. Gallegos*, 2007-NMSC-007, ¶ 26, 141 N.M. 185, 152 P.3d 828 (holding that the appellate court will affirm the district court's decision if it is right for any reason, so long as it is not unfair to the appellant); *State v. Wilson*, 1998-NMCA-084, ¶ 17, 125 N.M. 390, 962 P.2d 636 ("Appellate courts usually apply the right for any reason basis of affirmance to strictly legal questions."). The ultimate question in a reasonable suspicion challenge is "whether the facts available to the officer warrant the officer, as a person of reasonable caution, to believe the action taken was appropriate." *Hubble*, 2009-NMSC-014, ¶ 8. Thus "in evaluating the propriety of a vehicle stop, the reasonable, experienced officer standard allows consideration of all facts that the officer knew at the time, whether or not the officer actually considered or later verbalized those factors as the reason for the stop." *State v. Vargas*, 1995-NMCA-091, ¶ 13, 120 N.M. 416, 902 P.2d 571. In other words, if there is another statutory basis for supporting Deputy Martinez's suspicion that Defendant was violating the law by driving a vehicle with a taillight whose larger upper bulb was not lit, the stop was reasonable.

{17} We begin by observing that operating a motor vehicle upon public highways in New Mexico is a privilege, not a right. *See, e.g.,* § 66-1-4.16(S) (defining "suspension" as used within the Motor Vehicle Code as meaning that "a person's driver's license and *privilege to drive a motor vehicle* on the public highways are temporarily withdrawn" (emphasis added)); *In re Suazo*, 1994-NMSC-070, ¶ 31, 117 N.M. 785, 877 P.2d 1088 (Baca, J., specially concurring) (explaining that "operating a motor vehicle in New Mexico is a privilege, not a right"). Our Legislature has enumerated in the Motor Vehicle Code the many responsibilities and obligations that accompany that privilege. *See* §§ 66-1-1 to -8-141. As discussed above, in Sections 66-3-801 to -887 the Legislature set forth specific, technical, equipment-related requirements for all motor vehicles and provided in Section 66-3-801(A) that failure to comply with those requirements constitutes a misdemeanor. The Legislature further provided that drivers must ensure that the equipment on their vehicle is generally in "good working order" in order to operate the vehicle on public highways. Section 66-3-901 ("No person shall drive or move on any highway any motor vehicle . . . unless the equipment upon every vehicle is in good working order and adjustment as required in the Motor Vehicle Code.").

{18} We understand Section 66-3-901 to impose an additional requirement—that the equipment on driven vehicles function properly—above and beyond those specifically provided for in Sections 66-3-801 to -887. The dissent's criticism of this analysis mistakes that it expands upon the more specific taillight equipment requirements of Section 66-3-805. *See* Dissent ¶ 24. Section 66-3-805(A), however, establishes specific visibility requirements separate and apart from Section 66-3-901's requirement that equipment on a vehicle, including within the vehicle's tail lamps, operate properly. In other words, the statutes reflect different purposes, do not overlap, operate independently from one another, and neither conflict with nor render a nullity the requirements of the other. Our analysis is further guided by the rule that the statute or statutes whose construction is in question are to "be read in connection with other statutes concerning the same subject matter[.]" *Quantum Corp. v. N.M. Taxation & Revenue Dep't*, 1998-NMCA-050, ¶ 8, 125 N.M. 49, 956 P.2d 848. While we acknowledge that Section 66-3-801(A) requires that all vehicles be equipped "in proper condition and adjustment as is required by Sections 66-3-801 through 66-3-887[,]" we conclude that the Legislature intended for the "good working order" requirement in Section 66-3-901 to be understood differently than Section 66-3-801(A)'s "proper condition" provision. *Cf. Am. Fed'n of State, Cty. & Mun. Emps. (AFSCME) v. City of Albuquerque*, 2013-NMCA-063, ¶ 5, 304 P.3d 443 ("Statutes must also be construed so that no part of the statute is rendered surplusage or superfluous[.]" (internal quotation marks and citation omitted)). A plain reading of Section 66-3-901 leads to the conclusion that the Legislature intends that all equipment on a vehicle be in not only working order but *good* working order, which requirement applies to not only Sections 66-3-801 to -887 but the entire Motor Vehicle Code, of which Section 66-3-901 itself is a part. *See Duhon*, 2005-NMCA-120, ¶ 10 ("When the language in a statute is clear and unambiguous, we give effect to that language and refrain from further statutory interpretation.").

{19} The uncontroverted facts, here, are that Deputy Martinez noticed that the left taillight on Defendant's vehicle was "not working properly." Specifically, the entire upper, larger portion of the taillight was not lit. In his statement of appellate issues to the district court, Defendant acknowledged that he "had one tail[light] that was not working at 100 per[]cent" and described the left taillight as "not working perfectly[.]" But applying Section 66-3-901, Defendant's contention that "the light, maybe a bulb, being out was not reason enough to pull over [Defendant]" is incorrect. A taillight bulb being burned out means that not all equipment on Defendant's vehicle was in working order, let alone *good* working order as required by Section 66-3-901. Thus, while a bulb being out may not have been enough to give rise to reasonable suspicion of a per se violation of Section 66-3-805(A) or (C) or an "unsafe condition" violation of Section 66-3-801(A), it was enough to establish reasonable suspicion of a violation of Section 66-3-901 to justify the ensuing stop. *See Hubble*, 2009-NMSC-014, ¶ 9 (explaining that "[t]he determination of

whether [an officer] had reasonable suspicion to make [a] traffic stop does not hinge on whether [the d]efendant actually violated the underlying . . . statute"); *Moseley*, 2014-NMCA-033, ¶ 15; *Munoz*, 1998-NMCA-140, ¶ 9. Ultimately, we conclude that it can hardly be considered unreasonable, as would Judge Garcia in this circumstance, for an officer to have reasonable suspicion that the law is being violated when he observes a malfunctioning light on a vehicle that is being driven on a public highway at night. *See* Dissent ¶¶ 28-29. But Section 66-3-901 does not require that an officer look askance in some instances in which a vehicle's equipment is not in good working order; rather, it requires vehicles' equipment to operate properly. To hold that an officer lacks reasonable suspicion to pull over a vehicle in New Mexico upon observation of a taillight bulb not illuminating would be markedly inconsistent with the purpose of the Motor Vehicle Code as applicable to the privilege that is driving in New Mexico. *See State v. Herrera*, 1974-NMSC-037, ¶ 6, 86 N.M. 224, 522 P.2d 76 (explaining that courts "will not construe statutes to achieve an absurd result or to defeat the intended object of the [L]egislature"). Because Deputy Martinez articulated specific facts indicating that the equipment on Defendant's vehicle was "not working properly"—i.e., was not in good working order—he had reasonable suspicion to believe that *a* traffic law, even if not the one he had in mind at the time or at trial, was being violated.

Defendant's Claim Under the New Mexico Constitution

{20} In his reply brief, Defendant raises for the first time a claim under Article II, Section 10 of the New Mexico Constitution. Defendant couches his new argument as responding to the State's citation in its answer brief to *Heien v. North Carolina*, ___ U.S. ___, 135 S. Ct. 530 (2014), as support for the proposition that the Fourth Amendment of the United States Constitution permits investigatory traffic stops by officers based on mistakes of law. We initially note that our case law is clear that the New Mexico Constitution affords no greater protection against investigatory traffic stops than does the Fourth Amendment. *See State v. Yazzie*, 2016-NMSC-026, ¶ 38, 376 P.3d 858 ("Although we have interpreted Article II, Section 10 to provide broader protections against unreasonable search and seizure than the Fourth Amendment in some contexts, we have never interpreted the New Mexico Constitution to require more than a reasonable suspicion that the law is being or has been broken to conduct a temporary, investigatory traffic stop[.]" (citation omitted)). We next note that *Heien* does not alter the basic reasonable suspicion analysis under the Fourth Amendment but merely provides that an officer's mistake of law, if reasonable, does not make a stop per se unreasonable and thus a violation of the Fourth Amendment. *See Heien*, 135 S. Ct. at 539 (explaining that "the mistake of law relates to the antecedent question of whether it was reasonable for an officer to suspect that the defendant's conduct was illegal. If so, there was no violation of the Fourth Amendment in the first place"). Defendant appears to argue that *Heien* creates a novel opportunity to consider whether the New Mexico Constitution affords more expansive protection than the Fourth Amendment in the context of investigatory stops based on reasonable mistakes of law, thus potentially excusing his failure to preserve this challenge below. However, we need not reach that issue because the basis for our affirmance is not that Deputy Martinez made a reasonable mistake of law, making it unnecessary for us to consider whether Defendant should be permitted to make an unpreserved challenge in light of *Heien*. Moreover, we note that Defendant does nothing more to develop his argument than provide an explanation regarding why he did not raise this issue below and cite a single, distinguishable case for the proposition that "the New Mexico Constitution provides greater protection [regarding mistakes of law] as the exclusion of evidence illegally obtained does not rely upon deterrent effect or judicial integrity but rather vindicates the right of the individual and effectuates the law of the pending case." As is well-established practice in appellate review, we decline to speculate as to what the specific basis for Defendant's argument may be. *See State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining that appellate courts are under no obligation to review unclear or undeveloped arguments); *cf. Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("To rule on an inadequately briefed issue, this Court would have to develop the arguments itself, effectively performing the parties' work for them. . . . This creates a strain on judicial resources and a substantial risk of error." (citation omitted)).

CONCLUSION

{21} Because Deputy Martinez had reasonable suspicion to stop Defendant's vehicle, we affirm his convictions.

{22} IT IS SO ORDERED.

J. MILES HANISEE, Judge

I CONCUR:
STEPHEN G. FRENCH, Judge
TIMOTHY L. GARCIA, Judge (dissenting).

GARCIA, Judge (dissenting).

{23} I respectfully dissent in this case. Section 66-3-901 did not provide an additional, independent criminal basis to violate the Motor Vehicle Code and thereby establish reasonable suspicion for Deputy Martinez to stop Defendant's vehicle. Because the majority's ruling is one of "first impression" and focuses on statutory construction to arrive at a right for any reason determination, my analysis shall address each distinct issue separately.

{24} First, both the majority and I could find no New Mexico case to support the position that Section 66-3-901 provides an independent basis to establish a "criminal violation" of the Motor Vehicle Code, either in general or specifically, and that the present state of our judicial precedent only recognizes criminal lighting violations that are based upon the specific lighting requirements set forth in Sections 66-3-801 to -805. *See* Majority Opinion, ¶¶ 16-19. The original predecessor to Section 66-3-901 was NMSA 1953, Section 64-21-1(a) (1953). Historically, a statutory requirement for safety inspections and certificates also existed and required a state approval certificate for all motor vehicles. *See* NMSA 1953, § 64-21-2 to -4 (1953).

{25} Under the statutory scheme involving an official certificate of inspection and approval, our Supreme Court recognized that civil liability could exist against the owner of an uncertified vehicle in order to establish a presumption of civil negligence based upon the "defective condition of the brakes" and the requirements of Sections 64-21-1 to -8 (1953). *See Ferran v. Jacquez*, 1961-NMSC-072, ¶¶ 5, 7, 12-18, 68 N.M. 367, 362 P.2d 519 (recognizing the potential for civil liability against the owner of an uncertified vehicle, a misdemeanor offense under NMSA 1953, Section 64-20-1 (1953), when the owner's son lent the uncertified vehicle to another person and it quickly caused an accident due to defective condition of the brakes). However, our appellate courts have never recognized Section 64-21-1 (1953) and its present-day successor, Section 66-3-901, as the basis for establishing a misdemeanor crime arising from a lighting equipment violation that is more specifically addressed under the other provisions of the Motor Vehicle Code. Majority Opinion ¶¶

17-18; *see State v. Creech*, 1991-NMCA-012, ¶ 12, 111 N.M. 490, 806 P.2d 1080 (recognizing that the detention of a motor vehicle "is forbidden" unless the officers have probable cause, or at least reasonable suspicion, to believe that the vehicle is "subject to seizure under applicable *criminal laws*" (emphasis added) (internal quotation marks and citation omitted)). As emphasized below, the majority's *sua sponte* criminal expansion of Section 66-3-901 on a right for any reason basis appears to be an error because it prioritizes this general statute over conflicting wording contained in the more specific lighting equipment statutes.

{26} Second, the right for any reason doctrine only applies when it is not unfair to the appellant. *See Gallegos*, 2007-NMSC-007, ¶ 26 (recognizing that the appellate courts "will affirm the trial court's decision if it was right for any reason so long as it is not unfair to the appellant"). In this case of first impression, it would be unfair to Defendant to expand Section 66-3-901 to establish an independent criminal basis for liability under the Motor Vehicle Code when Defendant had no opportunity to respond to the majority's new argument addressing the application of various principles of statutory construction. *See Freeman v. Fairchild*, 2015-NMCA-001, ¶ 29, 340 P.3d 610 (recognizing that it is unfair to apply the right for any reason doctrine where the appellant "had no opportunity . . . to respond to the unasserted argument").

{27} Third, by applying the appropriate rule of statutory construction, Section 66-3-901 would not establish an independent criminal basis for vehicle lighting violations under the Motor Vehicle Code. *See State v. Blevins*, 1936-NMSC-052, ¶ 12, 40 N.M. 367, 60 P.2d 208 (agreeing "that all of the canons of interpretation that apply to civil statutes apply to criminal statutes, . . . [including] the canon that they are to be strictly construed[, therefore] . . . the special statute controlled the general act, and the government had no election as to which it would proceed [to prosecute] under, the question being a judicial one"). The critical language in Section 66-3-901 is very general and broadly worded, in that it restricts the driving of any motor vehicle on any highway "unless the equipment upon every vehicle is in good working order and adjustment *as required in the Motor Vehicle Code* [*Section 66-1-1*]." (Emphasis added.) The majority does not dispute that there are numerous vehicle equipment provisions set forth in the Motor Vehicle Code that address the specific conditions and functionality of various equipment on a vehicle, and the only specific statutory basis for misdemeanor lighting violations applicable in the present case are set forth in Sections 66-3-801 to -805. *See* Majority Opinion ¶¶ 8-18.

{28} When applying the general/specific rule of statutory construction to the conflicting language between Sections 66-3-801 to -805 (the more specific statutes) and Section 66-3-901 (the general statute), the more specific statutory provisions would take precedence over the general statute so that the two statutes will be harmonized and each is given effect. *See Albuquerque Commons P'ship v. City Council of City of Albuquerque*, 2011-NMSC-002, ¶ 23, 149 N.M. 308, 248 P.3d 856 ("When faced with two provisions addressing the same topic, we resort to the familiar principle of statutory construction: a statute dealing with a specific subject will be considered an exception to, and give effect over, a more general statute." (internal quotation marks and citations omitted)); *State v. Santillanes*, 2001-NMSC-018, ¶ 18, 130 N.M. 464, 27 P.3d 456 (recognizing the general/specific rule of statutory construction to apply in circumstances where "conduct in one group of statutes resulted in an irreconcilable conflict with the apparent criminalization of the same conduct in another statute"); *State v. Cleve*, 1999-NMSC-017, ¶ 25, 127 N.M. 240, 980 P.2d 23 (acknowledging that "the general/specific statute rule determines whether the Legislature intended to limit the discretion of the prosecutor in its selection of charges"). Here, the two statutes are factually in conflict because a vehicle with a taillight bulb that is not "in good working order" in violation of Section 66-3-901 can still emit sufficient lighting from other bulbs to be "plainly visible from a distance of five hundred feet to the rear" pursuant to Section 66-3-805(A). *See State ex rel. Madrid v. UU Bar Ranch Ldt. P'ship*, 2005-NMCA-079, ¶ 20, 137 N.M. 719, 114 P.3d 399 (recognizing that "the general/specific rule of statutory construction is only applicable when the two statutes are in conflict"); *State ex rel. Stratton v. Gurley Motor Co.*, 1987-NMCA-063, ¶ 9, 105 N.M. 803, 737 P.2d 1180 (emphasizing that the "specific statute controls over a general statute dealing with the same subject matter [and] . . . the same conduct . . . [where] conflicting statutory provisions [exist and the] . . . repugnancy cannot possibly be harmonized" (citations omitted)).

{29} Because Deputy Martinez never determined whether Defendant's right taillight was sufficiently illuminated by the other bulb to be visible from a distance of 500 feet to the rear, the majority has already determined that a violation of the more specific statute, Section 66-3-805(A), cannot stand even if a violation of the more general statute, Section 66-3-901 can be recognized. Majority Opinion ¶¶ 9, 18-19. As a result, the majority's "right for any reason" determination recognizing an ability to prosecute Defendant under Section 66-3-901 clearly violates the general/specific rule of statutory construction and effectively makes Section 66-3-805(A) irrelevant and incapable of harmonization with Section 66-3-901 in this case. *See Cleve*, 1999-NMSC-017, ¶ 18 (recognizing that the Legislature did not intend for the general criminal statute protecting cruelty to animals to apply to hunting activities governed by specific game and fish statutes); *Blevins*, 1936-NMSC-052, ¶¶ 7, 13 (reversing the defendant's conviction under the more general statute by applying "the rule [that] is stated as follows: Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to give effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, unless it appears that the [L]egislature intended to make the general act controlling"); *State v. Parson*, 2005-NMCA-083, ¶¶ 14-19, 137 N.M. 773, 115 P.3d 236 (addressing the continuing validity of the general/specific rule applied in *Cleve* and its continuing application to crimes involving free-roaming, wild animals). As a result, the Defendant was not subject to criminal prosecution under Section 66-3-901 of the Motor Vehicle Code. This general statute, requiring equipment in good working order, was not a proper "right for any reason" alternative basis to establish reasonable suspicion that a crime was being committed and authorize Deputy Martinez to stop Defendant's vehicle.

{30} In conclusion, I do not concur with the result reached by the majority, and Defendant's conviction should be reversed.

TIMOTHY L. GARCIA, Judge

[1]It is undisputed that Defendant's right taillight was working properly.

Classified

Positions

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