

BAR BULLETIN

March 14, 2018 • Volume 57, No. 11



Certainties of the Sun, by Sarah Hartshorne

Matrix Fine Art

Inside This Issue

Table of Contents	3
Investiture Ceremony for New Mexico Court of Appeals Judge Daniel J. Gallegos	4
Amy Haas Named 2017 Lawyer of the Year ...	8
Board of Bar Commissioners Meeting Summary	9
Clerk's Certificates	12
From the New Mexico Court of Appeals	
2018-NMCA-009, No. A-1-CA-35013: State v. Storey	17

—SPECIAL INSERT—
**Board of Bar
Commissioners**

New!

The New Mexico State Bar Foundation Announces its How to Practice Series



How to Practice Series

Providing practitioners with hands-on
basic skills they can use right away.

*"The best
CLE yet! I'll
be coming to
the rest of the
series!"*

*"I felt like this
CLE was the most
practical one I have
attended that could
help me improve
my skills as an
attorney."*

How to Practice attendees will receive:

- **Interactive format using case studies, mock hearings and role plays**
- **Start to finish training in the "flow of the case"**
- **Example forms and checklists in electronic format**
- **Training in "core" practice skills and how to avoid common pitfalls**

*"We've been
needing courses like
this for attorneys
who are interested
in starting different
areas of practice."*

Mark your calendars for 2018:

Civil Litigation April 27

Watch for **Family Law** later in the year.

For more information about the
How to Practice Series, contact the
Center for Legal Education at
505-797-6020 or cleonline@nmba.org.



*Your Choice.
Your Program.
Your Bar Foundation.*



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March 14, 2018 • Volume 57, No. 11

Table of Contents

Notices 4
 Calendar of Continuing Legal Education..... 6
 Amy Haas is the 2017 NREEL Lawyer of the Year 8
 Board of Bar Commissioners Meeting Summary..... 9
 Court of Appeals Opinions List..... 11
 Clerk's Certificates..... 12
 Opinions

From the New Mexico Court of Appeals

2018-NMCA-009, No. A-1-CA-35013: State v. Storey 17
 Advertising 27

Meetings

March

- 14**
Tax Section Board
11 a.m., teleconference
- 14**
Animal Law Section Board
Noon, State Bar Center
- 14**
Children's Law Section Board
Noon, Juvenile Justice Center
- 16**
Family Law Section Board
9 a.m., teleconference
- 16**
Legal Services and Programs Committee
10:30 a.m., State Bar Center
- 20**
**Real Property, Trust and Estate Section:
Real Property Division**
Noon, teleconference
- 20**
Solo and Small Firm Section Board
11 a.m., State Bar Center
- 20**
Senior Lawyers Division
4 p.m., State Bar Center
- 23**
Immigration Law Section
Noon, New Mexico Immigrant Law Center,
Albuquerque
- 24**
Young Lawyers Division
10 a.m., State Bar Center

Workshops and Legal Clinics

March

- 21**
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District
Court, Albuquerque, 1-877-266-9861
- 28**
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque,
505-797-6094

April

- 4**
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque,
505-797-6022
- 4**
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District
Court, Albuquerque, 1-877-266-9861
- 11**
**Common Legal Issues for Senior Citizens
Workshop**
10–11:15 a.m., Mora Senior Center, Mora,
1-800-876-6657
- 13**
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County
Metropolitan Court, Albuquerque,
505-841-9817
- 18**
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District
Court, Albuquerque, 1-877-266-9861

About Cover Image and Artist: The focus of Sarah Hartshorne's work has been on capturing the unique in the ordinary, the beauty in the mundane. Like the impressionists, she paints in oil from everyday life and the world around her, sharing what often goes unnoticed and exploring the play of light and shadow.

Notices

COURT NEWS **New Mexico Supreme Court** **Commission on Access to** **Justice** **Meeting Notice**

The next meeting of the Commission on Access to Justice is noon–4 p.m., March 16, at the State Bar Center. Interested parties from the private bar and the public are welcome to attend. Further information about the Commission is available at Access to Justice at nmcourts.gov.

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. The deadline for public commentary has been extended to May 18. To be fully considered by the Commission, comments must be received by that date 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.

New Mexico Court of Appeals **Investiture Ceremony for Judge** **Daniel J. Gallegos**

The New Mexico Court of Appeals cordially invites members of the legal

Professionalism Tip

With respect to my clients:

In appropriate cases, I will counsel my client regarding options for mediation, arbitration and other alternative methods of resolving disputes.

profession to attend the investiture of Judge Daniel J. Gallegos at 4 p.m., March 23, at the National Hispanic Cultural Center, Bank of America Theatre, 1701 4th Street, SW, Albuquerque. A reception will immediately follow the ceremony in Salon Ortega

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 Judge Conrad Perea, District Judge, Division III, shall be reassigned to Judge 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.

Eleventh Judicial District **Court**

Mass Reassignment

Effective March 5, the chief judge of the Eleventh Judicial District Court has, pursuant to her authority in Rule 23-109 NMRA, directed a mass reassignment of cases due to the appointment of Judge Sarah V. Weaver to the bench in Division III. With the exception of abuse and neglect cases which are being individually reassigned, all other cases currently assigned to Division III are reassigned to Judge Weaver. Parties who have not yet exercised a peremptory excusal under Rule 1-088.1 or Rule 10-162 NMRA in a case being reassigned in this mass reassignment will have 10 business days from March 21 to excuse Judge Sarah V. Weaver.

U.S. District Court for the **District of New Mexico** **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 on 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 19, 5:30 p.m.
UNM School of Law, 1117 Stanford

NE, Albuquerque, 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#.

- April 2, 5:30 p.m.
First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- April 9, 5:30 p.m.
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is 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.

Appellate Practice Section Luncheon with New Appellate Mediator

Join the Appellate Practice Section for a brown bag lunch at noon, March 16, 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.

Solo and Small Firm Section Spring Monthly Speaker Series Line-up

The Solo and Small Firm Section wraps up its spring season in two programs with a decidedly political bent. On March 20, prominent Republican State Sen. Sander Rue of Rio Rancho reviews from his side of the aisle the recent legislative session, what it accomplished and what the future may hold for New Mexico. April 17 features one of our state's genuine natural wonders, Sen. Fred Harris, former U.S. senator and UNM associate professor, on "Being Fred Harris." As the only surviving member of the 1967 Kerner Commission on racial violence, he will discuss his new book on that subject, his sixty years of public service, and whatever else his audience wishes to raise. All members of the bar, including judges, are invited to attend, enjoy a complimentary lunch, and engage in vigorous discussion. Both presentations will take place from noon-1 p.m. at the State Bar Center. R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Young Lawyers Division 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.
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Human Rights and the Global Climate Regime

Atieno Mboya Samandari, postdoctoral fellow and adjunct professor at Emory University School of Law, will present a lecture titled "Human Rights and the Global Climate Regime" at 5:15 p.m. on March 22, in Room 2401 at the UNM School of Law, 1117 Stanford NE, Albuquerque. Dr. Samandari will discuss her upcoming article with the *Natural Resources Journal* of the UNM School of Law, which examines the human rights implications of the market-based mechanisms operationalized under the global climate change regime and proposes allocation of carbon investment rights for developing countries as a means of promoting climate justice. In conjunction with this topic, she will present an eco-feminist perspective on

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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

the neoliberal response to climate change. The presentation is hosted by the *Natural Resources Journal* of the UNM School of Law, the Women's Law Caucus and the Environmental Law Society. No registration is required, and free parking is provided at the School of Law. For more information, call Laura Burns at 505-277-3253.

Women's Law Caucus 2018 Justice Mary Walters Award Dinner

Join the UNM School of Law Women's Law Caucus for the 2018 Justice Mary Walters Award Dinner honoring Nancy Hollander and Christine Zuni Cruz. The event will be at 5:30 p.m., March 21, at the UNM Student Union Building Ballroom C. To purchase tables or individual seats, visit goto.unm.edu/walters.

Continued on page 8.

Legal Education

March

- 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 Committee**
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 **Lawyer Well-Being: Call to Action – I W.I.L.L Care**
1.0 EP
Live Seminar,
San Juan County Bar
505-599-9810 or 505-797-6003 (no registration required)
- 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/depositions
- 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 **Cybersleuth: 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 G
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
- 30 Speaking to Win: The Art of Effective Speaking for Lawyers**
5.0 G, 1.0 EP
Live Webcast/Live Seminar,
Albuquerque
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
- 5 Veterans Disability Law Bootcamp**
4.7 G
Live Seminar, Albuquerque
Vet Defender
www.lawyershelpingwarriors.com
- 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
- 6 Uncovering and Navigating Blind Spots Before They Become Land Mines (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org
- 6 Deposition Practice in Federal Cases (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org
- 6 Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org
- 10 Closely Held Stock Options, Restricted Stock, Etc.**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org
- 12 Domestic Self-Settled Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org
- 17 Protecting Client Trade Secrets & Know How from Departing Employees**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org
- 18 Equipment Leases: Drafting & UCC Article 2A Issues**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org
- 19 Advanced Mediation**
10.2 G
Live Seminar, Santa Fe
David Levin and Barbara Kazen
505-463-1354
- 20 Ethically Managing Your Practice (2017 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org
- 20 Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org
- 24 Drafting Ground Leases, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org
- 25 Drafting Ground Leases, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org
- 26 Defined Value Clauses: Drafting & Avoiding Red Flags**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org
- 26 Oil and Gas: From the Basics to In-Depth Topics (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org
- 26 Ethics for Government Attorneys (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org
- 26 Add a Little Fiction to Your Legal Writing (2017)**
2.0 G
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.

Continued from page 5.

OTHER BARS

American Bar Association Commission on Lawyer Assistance Programs

Law Student Wellness Twitter Chat

Students face myriad issues and stressors as they transition both into law school and ultimately from law school into the profession. Some students will seek assistance when issues and pressures mount, while others will attempt to go it alone. This national Twitter Chat aims to encourage students to seek help when they need it, by addressing questions around stigma, bar application character and fitness, and anything else on the minds of students and those who care about them. Join the chat by searching #LawStudentWellness on Twitter from 1–2 p.m. ET on March 28. For more information, visit ambar.org/lawstudentwellness.

New Mexico Chapter of the Federal Bar Association Pro Bono Survey

Do you practice in the federal district courts of New Mexico? The New Mexico chapter of the Federal Bar Association seeks to support the civil pro bono programs in the U.S. District Courts for the District of New Mexico. Consider taking 10 minutes to complete the following survey <https://www.surveymonkey.com/r/QMMZHDD>. All answers are voluntary,

confidential and anonymous. For more information about the survey, contact the Community Outreach Committee: Veronica C. Gonzales-Zamora at vgonzales-zamora@bhfs.com.

New Mexico Criminal Defense Lawyers Association Trial Skills College

NMCDLA's Trial Skills College returns this year with some new features including forensic pathology fellows who will act as experts during the cross and direct examination segments, as well as a new case file on eyewitness ID. This is a great opportunity to develop skills in every aspect of trial—for new and seasoned practitioners alike. From jury selection to closing arguments, participants work with some of the best trial attorneys in the state as faculty, dedicated to helping you step up your trial game. This 2+ day hands-on workshop begins the evening of April 5 through April 7. It is limited to 36 participants, with some spots open to civil practice attorneys as well. Visit nmcdla.org to register by March 23.

New Mexico Women's Bar Association 2018 Henrietta Pettijohn Reception

The New Mexico Women's Bar Association invites members of the legal profession to attend its annual Henrietta

Pettijohn Reception Honoring the Honorable Sharon Walton. The 2018 Supporting Women in the Law Award will be presented to Little, Gilman-Tepper & Batley, PA. The Exemplary Service Award will be presented to Sarita Nair and the Outstanding Young Attorney Award will be presented to Emma O'Sullivan. The reception will be 6–9:30 p.m., May 10, Hyatt Regency Albuquerque. Tickets are \$25 for law students, \$50 for members, \$60 for non-members. Contact Libby Radosevich, eradosevich@peiferlaw.com to purchase tickets and sponsorships.

OTHER NEWS

Center for Civic Values Pecos High School Seeks Mock Trial Team Coach

Pecos High School is looking for an attorney coach for their Mock Trial team during the 2018-2019 school year. Pecos High School is a small school with a population of less than 200, but with a group of eager and talented students with a passion for competing in the Mock Trial competition. The team has been complimented on their professionalism and natural talent the last couple years at competition. The difference-maker for the team could be having an attorney coach that could help take the team to the next level. Contact teacher coach Spencer Faunt at 503-740-2084 to help lead our team to success in next year's competition.



Natural Resources, Energy and Environmental Law Section

Amy Haas is the 2017 NREEL Lawyer of the Year

The NREEL Section would like to congratulate Amy Haas, the 2017 NREEL Lawyer of the Year. Haas is the deputy executive director and general counsel for the Upper Colorado River Commission and was selected to receive the award based on her professionalism and integrity, superior legal service, exemplary service to the NREEL Section, and her service to the public.



BOARD OF BAR COMMISSIONERS

MEETING SUMMARY

The Board of Bar Commissioners met at the State Bar Center in Albuquerque on Feb. 23. Action taken at the meeting was as follows:

- Approved the Dec. 7, 2017, meeting minutes as submitted;
- Accepted the 2017 year-end and January 2018 financials;
- Signed a resolution updating signers on the State Bar and New Mexico State Bar Foundation bank accounts;
- Approved an intercompany payment from the Bar Foundation to the State Bar for the shared costs of the organizations;
- Approved a credit card for the new executive director Richard Spinello;
- Approved a donation of \$1,000 to assist with expenses for a national speaker for the 11th Annual New Mexico Legal Service Provers Conference;
- Approved a request from the Committee on Women and the Legal Profession for an additional donation of \$1,000 for a permanent Justice Pamela Minzner Award at the Court of Appeals in Albuquerque;
- Approved the Judges and Lawyers Assistance Program's recommendation to accept the proposal from The Solutions Group, an employee assistance program for State Bar members, their immediate family members, members' staff, and State Bar staff;
- Received a report on the 2018 dues and licensing; 264 active and 202 inactive members are unpaid and there are currently 9,461 active and inactive members of the State Bar;
- Reported that the current financial policies need updating and will be revised in the near future;
- Reported on the new Board meeting agenda format which will include strategic planning at each meeting;
- Reported that the Bar Foundation Bylaws are being updated for consistency and to create independence between the Boards and they will be presented to the Board for approval once they're finalized;
- Reported that a contractual agreement between the two boards will be drafted once the new board is formed;
- Discussed the discontinuation of Legal Specialization; a survey will be sent to the current specialists to determine whether the program should be undertaken by the State Bar and what improvements could be made;
- Approved the draft MCLE Transition Plan to be sent to the Supreme Court by March 1;
- Received a preliminary Communications Plan in an effort to be more relevant to members and highlighted some of the upcoming new features of the *Bar Bulletin* and the *Bench & Bar Directory*;
- Ratified action taken by the Executive Committee including: appointed Thomas W. Olson and Judge Timothy Aldrich to the State Bar Access to Justice Fund Grant Commission; reappointed Stuart Bluestone, David Hernandez and Mekko Miller to the New Mexico Legal Aid Board for three-year terms; approved the Appellate Practice Section's request to carry over \$1,000 to help fund the section's Appellate Pro Bono Program; approved a proposal from Aiken Printing to print and mail the *Bench & Bar Directory*; and approved a sponsorship in the amount of \$1,000 for the UNM School of Law Symposium on 50 Years of the Indian Civil Rights Act;
- Received a report on the Bylaws and Policies Committee meeting including: reported that the revised Bar Foundation Bylaws will be forwarded to the Board for approval once finalized; the committee was requested to review the JIFFY's SOPA (Secure Odyssey Public Access) Policy and make a recommendation; a letter to the NM Supreme Court will be drafted with the committee's questions and concerns regarding the policy for the Board's approval at the May meeting; the committee reviewed the Contribution/Donation Policy regarding timing of requests and the revised policy will be forwarded to the Board for approval at the May meeting; and approved the Tax Section's Bylaw changes to Sections 7.2 and 8.1 to reduce the terms of the chair and chair-elect from two years to one year;
- Approved a request to support a proposed rule to permit the admission of military spouse attorneys licensed in other jurisdictions and send a letter of support to the Board of Bar Examiners and the NM Supreme Court;
- Received a request to create a Cannabis Law Section and referred it to the Bylaws and Policies Committee to review the proposed Cannabis Law Bylaws for consistency and any conflicts with other section bylaws and the governmental affairs provisions in the State Bar Bylaws, as well as the State Bar Bylaws regarding the formation and requirements of proposed sections;
- Received a report from the Committee on Women and the Legal Profession regarding the update to the 1990 Report and 5-Year Update of the Task Force on Women; the committee will be working with UNM for assistance in conducting the survey and they requested assistance with focus groups and advertising and for the Board to appoint a liaison to the committee; they would like to launch the survey at the Annual Meeting and publish the report in 2019;
- Appointed Barry C. Kane by secret ballot to the vacancy in the Third Bar Commissioner District through Dec. 31, 2018;
- Received a report on and highlights from the Executive Committee and Senior Staff Retreat held on Feb. 9 and 10;
- Received a report/update from the Compilation Commission;
- Received the 2017 annual reports of the standing committees and sections;
- NM Supreme Court Chief Justice Judith Nakamura attended the meeting to swear-in the new and re-elected commissioners as follows: Aja N. Brooks and Robert Lara, Jr. in the First Bar Commissioner District; Erinna M. Atkins in the Sixth Bar Commissioner District; YLD Chair Sean M. FitzPatrick; and Paralegal Division Liaison Christina M. Babcock;
- The State Bar 132nd Birthday Celebration honoring State Bar members who have practiced for 25 and 50 years followed the meeting; Chief Justice Nakamura and President Wesley Pool officiated the ceremony; reported that John B. "Jack" Burton, Senior Lawyers Division Delegate to the Board, was receiving a 50-year practitioner award during the ceremony.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the May 18 meeting.

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Opinions

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

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Effective March 2, 2018

PUBLISHED OPINIONS

A-1-CA-34909	State v. P Salazar	Affirm	02/28/2018
A-1-CA-35471	State v. J Aslin	Affirm/Reverse/Remand	02/28/2018

UNPUBLISHED OPINIONS

A-1-CA-36636	S Hernandez d/b/a J Construction v. R Medina	Affirm	02/26/2018
A-1-CA-35554	State v. W Valencia	Affirm	02/27/2018
A-1-CA-35527	State v. A Rivas	Affirm	02/28/2018
A-1-CA-36266	BOKF v. R Metzgar	Affirm	02/28/2018
A-1-CA-36422	US Bank v. M Khalsa	Affirm	02/28/2018
A-1-CA-36546	D Moreno v. J Moreno	Dismiss	02/28/2018
A-1-CA-35264	State v. D Gabaldon	Affirm	03/01/2018
A-1-CA-36123	A Atherton v. R Chapman	Affirm/Dismiss	03/01/2018
A-1-CA-36772	State v. Keisean A	Reverse	03/01/2018

Slip Opinions for Published Opinions may be read on the Court's website:

<http://coa.nmcourts.gov/documents/index.htm>

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective March 14, 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 2018 NMRA:

Effective Date

Rules of Civil Procedure for the District Courts

1-088.1	Peremptory excusal of a district judge; recusal; procedure for exercising	03/01/2018
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To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at <http://nmsupremecourt.nmcourts.gov>. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at <http://www.nmcompcomm.us>.

STATE BAR OF NEW MEXICO Board of Bar Commissioners

2018



● **President**
Wesley O. Pool

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Wesley Pool is the principal and owner of Pool Law Firm, P.C., in Clovis. He is a graduate of Texas Tech University, B.A., and Texas Wesleyan University School of Law, J.D. He is admitted to practice in New Mexico and Texas, The United States District Court for the

District of New Mexico, the United States Bankruptcy Court for the District of New Mexico, The United States Bankruptcy Court for the Northern District of Texas, and the United States Court of Appeals for the Tenth Circuit. The firm focuses on commercial litigation in addition to real estate, bankruptcy, probate, wills and estate planning, personal injury and domestic relations. Pool is a member of the Curry/Roosevelt Bar Association, the American Bar Association, and the American Trial Lawyers Association, the New Mexico Trial Lawyers Association and the New Mexico Criminal Defense Lawyers Association. He has served on the Board of Directors of the Business Law Section and as the BBC liaison to the Minimum Continuing Legal Education Board.



● **President-Elect**
Gerald G. Dixon

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Jerry Dixon is a shareholder at Dixon Scholl Carrillo P.A. He practices in the areas of professional malpractice defense, commercial and construction litigation. He is a frequent speaker on professional liability and risk management issues. Dixon was admitted to the

Colorado Bar Association in 1981 and the State Bar of New Mexico in 1986. He is a member of the Albuquerque Bar Association (President, 1994). Dixon attended Texas Tech University (BBA 1977, J.D. 1981). He has participated in the New Mexico high school mock trial program as a coach or judge since 1988 and has served as a trustee for the Texas Tech School of Law Foundation since 2005. Dixon received the Distinguished Service Award from Texas Tech School of Law in 2015. He provides pro bono services through Christian Legal Aid. Dixon was recognized by Best Lawyers each year since 2009 and as 2014 and 2016 Lawyer of the Year in the area of professional malpractice. He was named Outstanding Attorney by the Albuquerque Bar Association in 2014. Dixon represents the First Bar Commissioner District. He serves on the Client Protection Fund Commission.



● **Secretary-Treasurer**
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Ernestina R. Cruz is a solo practitioner and the owner of Cruz Law Office in Taos. Her practice is primarily focused in the areas of civil rights, employment law, and personal injury. She is a graduate of the University of New Mexico (B.A. 1996 and J.D. 2001) and the University of Notre Dame (M.A. 1998). In addition to her law practice, she is currently attending the Straus Institute for Dispute Resolution at Pepperdine University School of Law where she is completing coursework to obtain a LL.M. in Dispute Resolution with a concentration in Mediation. In 2008, she was named the Young Lawyer of the Year by the New Mexico Hispanic Bar Association. She was also recognized by the Hispanic National Bar Association as a Top Lawyer under 40 in 2010. She is a past chair of the State Bar Young Lawyers Division and Employment and Labor Law Section.

Ernestina R. Cruz is a solo practitioner and the owner of Cruz Law Office in Taos. Her practice is primarily focused in the areas of civil rights, employment law, and personal injury. She is a graduate of the University of New Mexico (B.A. 1996 and J.D. 2001) and the University of Notre Dame (M.A. 1998). In addition to her law practice, she is currently attending the Straus Institute for Dispute Resolution at Pepperdine University School of Law where she is completing coursework to obtain a LL.M. in Dispute Resolution with a concentration in Mediation. In 2008, she was named the Young Lawyer of the Year by the New Mexico Hispanic Bar Association. She was also recognized by the Hispanic National Bar Association as a Top Lawyer under 40 in 2010. She is a past chair of the State Bar Young Lawyers Division and Employment and Labor Law Section.



● **Immediate Past President**
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Scotty A. Holloman is General Counsel/Executive Director of Administrative Services at New Mexico Junior College in Hobbs. He attended Texas Tech University (B.B.A., Accounting, 1980) and Texas Tech University School of Law (J.D., 1983). Holloman was admitted to practice law in Texas in 1983 and in New Mexico in 1984. He is a member of the State Bar Real Property, Trust and Estate Section and the State Bar Business Law Section. He served as president of the Lea County Bar Association. From 2009-2012 he served as the out-of-state liaison to the State Bar of Texas Board of Directors. Holloman and his wife, Terry, have three children: Aaron and wife Kelli; Emily; Jacob and wife Lacey; and four grandchildren: Simon, Owen and Annie of Roswell and Fern of Midland, Texas. Holloman also represents the Sixth Bar Commissioner District.

Scotty A. Holloman is General Counsel/Executive Director of Administrative Services at New Mexico Junior College in Hobbs. He attended Texas Tech University (B.B.A., Accounting, 1980) and Texas Tech University School of Law (J.D., 1983). Holloman was admitted to practice law in Texas in 1983 and in New Mexico in 1984. He is a member of the State Bar Real Property, Trust and Estate Section and the State Bar Business Law Section. He served as president of the Lea County Bar Association. From 2009-2012 he served as the out-of-state liaison to the State Bar of Texas Board of Directors. Holloman and his wife, Terry, have three children: Aaron and wife Kelli; Emily; Jacob and wife Lacey; and four grandchildren: Simon, Owen and Annie of Roswell and Fern of Midland, Texas. Holloman also represents the Sixth Bar Commissioner District.



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● First Bar Commissioner District



Joshua A. Allison

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Joshua A. Allison has been a shareholder and director at Sheehan & Sheehan, P.A. since 2013, where his practice is focused in legal malpractice defense, complex business disputes, and construction litigation. Allison graduated from the University of New Mexico School of Law in 2008 and clerked for then-Chief Justice Edward L. Chávez for one year. After practicing in Southern California, he returned to New Mexico in 2010 with his wife and children to build his practice at Sheehan. Allison is also a member of the State Bar Lawyers Professional Liability and Insurance Committee. He is also a member of the Disciplinary Board. When he is not practicing law, he is spending time with his wife of 15 years, Michelle, and their four kids.



Aja Nicole Brooks

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Aja Nicole Brooks is a native New Mexican, born in Hobbs. She is a graduate of Wake Forest University in Winston-Salem, North Carolina, where she received her Bachelor of Arts in English and Spanish. She attended the University of New Mexico School of Law and graduated with her juris doctorate in 2008. Thereafter, she worked as a criminal defense attorney in Albuquerque for the Law Office of the Public Defender in its metropolitan and felony divisions from 2008 until 2014. She is currently employed as the statewide Pro Bono Coordinator for New Mexico Legal Aid's Volunteer Attorney Program. Brooks is involved in many State Bar groups and activities, including the Young Lawyers Division, the Committee on Diversity in the Legal Profession and the Bridge the Gap Mentorship Program. She is the treasurer of the New Mexico Black Lawyers Association, the secretary of the Women's Bar Association, is a Board member of Pegasus Legal Services for Children, and is the New Mexico Connection Coordinator for the Iota Xi Omega Chapter of Alpha Kappa Alpha Sorority, Incorporated.

Gerald G. Dixon

See page 1.



Hon. Kevin L. Fitzwater (ret.)

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Hon. Kevin L. Fitzwater (ret.) is a retired Metropolitan Court judge. On the bench for 18 years hearing criminal and civil cases, he also served a term as Chief Judge. He founded the first Mental Health Court in the state of New Mexico. Previous to that, he served as a Deputy District Attorney in charge of the Metropolitan Court division, having handled a broad range of cases from misdemeanors to violent crimes. Fitzwater came to the DA's office after leaving active military service. He served in the United States Marine Corps as a combat arms officer, having graduated from UNM in 1981, and was one of four selected to attend law school, coming home to attend UNM School of Law. He returned to active duty as a criminal defense attorney, and worked in appellate law. He retired after a 30-year career as a colonel in the reserves.



Robert Lara

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Robert Lara is an attorney and political consultant practicing in domestic relations, civil, and election law matters. Robert has served as an attorney for private law firms, federal and state government, and non-profit organizations. He was recognized by the State Bar of New Mexico with the 2016 Outstanding Legal Program of the Year award for his work as a Staff Attorney at the 3rd Judicial District Court Self Help Center. Robert attended the University of Texas at El Paso (B.A. 2004) and the University of New Mexico School of Law (J.D. 2007) where he was honored with the Dean's Award for Service to the Law School Community. He works to bring people, good policies, projects, and pesos together through the use of the law and politics. When not in the office Robert can be found advocating for Dachshund rights, riding a triathlon bike, or behind two turntables and a microphone.



Carla C. Martinez

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Carla C. Martinez is a native New Mexican and a 1998 graduate of the New Mexico School of Law. Martinez currently serves as the Chief Administrative Officer for the Second Judicial District Attorney's Office. Prior to joining the 2nd DA's Office, Martinez was Chief of Staff for Operations for the New Mexico Office of the Attorney General. She served in this capacity for approximately two years. Immediately preceding, Martinez was the Deputy State Auditor for the New Mexico Office of the State Auditor for eight years. She also served for four years as a Board Member and Chair of the New Mexico Gaming Control Board. Previously, Martinez has worked for an insurance defense law firm and an international accounting firm. Martinez is also a Certified Public Accountant and a Certified Fraud Examiner.



Clara Moran

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Clara Moran is a 2005 graduate of the University of New Mexico School of Law. She is currently the Division Director of Special Prosecutions Division of the Office of the Attorney General. Moran has been a prosecutor her whole career, prosecuting Violent Crimes, Crimes Against Children, Sex Crimes, and Public Corruption cases state-wide. She was named the 2014 Jurisprudence Prosecutor of the Year by the New Mexico District Attorneys Association, received the 2009 Outstanding Young Lawyer of the Year Award from the State Bar of New Mexico and the 2007 Spirit Award from the New Mexico Coalition Against Domestic Violence. Moran is a past chair of the State Bar Prosecutors Section and a former board member of the Criminal Law and Trial Practice sections, the Supreme Court Uniform Jury Instruction Committee from 2010 to 2014 and the Young Lawyer's Division.



Ben Sherman

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Ben Sherman is the founder of Ben Sherman Law LLC, located in Albuquerque. His practice is focused on representing injured workers in workers' compensation cases. Prior to opening his own law firm, he enjoyed serving the public as a prosecutor

with the 2nd Judicial District Attorney's Office and as an assistant city attorney with the City of Albuquerque's litigation department. Sherman is a proud 2008 graduate of the University of New Mexico School of Law and has been fortunate to practice law in New Mexico for the past nine years. A fluent Spanish-speaker, he enjoys representing people from all communities and appreciates New Mexico's unique diversity and rich traditions. Sherman is a past chair and board member of the State Bar of New Mexico Young Lawyers Division and currently sits on the University of New Mexico School of Law Alumni Board. In his free time, he enjoys volunteering, playing soccer, kayaking, hiking, music, reading, and spending time with family and friends.

● Second Bar Commissioner District



Joseph F. Sawyer

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Joseph F. Sawyer is Deputy County Attorney for San Juan County. A Farmington native, he attended the University of New Mexico (B.A., 1995) and Notre Dame Law School (J.D., 1999). Prior to working for San Juan County, Sawyer spent several years in private practice and worked for the 11th Judicial District Attorney's Office in Farmington. He served as president of the San Juan County Bar Association in 2011 and was on the State Bar of New Mexico Young Lawyers Division Board of Directors from 2006 to 2007. Sawyer and his wife Ana enjoy backpacking, mountain biking, traveling and spending time with their two daughters.

● Third Bar Commissioner District



Barry Kane

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Barry C. Kane is the principal and managing member of Kane & Co., PLC, with offices in Grand Rapids, Michigan and Santa Fe specializing in patent and trademark litigation. Previously he was the chair of the intellectual property section at the law firm of Miller Johnson Snell & Cumiskey in Grand Rapids, Michigan. Mr. Kane is a SCAO Certified Facilitative Mediator for the U.S. District Courts as well as for the American Intellectual Property Law Association, the International Trademark Association and the local courts in Santa Fe County. Mr. Kane is admitted and has presented arguments before the United States Supreme Court, the United States Court of Appeals for the Federal Circuit; and the United States Court of Appeals for the Sixth Circuit. He received his Bachelor's Degree in geology from the University of Northern Colorado. He received his Master's Degree in geophysics from the University of Florida. He earned his Juris Doctorate Degree from South Texas College of Law.



Elizabeth J. Travis

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Elizabeth J. Travis is a deputy general counsel with the New Mexico Department of Transportation, serving as counsel for the Department's construction, operations and finance organizations, a practice which includes construction, environmental, procurement and contract law. Prior to working for the State, Travis served as an assistant county attorney for Santa Fe County. As a private practice attorney her clients included a privately

held ski area, a local public entity hospital, various non-profit organizations, and small businesses. In addition to her new role on the BBC representing District 3, Travis also serves on the State Bar Ethics Advisory Committee. She is also an active member of the ABA, participating in the public contract law section and the construction industry forum. Travis is licensed to practice in state and federal court in New Mexico and California.



Carolyn A. Wolf

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Carolyn A. Wolf is an attorney in Santa Fe. She is a graduate of Rice University and the University of New Mexico School of Law. In more than 20 years in state government, she was in-house counsel for the Human Services Department, Health and Environment Department, and Taxation and Revenue Department, and was counsel for other agencies, boards and commissions as an attorney in the Civil Division of the Attorney General's office. Wolf served as general counsel for the Department of Finance and Administration and Taxation and Revenue Department. She was named Public Lawyer of the Year in 2017. Wolf was also a shareholder and of counsel with Montgomery & Andrews, P.A. She is the Board of Bar Commissioners representative on the Appellate Rules Committee. She is also a member of the Compilation Commission Advisory Committee.

● Fourth Bar Commissioner District

Ernestina R. Cruz

See page 1.

● Fifth Bar Commissioner District

Wesley O. Pool

See page 1.

● Sixth Bar Commissioner District



Erinna M. "Erin" Atkins

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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 and lives in the Twelfth Judicial District. 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 a commissioner for the NM Commission for Community Volunteerism, as a board member for the Young Lawyers 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.

Scotty A. Holloman

See page 1.



Jared G. Kallunki

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Jared G. Kallunki is a Public Defender in Roswell. He attended the University of Alabama (B.A. 2001 and M.A. 2004) and Thomas Jefferson (J.D. 2007). Previously, he was the Managing Attorney of the Roswell office of New Mexico Legal Aid and served on the board of the Young Lawyers Division of the

State Bar of New Mexico. Kallunki is a past recipient of the Robert H. LaFollette Pro Bono Award for his work with the less fortunate. He lives in Roswell with his wife, Tiesha, and his three children, Detroit, Joaquin and Cedric.

● Seventh Bar Commissioner District



Mick I. R. Gutierrez

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Mick graduated from the UCLA School of Law in 1980. He was awarded a post-doctorate community lawyer fellowship from Howard University, 1980-82. Gutierrez began his legal career at Southern NM Legal Services in Las Cruces which lasted four years. He then moved on to become a Special

Assistant AG for two years, an ADA for four years at the Third Judicial DA's office, spent about four years with Miller, Stratvert, Torgerson and Schlenker, and twenty-one years with the Department of Justice (DOJ). Through the DOJ Gutierrez had two overseas assignments: West Africa and the Caribbean. He was a Bar Commissioner in the 90s and has served on numerous professional committees and community boards. Mick is married to Lizabeth, they have three adult daughters, and five grandkids.

David P. Lutz

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David P. Lutz is a Las Cruces attorney at Martin & Lutz, P.C. He practices law with his father and focuses primarily on civil and domestic relations matters. He has been with the firm since 2004. He was born in Las Cruces, New Mexico and graduated from Ocate High School. He attended

Claremont McKenna College (B.A. 1997) and Cornell Law School (J.D. 2000). He has appeared and practices regularly in the Third, Sixth, and Seventh Judicial Districts. He served on the Young Lawyers Division Board as a Regional Director from 2007 through 2011. When he is not working, he enjoys playing soccer and going with his family to cultural and/or sporting events at New Mexico State University.

● Senior Lawyers Division Delegate



John P. "Jack" Burton

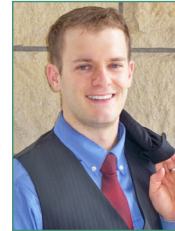
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Jack Burton is a full-time director and shareholder of the Rodey Law Firm. His practice includes transactions and dispute resolution (mediation, arbitration, and litigation) in all types of business, finance, and property matters. Burton has been active in the Senior Lawyers Division and several sections of the

State Bar, including the Commercial Litigation Section, serving as chair. The Business Law Section named him Business Lawyer of the Year in 2004. Jack is listed in Best Lawyers in America in ten categories of law,

and has been named Santa Fe Lawyer of the Year in three: Real Estate in 2011, Mediation in 2013, and Arbitration in 2016. Burton is a member of the Uniform Law Commission and helps to pass uniform laws in the legislature. He graduated from Louisiana Tech University (accounting major, magna cum laude) and Harvard Law School (LL.B.). He and his wife Anne live in Santa Fe.

● Young Lawyers Division Chair



Sean M. FitzPatrick

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Sean FitzPatrick is a graduate of UNM School of Law and currently practices plaintiff's civil litigation in Albuquerque, NM through his firm FitzPatrick Law, LLC. FitzPatrick worked as a prosecutor in Farmington, NM litigating a variety of felony and misdemeanor cases for a few years after law school.

FitzPatrick is excited to bring new programming to the New Mexico State Bar 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.

● Paralegal Division Liaison



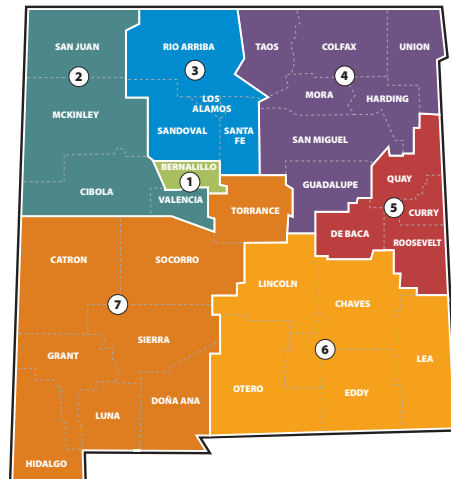
Christina G. Babcock

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Christina Babcock is a full-time Paralegal Studies Professor at Central New Mexico Community College. She has been with CNM for nine years and teaches a variety of classes including Criminal Litigation, Computers in the Law Practice, Wills and Probate, and Introduction to Paralegal Studies.

Babcock is the 2018 Chair of the Paralegal Division for the State Bar of NM. She has been a member of the division since 2011 and also served on the board of directors in 2016. Her experience includes 23 years of work as paralegal primarily in criminal defense. She has an A.A.S. in Legal Assistant Studies (1995), a Bachelor's in Criminal Justice (2014), and is currently pursuing her Master's degree in Paralegal Studies from George Washington University. Christina lives in Albuquerque with her husband, Raymond, and their two children, Brandy and Matthew.

● Board of Bar Commissioners District Map



Certiorari Denied, October 31, 2017, No. S-1-SC-36695

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-009

No. A-1-CA-35013 (filed September 28, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JULIAN STOREY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Brett R. Loveless, District Judge

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico

JOHN KLOSS
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

BENNETT J. BAUR
Chief Public Defender
Santa Fe, New Mexico

STEVEN J. FORSBERG
Assistant Appellate Defender
Albuquerque, New Mexico
for Appellant

Opinion

Henry M. Bohnhoff, Judge

{1} Julian Storey (Defendant) was arrested in Albuquerque, New Mexico on suspicion of driving under the influence of marijuana. Following a jury trial in Bernalillo County metropolitan court, he was convicted of aggravated driving under the influence of a drug (DUI), possession of drug paraphernalia, and failing to maintain lane. The district court affirmed these convictions. On appeal to this Court, Defendant raises five challenges to the aggravated DUI conviction: (1) the trial court erred when it denied Defendant's motion to strike three potential jurors for cause, thus denying Defendant a fair trial; (2) there was insufficient evidence to support the jury's finding that Defendant was guilty of aggravated DUI; (3) the trial court erred by denying Defendant's motion for a mistrial due to the prosecutor's comments regarding the legal standard for DUI; (4) NMSA 1978, Section 66-8-102(D)(3) (2016) is unconstitutional because it criminally punishes defendants for refusing to submit to a warrantless

blood draw; and (5) on the same constitutional grounds, fundamental error occurred when the prosecutor commented during closing argument on Defendant's refusal to submit to the blood draw. Pursuant to the United States Supreme Court's holding in *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160 (2016), and following this Court's ruling in *State v. Vargas*, 2017-NMCA-023, ¶ 15, 389 P.3d 1080, *cert. granted*, 2017-NM-CERT-___, (No. A-1-CA-33718, Feb. 14, 2017), we conclude that Section 66-8-102(D)(3) is unconstitutional under the facts of this case. Pursuant to the Fourth and Fourteenth Amendments to the United States Constitution, a state cannot criminally punish an individual for refusing to submit to a warrantless blood draw. However, we also conclude that the constitutional proscription announced in *Birchfield* does not extend to the introduction of evidence of, or a prosecutor's comment on, such refusal to consent. Thus, the trial court did not err by allowing the prosecutor to comment during closing argument on Defendant's refusal to submit to a blood draw. We are not persuaded by Defendant's remaining arguments. We thus affirm in part and

reverse in part, and remand for entry of judgment and sentence for violation of the underlying DUI offense.

BACKGROUND

I. New Mexico's Impaired Driving Laws

{2} Section 66-8-102(A) generally prohibits driving under the influence of alcohol: "It is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state." "[U]nder the influence," as that phrase is used in Section 66-8-102(A), means that "as a result of drinking liquor, the driver [is] less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety." (DWI). *State v. Neal*, 2008-NMCA-008, ¶ 21, 143 N.M. 341, 176 P.3d 330 (alteration, emphasis added) (internal quotation marks and citation omitted). Section 66-8-102(B) generally prohibits driving under the influence of a drug: "It is unlawful for a person who is under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within this state." (Emphasis added.)

{3} The New Mexico Implied Consent Act (the Act), NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2015), aids in the enforcement of Section 66-8-102. The Act generally provides that any person who operates a motor vehicle within the state is deemed to have consented to a breath or blood test if he or she is arrested on suspicion of driving under the influence of intoxicating liquor or drugs. Section 66-8-107(A); *State v. Watchman*, 1991-NMCA-010, ¶ 31, 111 N.M. 727, 809 P.2d 641, *overruled in part on other grounds by State v. Hosten*, 1996-NMCA-084, ¶ 21, 122 N.M. 228, 923 P.2d 595. The subject may refuse to consent to the test, Section 66-8-111(A), but the Act provides sanctions for refusing: revocation of the subject's driver's license for one year, Section 66-8-111(B), and a mandatory jail sentence if he or she is convicted of the underlying DUI offense, Section 66-8-102(E). That is, Section 66-8-102(D)(3) establishes the offense of aggravated driving while under the influence of intoxicating liquor or drugs (aggravated DUI): "refus[al] to submit to chemical testing, as provided for in [the Act, while,] in the judgment of the court, based upon evidence of intoxication presented to the court, the driver was under the influence of intoxicating liquor or drugs."¹ *Id.*

¹"[E]very [s]tate . . . has long had what are termed 'implied consent laws.' These laws impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the [s]tate's drunk-driving laws." *Birchfield*, 136 S. Ct. at 2166; see, e.g., *South Dakota v. Neville*, 459 U.S. 553, 559-60 (1983).

II. Defendant's Arrest

{4} Deputy Sarah Young of the Bernalillo County Sheriff's Department was on duty during the early morning hours of November 7, 2013. She was traveling westbound on Montano Boulevard in Albuquerque, New Mexico (Montano), in the same direction as a sport utility vehicle (SUV) that was ahead of her and was traveling in the far right lane. The deputy observed the SUV cross over the solid painted lane divider into the right shoulder lane three times. Deputy Young then observed the vehicle move the opposite direction into the far left lane and appear to graze the concrete lane divider. After the SUV turned southbound onto Coors Boulevard, Deputy Young initiated a traffic stop. When she made contact with Defendant, who was the driver of the SUV, the deputy smelled the odor of burnt marijuana coming from the vehicle. Deputy Young then asked Defendant whether there was anything in the vehicle she should be aware of, and Defendant produced a marijuana pipe from the center console. Based on the odor of burnt marijuana, the marijuana pipe, and how Defendant was driving, Deputy Young called dispatch to request a DUI officer. Deputy Johan Jareno responded to the call.

{5} When Deputy Jareno arrived, he was briefed by Deputy Young and then made contact with Defendant. Deputy Jareno also smelled the odor of burnt marijuana coming from the vehicle, and Defendant admitted to Deputy Jareno that he had smoked marijuana "a couple hours" earlier. Deputy Jareno asked Defendant if he would perform standardized field sobriety tests (FSTs) and Defendant agreed. Defendant followed Deputy Jareno's instructions for the horizontal gaze nystagmus test, but missed the heel-to-toe twice, turned incorrectly, and used his arms for balance during the walk-and-turn test. Defendant also failed to follow Deputy Jareno's instructions during the one-leg stand test, hopping once and failing to look at his foot or keep his hands by his sides.

{6} Deputy Jareno testified that standardized FSTs help a law enforcement officer assess a driver's ability to operate a motor vehicle safely, because "the tests are divided attention tests that require multitasking, as does driving." FSTs are designed to assess a person's intoxication regardless of the intoxicating substance. Deputy Jareno had training in Advanced Road Impairment Detection and Enforcement, where he learned how to identify drugs by

look, smell, and consistency, and he also received specialized training as a Drug Recognition Examiner.

{7} Following completion of the initial FSTs, Deputy Jareno then decided to give Defendant two alternate tests. For the first test, Deputy Jareno asked Defendant to estimate thirty seconds of time. When Defendant performed this exercise, forty-one seconds actually passed. For the second test, Deputy Jareno asked Defendant to recite the alphabet from J to Y, but Defendant was able to recite the alphabet only between J and P. Based on the results from the standardized FSTs and the two alternate tests, Deputy Jareno concluded that Defendant was not able to safely operate a vehicle and arrested him for DUI.

{8} For Defendant's part, he testified that "he did not feel intoxicated and thought he was safe to drive." He testified that his truck was "beat up" and that he had "blown out" the suspension, causing the truck to sway between the lanes because the road was "very bumpy." Defendant also testified that he believed his driving was fine and that his vehicle did not strike the barrier. Defendant also denied that the marijuana pipe he turned over to Deputy Young belonged to him.

{9} After Defendant's arrest, but while still on the scene, Deputy Jareno read Defendant a scripted advisory statement for implied consent that states:

You are under arrest for driving under the influence of intoxicating liquor and/or drug[s]. The New Mexico Implied Consent Advisory [sic] requires you to submit to a breath test, a blood test, or both to determine the alcohol or drug content of your blood. After you take one or both of our tests, you will have the right to choose an additional independent test. . . . Do you agree to take our test or tests—yes or no?

Defendant stated that he understood the advisory and he agreed to be tested. Deputy Jareno transported Defendant to a police station where Defendant was administered a breath test. The test showed negative for alcohol. Deputy Jareno then asked Defendant to submit to a blood test and Defendant refused. Deputy Jareno then stated:

I cannot force you to take our test but if you refuse you will lose your New Mexico driver's license or

non-resident operating privilege for up to one year. If you are also found guilty in court of driving while under the influence you may receive a greater sentence because you refused to submit to be tested.

Defendant still refused to submit to a blood test.

III. District Court Appeal

{10} The metropolitan court (trial court) jury found Defendant guilty of possession of drug paraphernalia, failure to maintain traffic lane, and aggravated DUI. The trial court entered its sentencing order and judgment on July 14, 2014. Defendant appealed his conviction to the district court, asserting error based on the trial court's denial of his motion to strike the three potential jurors for cause, the claimed lack of sufficient evidence to prove failure to maintain traffic lane, the claimed lack of sufficient evidence to prove Defendant was guilty of DUI, and the trial court's denial of his mistrial motion based on the prosecutor's claimed misstatement of the law during closing argument. In a motion to dismiss, the State contended that Defendant had waived any claim of error with respect to the sufficiency of the evidence. In its memorandum opinion entered on July 29, 2015, the district court did not address the State's waiver argument and instead proceeded to address the merits of Defendant's arguments, but ultimately found no reversible error and affirmed the sentencing order. Defendant timely filed his notice of appeal to this Court. We note that the State has not appealed the district court's de facto denial of its motion to dismiss, and thus we do not address the waiver issue.

ANALYSIS

I. The Trial Court Did Not Abuse Its Discretion in Denying Defendant's Motion to Strike Jurors for Cause

{11} Defendant's jury selection argument focuses on two members of the venire panel, Baker and Romero, who were not selected to serve on the jury, and one, Lucero, who was selected as a juror.

{12} During voir dire, in response to a question from defense counsel ("How many of you think that if you have used drugs or alcohol, no matter in what amount, in just the slightest amount, that you are not okay to drive?"), Baker stated, "I don't allow drugs of any sort, even one drink is breaking the law." Baker spoke only the one time during voir dire. Defense counsel never followed up with Baker to

ascertain whether, notwithstanding his incorrect understanding of the law, he still could follow the court's instructions and decide the case fairly and impartially.

{13} Later during voir dire, defense counsel asked the following question: "Ms. Lucero? Okay. Let's see—how do you feel about . . . the questions regarding whether if you've used any amount of marijuana, whether or not you're safe to drive—do you think that's the case?" Lucero responded, "Yes it is because it's endangering himself and endangering other people." That response was the only time that Lucero spoke during voir dire. Defense counsel did not follow up with Lucero to ascertain whether she could follow the court's instructions and decide the case fairly and impartially.

{14} Defense counsel then asked Romero the following question: "Ms. Romero, I guess the same question to you—what do you think—would somebody who had any amount of marijuana in their system, would they be unable to drive safely?" Romero responded, "Well yeah, they'd be unable to drive because it's illegal to drink and drive." Similar to Baker and Lucero, defense counsel did not follow up with Romero to ascertain whether she could follow the court's instructions and decide the case fairly and impartially. That was the only time she spoke during voir dire.

{15} Outside the presence of the venire panel, defense counsel moved to strike Baker, Lucero, and Romero, as well as another panel member, Pilcher, for cause. As is discussed below, the trial court agreed to strike Pilcher, but otherwise denied the motion. During the course of selecting the six members of the jury, defense counsel used one of Defendant's two peremptory excusals to strike Baker, but accepted Lucero. During the course of selecting an alternate juror, defense counsel exercised Defendant's remaining peremptory challenge on Romero.

{16} Defendant argues that the trial court erred in denying his motion to strike Baker, Lucero, and Romero for cause. Defendant asserts that all three stated that, because marijuana is illegal, a driver who uses any amount cannot drive safely. In response, the State argues that Defendant failed to demonstrate how these three panel members were unwilling or unable to decide the case based on the evidence and the trial court's instructions. The State also points out that, of the three panel members that Defendant moved to strike, only one, Lucero, actually served on the jury.

{17} "Trial courts . . . are given broad discretion in overseeing the voir dire process. . . . The trial court, who is listening first hand to counsel's questions and the panel members' responses, is in the best position to determine whether voir dire has sufficiently exposed any biases that may preclude jurors from acting fairly and impartially." *State v. Martinez*, 2002-NMCA-036, ¶¶ 31, 35, 131 N.M. 746, 42 P.3d 851. "In general, we review the trial court's rulings regarding the selection of jurors for an abuse of discretion because the trial court is in the best position to assess a juror's state of mind, based upon the juror's demeanor and credibility." *State v. Allen*, 2000-NMSC-002, ¶ 83, 128 N.M. 482, 994 P.2d 728 (internal quotation marks and citation omitted). Further, and crucially, "[the d]efendant cannot prevail on appeal unless he demonstrates that the jurors finally selected were biased or prejudiced." *State v. Gardner*, 2003-NMCA-107, ¶ 16, 134 N.M. 294, 76 P.3d 47.

{18} In *State v. Rackley*, 2000-NMCA-027, 128 N.M. 761, 998 P.2d 1212, the defendant was convicted of multiple crimes in connection with a robbery. On appeal, he challenged the trial court's refusal to excuse for cause three members of the venire panel based on the fact that, during voir dire, two of the panel members commented generally about the defendant's decision to not testify and the third commented about the defendant's status as a convicted felon. *Id.* ¶¶ 10, 12. This Court noted that these comments implicated rules regarding the presumption of innocence, the privilege not to testify, and the rules of evidence limiting character and propensity evidence. *Id.* ¶¶ 11-12. This Court then observed that

[the d]efendant is trying to convert a juror's admission of a layperson's natural response into prima facie evidence of impermissible bias. Evidentiary rules restricting the use of propensity evidence reflect a judgment that the probative value of such evidence is outweighed by unfair prejudice, confusion, and waste of time. Although these rules and the policies they represent may be known to and accepted by lawyers, they are not necessarily familiar to non-lawyers, who routinely rely on information about a person's past behavior in making social and business judgments. The fact that a juror is unaware

at the outset of a criminal trial of the complicated scheme regulating the use of collateral offenses/character evidence is not at all surprising and should not, of itself, give rise to a presumption that a juror is incapable of following the trial court's instructions on the proper uses of evidence of collateral offenses. Indeed, the very purpose of instructions is to educate jurors about the applicable law.

Id. ¶ 12 (citations omitted). This Court concluded that, with respect to all three panel members, the defendant failed to demonstrate that any of the three panel members was "biased or otherwise incapable of deciding [the] case on the facts established at trial and the trial court's instructions on the law." *Id.*

{19} Defendant's jury selection argument herein can be resolved on similar grounds. The three panel members in question simply expressed their layperson views about the physiological effects of marijuana and/or the law governing driving under the influence of drugs. Defense counsel did not follow up on those questions and inquire whether they could and would follow the trial court's instructions on the law and decide the case on the basis of the testimony and exhibits that were introduced into evidence. In the absence of that information, we decline to speculate about whether any of the three members would not have obeyed the trial court's instructions and instead would have decided the case on the basis of their layperson views or any actual biases. We therefore conclude that the trial court did not abuse its discretion during jury selection.

II. Section 66-8-102(D)(3) Is Unconstitutional as Applied to a Motorist's Refusal to Submit to a Blood Test

{20} Citing *Birchfield*, Defendant argues that in aggravating the sanction for driving under the influence of marijuana based on his refusal to consent to a blood test, the State is punishing him for invoking his constitutional right to be free from warrantless searches of his person. He urges that the aggravated DUI charge therefore must be reversed.

A. Standard of Review

{21} "The legality of a search . . . ultimately turns on the question of reasonableness." *State v. Ryon*, 2005-NMSC-005, ¶ 11, 137 N.M. 174, 108 P.3d 1032. While this "inquiry is necessarily fact-based it compels a careful balancing of constitutional values,

which extends beyond fact-finding,” and is therefore subject to de novo review. *State v. Rowell*, 2008-NMSC-041, ¶ 8, 144 N.M. 371, 188 P.3d 95 (internal quotation marks and citation omitted). The constitutionality of a statute is reviewed de novo as well. See *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, ¶ 10, 378 P.3d 13.

B. Preservation of Error

{22} The State contends that, because he did not raise it below, Defendant waived his Fourth Amendment argument. “To preserve an issue for review it must appear that a ruling or decision by the trial court was fairly invoked.” Rule 12-321(A) NMRA. As discussed below, however, the grounds for the constitutional argument were not apparent until June 23, 2016, when the United States Supreme Court announced its opinion in *Birchfield*. “[W]here a decision by the district court was not fairly invoked on a particular issue, an appellate court may still consider jurisdictional questions, issues of general public interest, or matters involving fundamental error or fundamental rights of a party.” *Vargas*, 2017-NMCA-023, ¶ 15 (internal quotation marks and citation omitted). Here, where Defendant’s trial and district court appeal occurred well before the legal ground became known, “we will exercise our discretion to consider whether compelling [the d]efendant to submit to a blood test constitutes an illegal search under the Fourth Amendment because freedom from illegal search and seizure is a fundamental right that may, in particular circumstances, come within the exception to the preservation requirement.” *Id.* (internal quotation marks and citation omitted).

C. Fourth Amendment Principles Applicable to Blood Testing for I paired Driving

{23} The Fourth Amendment to the United States Constitution provides in pertinent part that: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause[.]” U.S. Const. amend. IV. The Fourth Amendment expresses a clear preference that law enforcement should obtain a search warrant prior to conducting a search. See *State v. Williamson*, 2009-NMSC-039, ¶ 14, 146 N.M. 488, 212 P.3d 376. “Any warrantless search analysis must start with the bedrock principle of both federal and state constitutional jurisprudence that searches conducted outside the

judicial process, without prior approval by a judge or magistrate, are per se unreasonable, subject only to well-delineated exceptions.” *Rowell*, 2008-NMSC-041, ¶ 10 (emphasis, internal quotation marks, and citation omitted); accord *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552, 1558 (2013) (holding that a warrantless search is reasonable only if it falls within a recognized exception). Courts have recognized exceptions for, among others, searches incident to arrests, exigent circumstances, and searches where the subject consents. See *Rowell*, 2008-NMSC-041 ¶ 13 (noting that an exception permits search of an arrestee, following a lawful arrest, to prevent him or her from obtaining a weapon or destroying evidence); *State v. Gomez*, 1997-NMSC-006, ¶¶ 36-44, 122 N.M. 777, 932 P.2d 1 (stating that an exception allows search “to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence” (internal quotation marks and citation omitted)); *State v. Garnenez*, 2015-NMCA-022, ¶ 5, 344 P.3d 1054 (“Consent and arrest are exceptions to the warrant requirement.”).

{24} Drawing an individual’s breath or blood for purposes of testing for alcohol content constitutes a search within the meaning of the Fourth Amendment. *Birchfield*, 136 S. Ct. at 2174; *State v. Richerson*, 1975-NMCA-027, ¶ 23, 87 N.M. 437, 535 P.2d 644. On several occasions over the past half century, the United States Supreme Court has applied the Fourth Amendment to breath and blood alcohol testing regimens that states have established to combat the problem of drunk driving. See *Schmerber v. California*, 384 U.S. 757, 771-72 (1966) (concluding under the circumstances of that case that a warrantless blood alcohol test (BAT) was justified under the exigent circumstances exception and therefore not an unreasonable search); see also *McNeely*, 133 S. Ct. at 1557 (clarifying *Schmerber* and holding that the exigency exception for warrantless blood testing must be applied on a case-by-case basis, reasoning that the natural metabolism and thus dissipation of alcohol in the bloodstream does not, by itself, justify a per se rule); cf. *Neville*, 459 U.S. at 559 (answering in the negative the question of whether a South Dakota implied consent statute, which expressly authorized admission into evidence of a defendant’s refusal to consent to a BAT when arrested on suspicion of drunk driving, violated the United States Constitution’s Fifth Amendment’s privilege against self-incrimination).

D. *Birchfield* and *Vargas*

{25} *Birchfield* considered whether the search incident to arrest exception was applicable to both breath and blood alcohol testing. After reviewing the exception’s history, the United States Supreme Court began its analysis by observing that, when there is a lack of guidance from the founding era, “we generally determine whether to exempt [on the basis of the search incident to arrest doctrine] a given type of search from the warrant requirement by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” 136 S. Ct. at 2176 (internal quotation marks and citation omitted). The Court reasoned that while breath tests do not implicate significant privacy concerns, blood tests are a different matter because “[t]hey require piercing the skin and extract a part of the subject’s body . . . the process is not one [many people] relish. It is significantly more intrusive than blowing into a tube.” *Id.* at 2178 (internal quotation marks and citation omitted). Blood tests are also different from breath tests because a blood test “places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple [blood alcohol content (BAC)] reading.” *Id.* at 2178.

{26} The Court then assessed the government’s interest in BAT. The Court acknowledged that laws that make it a crime to refuse to submit to alcohol testing via breath and blood tests “serve a very important function.” *Id.* at 2179. However, because the search incident to arrest doctrine is categorical, as opposed to the exigency exception to the warrant requirement, which, *McNeely* teaches, requires a case-by-case analysis, the Fourth Amendment does not permit warrantless blood draws for alcohol testing as searches incident to arrest: “[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test.” *Birchfield*, 136 S. Ct. at 2183-84. Warrantless breath alcohol tests, on the other hand, are constitutional as searches incident to arrest. See *id.* at 2184.

{27} Lastly, the *Birchfield* Court considered but rejected the argument that warrantless blood draws could be justified under the Fourth Amendment’s consent exception: “motorists cannot be deemed

to have consented to submit to a blood test on pain of committing a criminal offense.” *Id.* at 2186.

{28} In *Vargas*, this Court applied *Birchfield*’s holding to a conviction for aggravated DWI of a motorist who refused to consent to a blood test after being arrested for driving under the influence of alcohol: “[The d]efendant’s refusal to submit to the search cannot be the basis for aggravating [the DWI] sentence.” *Vargas*, 2017-NMCA-023, ¶ 25. We reversed the aggravated DWI conviction but remanded the case to the trial court for resentencing on the underlying DWI offense.

E. Applying *Birchfield* to Defendant’s Conviction for Aggravated Driving Under the Influence of Marijuana

{29} Notwithstanding its reliance on the availability of breath alcohol testing as one of the key reasons for its conclusion that blood alcohol testing did not merit a per se search incident to arrest exception to the warrant requirement, the Court in *Birchfield* declined to recognize such an exception for warrantless blood testing where a driver is arrested on suspicion of driving while under the influence of substances for which a breath test is not available:

One advantage of blood tests is their ability to detect not just alcohol but also other substances that can impair a driver’s ability to operate a car safely. A breath test cannot do this, but police have other measures at their disposal when they have reason to believe that a motorist may be under the influence of some other substance (for example, if a breath test indicates that a clearly impaired motorist has little if any alcohol in his blood). Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not.

136 S. Ct. at 2184 (citation omitted). Thus, the United States Supreme Court appears to have foreclosed any argument that a warrantless blood test for a drug other than alcohol, such as marijuana, can be justified under the search incident to arrest exception.

{30} The State argues that *Birchfield*’s holding should not be applied

retroactively, but the rule is to the contrary. “[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]” *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (eliminating retroactive application exception “for cases in which the new rule constitutes a ‘clear break’ with the past”); see *United States v. Johnson*, 457 U.S. 537, 562 (1982) (holding that “a decision of [the United State Supreme] Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered”); *State v. McCumber*, 893 N.W.2d 411, 417 (Neb. 2017) (noting that “with *Birchfield* pronouncing a new constitutional rule, it applies retroactively to any case on direct appeal”).

{31} The State also argues that, because Defendant did not assert the unconstitutionality of the aggravated DUI charge until after his conviction and pending the appeal, the State had “no occasion to present evidence or argument below as to whether concerns over the loss of evidence due to the metabolization of marijuana, exigent circumstances generally, or some other case-specific information could have provided an alternative basis on which to justify a warrantless test of [Defendant’s] blood.” Under the Act, a law enforcement agency may not, without a warrant, force a driver to undergo a blood test. See § 66-8-111(A). In other words, under the Act, the exigent circumstances exception is not available to New Mexico law enforcement to obtain a blood test where a driver is arrested for DUI and refuses to consent to the test. Further, law enforcement generally may not seek a warrant for a blood test of a motorist who is arrested for driving under the influence of alcohol or other drug, the only exceptions being where the driver has either caused death or great bodily harm, or committed a felony and chemical tests will produce material evidence in the felony prosecution. See *id.* Thus, it is a moot point whether in this case the State could establish exigent circumstances to justify an involuntary blood test of Defendant.

{32} As stated above, Section 66-8-102(D)(3) provides that aggravated DUI consists of “refusing to submit to chemical testing, as provided for in [the Act], and in the judgment of the court, based upon evidence of intoxication presented to the court, the driver was under the influence of intoxicating liquor or drugs.” The offense

thus consists of the underlying offense of driving under the influence of alcohol or another drug, plus refusal to consent to a blood test. Section 66-8-102(E) imposes criminal penalties for the act of refusal, in addition to those imposed for the underlying offense: for a first aggravated DUI offense, “the offender shall be sentenced to not less than forty-eight consecutive hours in jail.” *Id.* In light of *Birchfield*, and consistent with *Vargas*, we hold that Section 66-8-102(D)(3) is unconstitutional to the extent violation of it is predicated on refusal to consent to a blood draw to test for the presence of any drug in the defendant’s blood. We conclude that *Birchfield*’s holding—the constitution does not support an enhanced criminal penalty based upon a defendant’s refusal to consent to a blood test for the presence of alcohol—must be extended to any enhanced criminal penalty for a defendant’s refusal to consent to a blood test for the presence of other drugs, in this case marijuana. Defendant herein cannot be criminally punished for his refusal to submit to a blood test, and we therefore reverse his conviction for aggravated DUI.

III. *Birchfield* Does Not Invalidate the Introduction of Evidence of a Defendant’s Refusal to Submit to a Blood Chemical Test

{33} During his opening statement, defense counsel asserted, “They’re not going to be able to show you that he has any actual marijuana in his system because aside from this pipe that [Defendant] turned over to them, they really have no evidence that he had been using marijuana while driving or that he was under the influence of marijuana while driving. They don’t have a blood test, [Defendant] refused to take one, but they have no actual proof that he ha[d] marijuana in his system, and this isn’t necessarily—well, we’re gonna see some evidence about, perhaps, why he refused and we think that when you see it, you will conclude that he’s not refusing in order to evade detection of drugs in his system.”

{34} During his initial closing argument, the prosecutor commented on Defendant’s refusal: “[D]efendant refused because he was afraid of the results.” Defense counsel immediately objected, and the parties approached the bench for a side bar conference. Defense counsel argued that the prosecutor’s statement called for speculation. Both the prosecutor and the judge pointed out that the prosecutor’s statement concerned consciousness of guilt, and the judge overruled

the objection. The prosecutor continued, stating: “It was [D]efendant’s fear that drove him to refuse that [testing].” Later, at the end of his initial closing argument, the prosecutor stated:

It’s his admissions, the odor, his performance on the field sobriety tests, his poor driving, his refusal. He’s under the influence. [D]efendant believes he’s sober but the evidence points otherwise. That’s his belief, an individual who admittedly was smoking marijuana, and that can play into your credibility assessment of him. I don’t believe he was being dishonest. I believe he was impaired. The State asks you to find [D]efendant guilty.

Defense counsel did not object to this statement.

{35} During his rebuttal following defense counsel’s closing argument, the prosecutor stated, “He was honest, so there should be some other reason as to why he would refuse the test. . . . Ladies and Gentlemen, yes, he was honest with you, and handed the pipe over, admitted to smoking—until he was arrested for [DUI]. . . . Until there’s the very real probability that the blood needle goes into his arm and he gets tested and there is no doubt that he is under the influence.” Defense counsel then objected, and the parties approached the bench for a sidebar conference. Defense moved for a mistrial. The trial judge denied the motion, but stated, “I am concerned about saying sticking the needle in his arm that would have proven beyond—that would have proven he was guilty, because he can’t prove that, that’s purely speculation, so I’ll sustain the objection to that, and I think you need to withdraw that statement.” The prosecutor then continued his rebuttal, stating, “Ladies and Gentlemen, counsel has pointed out that I made a bit of a misstatement there. Just because he had his blood drawn wouldn’t have removed all doubt. The State still would have to produce that evidence in court. But [D]efendant was afraid of it.” Defense counsel did not object to this statement.

{36} Based on *Birchfield*, and reasoning that he should not be penalized for asserting his Fourth Amendment right, Defendant urges that the trial court also erred in allowing the prosecutor to argue during

final argument that Defendant’s refusal to consent to a blood test was evidence of consciousness of his guilt. For the same reasons this Court considers Defendant’s constitutional challenge to his aggravated DUI conviction notwithstanding his failure to preserve the claimed error, we also will consider this argument. Therefore, it is not necessary to undertake the plain or fundamental error analysis that Defendant pursues. However, we reject the substance of the argument and determine that the trial court did not err in allowing the comment.

A. *Birchfield* and Its Predecessors

{37} As mentioned above, *Neville* addressed the constitutionality of a South Dakota law that expressly permitted the introduction of evidence of a motorist’s refusal to consent to a BAT. South Dakota courts had concluded that the statute violated the federal constitutional privilege against self-incrimination on the theory that introducing evidence of refusal to consent to a blood test was analogous to introducing evidence of a criminal defendant’s refusal to testify. The United States Supreme Court disagreed. The Court noted that most state courts that had considered the question had concluded that refusal to submit is a physical act rather than a communication, and therefore not encompassed by the privilege. Instead, “evidence of refusal to take a potentially incriminating test is similar to other circumstantial evidence of consciousness of guilt, such as escape from custody and suppression of evidence.” 459 U.S. at 560-61. The Court ultimately grounded its ruling, however, on the alternative rationale that, because a defendant has a choice in taking or refusing to take the test, the blood test is not coerced, and therefore the refusal is not protected by the privilege. *See id.* at 561-64. It follows, therefore, that introduction of evidence of such refusal does not violate the Fifth Amendment privilege against self-incrimination.

{38} The Court did not address in *Neville* whether the admission of evidence of refusal to consent to a blood test infringed on a defendant’s Fourth Amendment right against unreasonable searches. Since *Neville*, however, the United States Supreme Court has spoken to that question twice. First, the court addressed the question in *McNeely* in connection with its holding that the natural metabolism of alcohol in the bloodstream does not constitute a per se exigency that justifies non-consensual, warrantless blood testing. In response to the state’s argument

that its compelling interest in combating drunk driving justified a per se exigency exception, the Court noted with approval the availability of other means of addressing the problem, including introduction of evidence of refusal to consent to a BAT:

States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 [s]tates have adopted implied . . . consent to BAC testing if [motorists] are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist’s driver’s license is immediately suspended or revoked, and most [s]tates allow the motorist’s refusal to take a BAC test to be used as evidence against [them] in a subsequent criminal prosecution.

133 S. Ct. at 1566 (emphasis added) (internal quotation marks and citation omitted). {39} Second, in *Birchfield*, and relying in part on the aforementioned language in *McNeely*, the United States Supreme Court spoke to the question in the context of distinguishing between criminalizing the refusal to take a BAT (which it deemed unconstitutional as a proposed exception under the consent doctrine) and using that refusal as evidence of consciousness of guilt on the underlying driving while intoxicated offense (which it signaled is constitutional):

Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them. It is another matter, however, for a [s]tate not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

Birchfield, 136 S. Ct. at 2185 (emphasis

²Based on this same qualifying language, *Birchfield* does not call into question the Act’s provision for revocation of one’s driver’s license as a civil penalty for refusal to consent to a blood test.

added) (internal quotation marks and citations omitted);² see also *Dill v. Texas*, No. 05-15-01204-CR, 2017 WL 105073, at *1-2 (Tex. App., Jan. 11, 2017) (not designated for publication) (rejecting, based on *McNeely* and *Birchfield*, the defendant's DUI argument that admission into evidence of her refusal to consent to blood test violated her Fourth Amendment rights).

B. New Mexico Precedent

{40} Independent of the United States Supreme Court's application of the Fourth Amendment, New Mexico courts have not identified any constitutional or other legal obstacles to the introduction of evidence of, or prosecutor comment on, a defendant's refusal to take a blood test for alcohol or other drugs. In *McKay v. Davis*, 1982-NMSC-122, 99 N.M. 29, 653 P.2d 860, the defendant was arrested for driving while under the influence of alcohol. He refused to consent to a breath alcohol test. At a pre-trial hearing, the metropolitan court advised that it would permit the introduction of evidence of, and comment on, the defendant's refusal to consent to the test. The defendant successfully sought a writ from the district court, prohibiting the metropolitan court from allowing evidence and comments regarding the defendant's refusal to consent to testing. On appeal, our Supreme Court reversed. Citing *Schmerber* and decisions from other states, the Court held that "evidence of a defendant's refusal to take a breath-alcohol test is admissible under the . . . Act." *McKay*, 1982-NMSC-122, ¶ 6. Foreshadowing *Neville*, the Court then ruled that the defendant's refusal was not protected as a privileged communication, *McKay*, 1982-NMSC-122, ¶ 7, and that the refusal reflected consciousness of guilt that was relevant and thus admissible pursuant to Rule 11-401 NMRA. *McKay*, 1982-NMSC-122, ¶¶ 14-16. Since 1982, New Mexico courts repeatedly have relied on evidence of refusal to consent to breath and blood alcohol tests to support convictions for driving while under the influence of alcohol. See, e.g., *State v. Marquez*, 2009-NMSC-055, 147 N.M. 386, 223 P.3d 931, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110; *State v. Caudillo*, 2003-NMCA-042, 133 N.M. 468, 64 P.3d 495. The logic underlying these decisions is equally applicable to Defendant's prosecution for, and conviction of, driving while under the influence of marijuana.

{41} We conclude on the basis of the foregoing federal and New Mexico precedent that the prosecutor's commentary on Defendant's refusal to consent to a blood test did not violate his constitutional rights under the Fourth Amendment.

C. Defendant Opened the Door

{42} In his opening statement, defense counsel raised the issue of Defendant's refusal to consent to the blood test. However, Defendant did not present any evidence at trial to follow-up with his opening statement about his refusal to consent. In both his initial and his rebuttal closing arguments, the prosecutor commented on Defendant's refusal, urging that, "It was [D]efendant's fear that drove him to refuse that [testing]," and "[D]efendant was afraid of it."

{43} *Birchfield* does not prohibit the introduction of evidence of, and commentary on, evidence establishing a defendant's refusal to take a blood test. The trial court therefore did not err, fundamentally or otherwise, in allowing the prosecutor's comments during closing argument regarding Defendant's refusal to take a blood test. But we also cannot ignore the defense counsel's comment to the jury during opening statements—that there was some explanation other than consciousness of guilt for Defendant's refusal to consent to a blood test. A court is "least likely to find [fundamental] error where the defense has opened the door to the prosecutor's comments by its own argument or reference to facts not in evidence." *State v. Sosa*, 2009-NMSC-056, ¶ 33, 147 N.M. 351, 223 P.3d 348 (internal quotation marks and citation omitted); cf. *State v. Smith*, 2001-NMSC-004, ¶ 5, 130 N.M. 117, 19 P.3d 254 (noting, in a murder trial, that defense counsel stated during opening that the defendant remained in the vehicle and did not participate in the killing; declining to reverse conviction based on the prosecutor's comment on lack of testimony to bear out counsel's representation, since the defense invited the argument). "That the prosecutor can refer to the defendant's failure to testify if the door is opened by the defense, is well supported by case law." *State v. Ruffino*, 1980-NMSC-072, ¶ 9, 94 N.M. 500, 612 P.2d 1311. Defense counsel's comment on Defendant's refusal to consent in his opening statement constitutes independent grounds for rejecting Defendant's complaint about the prosecutor's comments during closing argument.

IV. Sufficient Evidence Supported Defendant's Conviction for Aggravated DUI

{44} Defendant contends that the evidence presented at trial was insufficient to establish each of the elements of aggravated DUI beyond a reasonable doubt. Defendant maintains that, while he wasn't driving "perfectly," the fact that Deputy Young followed him for two miles indicated that he was capable of driving safely, and that his performance on the FSTs was "quite good[.]"

{45} "The test to determine the sufficiency of evidence in New Mexico is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 53, 345 P.3d 1056 (alteration, omission, internal quotation marks, and citation omitted). "[T]his test involves two separate parts. First, a reviewing court must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict. Second, an appellate court determines whether the evidence, viewed in this manner, could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *State v. Graham*, 2005-NMSC-004, ¶ 6, 137 N.M. 197, 109 P.3d 285 (alteration, emphases, internal quotation marks, and citations omitted). "[S]ubstantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and citation omitted). "[W]hen there is a conflict in the testimony, we defer to the trier of fact." *Buckingham v. Ryan*, 1998-NMCA-012, ¶ 10, 124 N.M. 498, 953 P.2d 33. Thus, "[c]ontrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

{46} Section 66-8-102(B) provides that, "[i]t is unlawful for a person who is under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within this state." Section 66-8-102(D)(3) provides that, "[a]ggravated driving while under the influence of intoxicating liquor or drugs [includes a driver's refusal] to

submit to chemical testing, as provided for in [the] Act, and in the judgment of the court, based upon evidence of intoxication presented to the court, the driver was under the influence of intoxicating liquor or drugs.” Substantial evidence supported all of the elements of aggravated DUI, and thus, DUI as well.

{47} First, the State presented substantial evidence that Defendant was under the influence of a drug. Both Deputy Young and Deputy Jareno smelled burnt marijuana emitting from Defendant’s vehicle. Defendant produced a marijuana pipe from his vehicle and gave it to Deputy Young. Defendant admitted to Deputy Jareno that he had smoked marijuana, and the jury was free to reject his claim that he had done so a “couple hours” before operating his vehicle and that the pipe belonged to someone else.

{48} Second, the State presented substantial evidence that Defendant was incapable of safely driving a vehicle. Deputy Young followed Defendant and observed that he could not maintain his lane of traffic on Montano, swerving multiple times onto the right shoulder and then to the left and possibly grazing the concrete lane divider. Defendant failed the standardized FSTs. The FSTs, as well as Defendant’s additional testimony that mechanical problems and the “bumpiness” of Montano caused his vehicle to swerve, all address the credibility and weight of the State’s evidence, factual issues that are left to the jury to resolve. *See Rojo*, 1999-NMSC-001, ¶ 19 (recognizing that under the proper standard of review, appellate courts cannot apply the conflicting evidence offered by a defendant that might have supported an acquittal).

{49} Regarding the third and fourth elements of DUI, Defendant did not dispute that he was operating his vehicle in New Mexico and that he refused to consent to take a blood test. Thus, the State presented substantial evidence at trial to support the jury verdict of guilt beyond a reasonable doubt with respect to each element of aggravated DUI. While we have concluded that Defendant’s conviction of the aggravated DUI was unconstitutional under United States Supreme Court precedent and therefore must be reversed, it nevertheless follows that sufficient evidence would support his conviction of the lesser DUI charge, which Defendant in fact argues in his brief in chief.

V. The Trial Court Did Not Abuse Its Discretion in Denying Defendant’s Motion for Mistrial Based on the Prosecutor’s Comments About the Legal Standard for Driving Under the Influence of Drugs

{50} Lastly, Defendant contends that the prosecutor’s comments during jury selection and final argument about the legal standard for driving under the influence of drugs were inaccurate and for that reason the trial court should have declared a mistrial and granted him a new trial.

{51} “Since the granting of a mistrial is discretionary with the trial court, we will not disturb the decision on appeal absent an abuse of discretion.” *State v. Sutphin*, 1988-NMSC-031, ¶ 18, 107 N.M. 126, 753 P.2d 1314. “Moreover, the power to declare a mistrial should be exercised with the greatest caution.” *Id.* “The trial judge is in a much better position to know whether a miscarriage of justice has taken place and his opinion is entitled to great weight in the absence of a clearly erroneous decision.” *Id.* (internal quotation marks and citation omitted). “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case.” *Id.*

A. Venire Panel Member Pilcher’s and the Prosecutor’s Comments About the Legal Standard for DUI During Jury Selection

{52} During voir dire, and in response to the same general question that defense counsel asked other panel members about whether the use of any amount of alcohol or marijuana would impair one’s ability to drive, Pilcher gave the following extended response:

[W]ell, according to as far as alcohol is concerned, the law states as to [0.08] percent [0.16] percent . . . alcohol in your bloodstream, that that is automatic infraction. It also says that even if you do not have that level of alcohol in your blood, that it is by level of “impairment.” So the level of impairment is really what they go on. It’s not, even if you are under the legal amount, if you cannot drive safely, then you shouldn’t be driving. Um, after that it goes for alcohol and tobacco—or not tobacco—but, . . . marijuana or any other impairing substances, even medicated, prescribed drugs . . . affect how you can function behind the wheel of a car. And if you have anything that impairs your ability to drive, you shouldn’t be driving. And that’s different for different people. Some people can probably down

a couple of beers and be functioning behind the wheel of a car, but other people probably have half a beer and not be able to function. So really it’s level of function and then whatever the legal standard is of . . . allowed substance in the bloodstream.

. . . .

I believe that no one should be drinking or doing alcohol or drugs anyway, but that’s—if it’s legal, then they can do it. But, I don’t believe if they are under the influence . . . that they should be driving.

. . . .

[To determine whether somebody is unable to drive,] I would need to know . . . how much alcohol is in their bloodstream and I would need to know if they have passed or failed the . . . sobriety tests—the coordination. So if the officer is of [the opinion] that they had passed within satisfactory measures, then I would be okay with that. But if they—had shown that they had not passed the . . . coordination the other tests that the officer’s conduct, then as far as I’m concerned, he’s impaired.

{53} Following completion of voir dire, and while the trial court and counsel were selecting the jury but outside the presence of the venire panel, the prosecutor made the following comment about Pilcher: “As far as a non-attorney juror, I think that Mr. Pilcher has most accurately stated what the standard is for driving while intoxicated out of any individual I’ve ever run across. This is an individual who knows the law and accurately recited it to the court. He doesn’t drink. He doesn’t use drugs. But he’s also said he will follow the law and he has to find impairment in order to convict and this is an individual who actually knows the law.” The prosecutor continued, “And Your Honor, regarding the statement of law, there is actually case law and if the court wants me to go get it right now, I will, that says driving while impaired to the slightest degree is exactly the same as driving while incapable of operating safely. The Court of Appeals has decided that that language is basically interchangeable and means the same thing.” The trial court ultimately struck Mr. Pilcher for cause.

B. The Prosecutor's Comments During Closing Argument on the Legal Standard for DUI

{54} During the State's closing argument, the prosecutor distinguished the correct standard for DUI with drugs (incapable of safely driving a vehicle (Section 66-8-102(B))), from the standard for DUI with alcohol (impairment to the slightest degree (Section 66-8-102(A); UJI 14-4501 NMRA)). See generally *State v. Gurule*, 2011-NMCA-042, ¶ 7, 149 N.M. 599, 252 P.3d 823. The prosecutor then stated, "Any impairment by a drug renders you incapable of operating a vehicle[.]" Defense counsel immediately objected and moved for a mistrial. The trial judge sustained the objection, characterizing the prosecutor's statement as "a misstatement of the law" and telling the prosecutor to rephrase his statement, but denied the mistrial motion. The prosecutor suggested rephrasing to say "any intoxicating drug," although it is unclear what exactly the prosecutor planned to say, and the trial judge added "may impair." The prosecutor then continued with closing argument by stating, "Defendant was impaired by marijuana, and there's plenty of evidence to support that. And any impairment, the smallest impairment by an intoxicating drug makes you unsafe. Half a second difference is unsafe. Six seconds, six seconds is way unsafe. Not even noticing that you've grazed a barrier because you're high is unsafe." Defense counsel did not object to this rephrasing.

C. The Trial Court Did Not Abuse Its Discretion in Denying a Mistrial

{55} Defendant insists that the trial court "abused its discretion in refusing to grant a mistrial in the face of the prosecution's continuing efforts to mislead the jury with misstatement and misapplication of the law." We disagree.

{56} First, the prosecutor's comments during jury selection were made to the trial court out of the presence of the venire panel. Whether or not the prosecutor's characterization of the law was incorrect, Defendant cannot claim any resulting prejudice.

{57} Second, after the prosecutor stated in closing argument that, "Any impairment by a drug renders you incapable of operating a vehicle," the trial court sustained defense counsel's objection, characterized the prosecutor's statement as "a misstatement of the law" and told the prosecutor to

rephrase his statement. We cannot say that these actions by the trial court, together with the definition of the offense contained in the instructions that the jury ultimately received and to which Defendant does not object, did not eliminate any prejudice that Defendant otherwise might have suffered. {58} Further, following the trial court's instruction to rephrase his statement, the prosecutor stated: "[D]efendant was impaired by marijuana, and there's plenty of evidence to support that. And any impairment, the smallest impairment by an intoxicating drug makes you unsafe. Half a second difference is unsafe. Six seconds, six seconds is way unsafe. Not even noticing that you've grazed a barrier because you're high is unsafe." Defense counsel did not object to this rephrasing. {59} The emphasized language essentially repeats the prosecutor's previous misstatement of the law. But he then blunted any impact of the error by equating "impairment" to the evidence of Defendant's unsafe driving as opposed to his mental state. We note as well that, prior to making this comment, the prosecutor himself had articulated the difference in the legal standards for driving under the influence of alcohol versus drugs. Consequently, we view the error as harmless under the circumstances. But in any event, defense counsel failed to object, and therefore waived the error.³

{60} Third, Defendant suggests that the lengthy statement of venire panel member Pilcher had already tainted the jury's collective thinking and predisposed them to apply an incorrect legal standard for establishing driving under the influence of a drug. This amounts to speculation. There is no evidence that the jury members did not follow the trial court's instructions regarding this standard and that the jury generally must follow its instructions. The trial court is given, and must exercise, considerable discretion in evaluating the propriety of argument and in curing any alleged defects. The trial court denied Defendant's motion for a new trial, stating that the prosecutor's comments had not deprived Defendant of a fair trial. "We believe that the court acted within the proper bounds of its discretion, and we will not reverse a decision denying a new trial on such a record." *State v. Sellers*, 1994-NMCA-053, ¶ 31, 117 N.M. 644, 875 P.2d 400. Based

on the foregoing, we conclude that the trial court did not abuse its discretion in denying Defendant's motion for mistrial. **CONCLUSION**

{61} This Court is keenly aware of the "grisly toll," see *Birchfield*, 136 S. Ct. at 2166, that drunk drivers take on our state's roads. The risk to society will only be exacerbated if individuals also get behind the wheel of a vehicle after they have consumed marijuana, a prospect that could occur more frequently in the future if trends toward the legalization of marijuana around the country continue. While *Birchfield* has taken away one of the tools—aggravation of the crime and punishment for refusing to consent to a blood test—that our Legislature has provided courts to use to address this serious problem, as we explain above, evidence of such refusal still may be introduced into evidence and commented on during trial of the underlying driving under the influence offense. *Birchfield* also does not foreclose the Legislature from authorizing law enforcement to obtain a warrant when a motorist refuses to consent to a blood test or seeking to obtain a warrantless blood test upon a showing of exigent circumstances. It is the province of the Legislature to consider these options. See, e.g., H.B. 129, 53rd Leg., 1st Sess. (N.M. 2017), available at <http://www.nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=129&year=17> (proposing amendments to Section 66-8-107 and Section 66-8-111, to authorize warrantless blood tests where exigent circumstances exist and to broaden the authorization for issuance of a warrant where there is probable cause to believe that the motorist is under the influence of alcohol or a controlled substance).

{62} We reverse Defendant's conviction for the aggravated portion of his DUI and affirm his conviction for DUI without any aggravation resulting from his refusal to submit to a blood test. We otherwise affirm Defendant's remaining convictions, and remand to the metropolitan court for entry of judgment and sentencing consistent with this opinion.

{63} **IT IS SO ORDERED.**
HENRY M. BOHNHOFF, Judge

I CONCUR:
TIMOTHY L. GARCIA, Judge

ZAMORA, Judge (specially concurring).

³Defendant does not contend that the prosecutor's second statement about the applicable legal standard rose to the level of fundamental error, and therefore we do not engage in that analysis. See *Sosa*, 2009-NMSC-056, ¶ 26.

{64} I concur in the majority opinion but write separately to express my concerns with inconsistencies in our conclusions in Sections II and III of the majority's analysis. Majority Op. ¶¶ 20-41. With the advent of *Birchfield*, these conclusions generate inconsistencies. 136 S. Ct. 2160. While on one hand we are concluding that Defendant has the Fourth Amendment right to refuse to comply with a warrantless blood test, Majority Op. ¶¶ 31-32, it appears that on the other hand we are taking that right away by using Defendant's refusal as evidence of consciousness of guilt. Majority

Op. ¶ 41. Another source of inconsistency arises from our conclusion that Defendant cannot be charged criminally for refusal to comply with a warrantless blood test, Majority Op. ¶ 32, but yet the refusal may be used against him to support a conviction for driving while under the influence of drugs. Majority Op. ¶¶ 40-41.

{65} While the majority cites to federal and state precedent in support of the use of Defendant's refusal to consent to a blood test to prove his consciousness of guilt, I did not see a principled analysis that resolves these inconsistencies. Nonethe-

less, our courts have spoken. See *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 33, 125 N.M. 721, 965 P.2d 305 ("Stare decisis is the judicial obligation to follow precedent, and it lies at the very core of the judicial process of interpreting and announcing law."). *Birchfield*, *Vargas*, and now this case have laid the ground work that may require a look to the New Mexico Constitution, Article II, Section 10 for solutions to these inconsistencies.

M. MONICA ZAMORA, Judge

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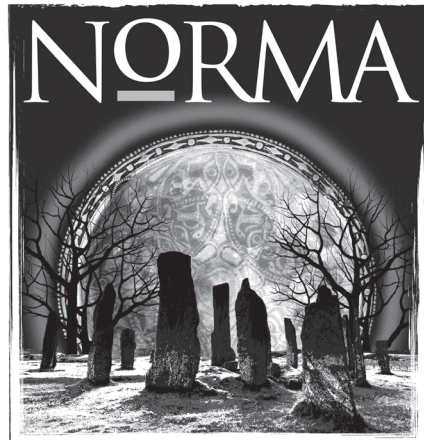
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Pueblo of Zia is seeking a part-time Chief Judge. Minimum Qualifications or Skills Required: Must have Juris Doctorate or Master's degree in criminal justice, family law, probate, substance abuse, civil, juvenile delinquency and truancy, or criminal case adjudication. Five-year minimum working experience serving in the capacity of an attorney, judge, or legal advocate with state, federal or tribal agency. Experience and/or practice in the field of Indian law and demonstrated experience with the concepts of federal Indian law, tribal law and principles of tribal sovereignty and jurisdiction is preferred. Must possess and maintain current valid driver's license with clean driving record as defined by company insurance carrier. Must not have been convicted and or pleaded guilty of a felony or a crime. Must pass pre-employment drug, alcohol and background screening. Interested applicants should submit letter of interest, resume, supporting documents, and application to the Human Resource office. For more information, please contact: Phone: 505.337.2111 Fax: 505.867.3308 Email: hr@ziapueblo.org

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Prominent insurance company has immediate need for litigation attorney with experience in insurance defense matters, including depositions, trials and arbitrations. Attorneys must be located in Albuquerque. Work is full-time and must be performed onsite. Work anticipated to last at least six weeks, perhaps longer. Possibility of temp-to-perm for right candidate. Please send resume in confidence to Debra M. Vinikour, Senior Recruiting Attorney, Assigned Counsel, at dvinikour@assignedcounsel.com.

**New Mexico Department
of Transportation
Office of General Counsel
RFP No. 18-30**

On-Call Professional Legal Services

The New Mexico Department of Transportation (NMDOT) requests proposals from lawyers and law firms to provide on-call professional legal services including litigation support. The services will include, but are not limited to, the following areas of law: matters involving real property law with an emphasis on title and right-of-way issues; land use law, eminent domain and inverse condemnation; Highway Beautification Act and outdoor advertising; employment and labor law; construction law; procurement and contract law; administrative law including rulemaking and/or hearing officer services; Inspection of Public Records Act; Fraud against Taxpayers Act and Whistleblower Protection Act; Open Meetings Act; tort law; complex bond and public finance; federal grant programs; collections; constitutional law, first amendment matters; environmental and water law; state, federal and tribal taxation; Indian law; information technology systems procurement and security; and appellate work, including administrative and civil law. Proposals shall be valid for one hundred twenty (120) days subject to all action by the New Mexico Department of Transportation. NMDOT reserves the right to reject any or all proposals in part or in whole. Proposals shall be submitted in a sealed container or envelope indicating the proposal title and number along with the Offeror's name and address clearly marked on the outside of the container or envelope. All proposals must be received and recorded by the Procurement and Facilities Management Division, NMDOT, 1120 Cerrillos Rd., Rm. #103, Santa Fe, NM 87504, no later than 2:00 P.M. (Mountain Daylight Time) on Tuesday, March 20, 2018. EQUAL OPPORTUNITY EMPLOYMENT: All qualified Offerors will receive consideration of contract(s) without regard to race, color, religion, sex or national origin. Proponents of this work shall be required to comply with the President's Executive Order No. 11246 as amended. Request for Proposals will be available by contacting VanessaA.Sanchez by telephone at (505) 827-5492, or by email at VanessaA.Sanchez@state.nm.us or by accessing NMDOT's website at http://dot.state.nm.us/content/nmdot/en/RFP_Listings.html. ANY PROPOSAL SUBMITTED AFTER THE DATE AND TIME SPECIFIED ABOVE WILL BE DEEMED NON-RESPONSIVE AND WILL NOT BE ACCEPTED.

Associate General Counsel

Office of Superintendent of Insurance is seeking an Associate General Counsel. Applicant must have at least five (5) years of experience. Insurance law, administrative law, and/or civil litigation experience preferred. For more information and to apply please visit www.spo.state.nm.us

**Business Law Professor
Full College Professor –
Business Law**

The Department of Finance in the College of Business at New Mexico State University (NMSU) is seeking to fill a 9-month, College Full Professor position to teach a variety of courses in Business Law. Applicant should have a Juris Doctorate, or equivalent degree, be licensed to practice law in any state, at least five years experience in the practice of law (public sector or private sector), and at least one year teaching. Applicants should demonstrate evidence of effective teaching and strong knowledge of business law. Applicants should be able to teach courses such as Legal Environment, Property Law, Consumer Law, and Sports Law, and other undergraduate and graduate law courses. NMSU is an equal opportunity and affirmative action employer. Women, minorities, people with disabilities and veterans are strongly encouraged to apply. Teaching evenings and weekends, online and face-to-face, and travel to remote site locations, may be required on occasion. The person selected will be expected to serve as a primary academic and career advisor for students seeking to attend law school. Interested applicants should apply online by March 26, 2018, at <http://jobs.nmsu.edu/postings/30718>. Candidates should direct any questions to Dr. Matthew Holt, Search Chair (email: mholt@nmsu.edu, telephone 474.646.5582).

Associate Attorney

Hatcher Law Group, P.A. seeks an Associate Attorney with four-plus years of legal experience for our downtown Santa Fe office. We are looking for an individual motivated to excel at the practice of law in a litigation-focused practice. Hatcher Law Group defends individuals, state and local governments and institutional clients in the areas of insurance defense, coverage, workers compensation, employment and civil rights. We offer a great work environment, competitive salary and benefit package. Send your cover letter, resume and a writing sample via email to juliez@hatcherlawgroupnm.com.

Associate General Counsel

Reporting to the Senior Vice President and General Counsel, this in-house position provides legal advice and assistance on complex and routine legal matters, primarily related to litigation, but also including matters of health law, involving Healthcare Services (PHS) and Health Plan. Litigation matters may include Federal and State law. AA/EOE/VET/DISABLED. Preferred qualifications include 15 years of experience as an attorney, with experience in the health care field and medical malpractice area. To Apply: <http://tinyurl.com/ycrdkub6> (requisition #11206)

**Employment Law Supervising
Attorney**

This position will serve as a Lawyer Supervisor within the State Personnel Office. Position will assist in managing and directing legal and administrative matters. The position will perform legal work associated with Human Resources, Labor Relations and employee discipline. The position will provide legal direction and support for Agency Human Resources and represent Agencies in relevant appeals in addition to providing guidance and direction to staff attorneys in handling legal matters. Minimum Qualifications: Licensed as an attorney by the Supreme Court of New Mexico or qualified to apply for limited practice license and five (5) years of experience in the practice of law. Location: Santa Fe. Salary: \$50,897 – \$88,524. http://www.spo.state.nm.us/State_Employment.aspx

Paralegal

Team, Talent, Truth, Tenacity, Triumph. These are our values. Mission: To work together with the attorneys as a team to provide clients with intelligent, compassionate and determined advocacy, with the goal of maximizing compensation for the harms caused by wrongful actions of others. To give clients and files the attention and organization needed to help bring resolution as effectively and quickly as possible. To make sure that, at the end of the case, the client is satisfied and knows Parnall Law has stood up for, fought for, and given voice and value to his or her harm. Success: Litigation experience (on plaintiff's side) preferred. Organized. Detail-oriented. Meticulous but not to the point of distraction. Independent / self-directed. Able to work on multiple projects. Proactive. Take initiative and ownership. Courage to be imperfect, and have humility. Willing / unafraid to collaborate. Willing to tackle the most unpleasant tasks first. Willing to help where needed. Willing to ask for help. Acknowledging what you don't know. Eager to learn. Integrate 5 values of our team: Teamwork; Tenacity; Truth; Talent; Triumph. Compelled to do outstanding work. Know your cases. Work ethic; producing Monday – Friday, 8 to 5. Barriers to success: Lack of fulfillment in role. Treating this as "just a job." Not enjoying people. Lack of empathy. Thin skinned to constructive criticism. Not admitting what you don't know. Guessing instead of asking. Inability to prioritize and multitask. Falling and staying behind. Not being time-effective. Unwillingness to adapt and train. Waiting to be told what to do. Overly reliant on instruction. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at <https://goo.gl/forms/Bo45QLhoTop6pkZy2>. Emailed applications will not be considered.

Director of First Impressions/ Receptionist/Legal Assistant

Director of First Impressions/Receptionist/Legal Assistant needed for growing plaintiffs personal injury law firm. Great pay, and a great environment, for a GREAT MIND AND ATTITUDE. Mission: To warmly and compassionately greet callers and visitors, making them feel welcome and comfortable. To make the best first, continued, and lasting impression on clients and all visitors and callers, including lawyers, doctors and other providers, witnesses, court reporters, insurance adjusters, etc. To create raving fan clients, and help the business and law practice grow and thrive. This position will provide support to our current receptionist. You will also be helping as a Legal assistant. These duties include: supporting 8 paralegals in the form of drafting basic form letters, scanning, creating mediation/arbitration notebooks, e-filing, compiling enclosures and sending out letters/demand packages, follow up phone calls with clients, providers, and vendors, IPRA requests and monitoring. What it takes to succeed in this position: Intelligence, able to handle and transfer multiple calls, warm personality, great phone voice, welcoming appearance, able to think ahead, common sense, able to diffuse a heated situation, obtaining accurate information for messages, desire to help team and client, willing and glad to help wherever needed, offering assistance beyond basic role, focus, motivation, and taking ownership of role. You must feel fulfilled by the importance of your role in managing the front desk, and being the firm's first impression. Other qualities required to succeed: Organization, decision making, being proactive, ability to work on multiple projects, ability to listen and ask questions, intrinsic desire to achieve, no procrastination, desire to help team and client, willing and glad to help wherever needed, offering assistance beyond basic role, focus, motivation, and taking ownership of role. You must feel fulfilled by the importance of your role in managing and filing documents and data. Obviously, work ethic, character, and good communication are vital in a law firm. Barriers to success: Struggling with database, unable to handle stress, guessing instead of asking, not looking for tasks to complete between calls, unprofessional appearance, lack of fulfillment in role. Thin skin. Being easily overwhelmed by a fast pace and multiple callers and/or visitors, or by information, data and documents. Lack of drive and confidence, procrastination, not being focused, too much socializing, taking shortcuts, excuses. We will train someone just out of school. We need to see superior grades, or achievement and longevity in prior jobs. 8-5 M-F. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at <https://goo.gl/forms/Bo45QLhoTop6pkZy2>. Emailed applications will not be considered.

Legal Assistant

Team, Talent, Truth, Tenacity, Triumph. These are our values. Legal assistant duties include support to 8 paralegals in the form of drafting basic form letters, scanning, creating mediation/arbitration notebooks, e-filing, compiling enclosures and sending out letters/demand packages, follow up phone calls with clients, providers, and vendors, IPRA requests and monitoring. We are a growing plaintiffs personal injury law firm. Candidate must be enthusiastic, confident, a great team player, a self-starter, and able to multi-task in a fast-paced environment. What it takes to succeed in this position: Organization, decision making, being proactive, ability to work on multiple projects, ability to listen and ask questions, intrinsic desire to achieve, no procrastination, desire to help team and client, willing and glad to help wherever needed, offering assistance beyond basic role, focus, motivation, and taking ownership of role. You must feel fulfilled by the importance of your role in managing and filing documents and data. Obviously, work ethic, character, and good communication are vital in a law firm. Barriers to success: Lack of drive and confidence, inability to ask questions, lack of fulfillment in role, procrastination, not being focused, too much socializing, taking shortcuts, excuses. Being easily overwhelmed by information, data and documents. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at <https://goo.gl/forms/Bo45QLhoTop6pkZy2>. Emailed applications will not be considered.

Paralegal

Hatcher Law Group, PA seeks a Paralegal with three plus years civil litigation experience (i.e. insurance defense, workers compensation, employment and civil rights) for our downtown Santa Fe office. We are looking for a motivated individual who is well organized, detail oriented and a team player. Proficiency in Word, Microsoft 365, Westlaw and Adobe Pro. Part/Full Time available. Salary contingent upon experience, plus benefit package. Send your cover letter and resume via email to juliez@hatcherlawgroupnm.com

Litigation Secretary – Las Cruces

Farmers Insurance is seeking a litigation secretary for our Las Cruces Branch Legal Office with knowledge of both New Mexico and Texas procedure and 3-5 years of civil litigation support experience. We provide a competitive salary and benefits package, a supportive team environment, and an excellent work-life balance. Please submit your resume to: debra.black@farmersinsurance.com

Administrative Assistant

Team, Talent, Truth, Tenacity, Triumph. These are our values. Duties include: Work together with the Administrator as a team to keep the office running smoothly. Assist the Administrator in her outcomes by performing various administrative tasks related to running of the office. Manage the building by: ordering supplies; communicating with office vendors; ensuring equipment and services are completed; IT liaison. Assist in bookkeeping tasks such as Accounts Payable entries. Various other tasks such as filing, and party-planning. Assist in scheduling meetings and travel arrangements for the attorneys. Possible assistance with marketing projects. We are a growing plaintiffs personal injury law firm. Candidate must be enthusiastic, confident, a great team player, a self-starter, and able to multi-task in a fast-paced environment. What it takes to succeed in this position: Organization, following directions, being proactive, ability to work on multiple projects, ability to listen and ask questions, intrinsic desire to achieve, no procrastination, desire to help team, willing and glad to help wherever needed, offering assistance beyond basic role, focus, motivation, and taking ownership of role. You must feel fulfilled by the importance of your role in providing support to the Administrator. Obviously, work ethic, character, and good communication are vital in a law firm. Barriers to success: Lack of organization. Lack of drive and confidence, inability to ask questions, lack of fulfillment in role, procrastination, not being focused, too much socializing, taking shortcuts, excuses. Being easily overwhelmed by information, data and documents. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at <https://goo.gl/forms/Bo45QLhoTop6pkZy2>. Emailed applications will not be considered.

Paralegal

Small, very busy Albuquerque law firm seeking experienced paralegal to assist in preparation of legal documents, monitoring & tracking of case files, and heavy client contact. Excellent communication, grammar and organizational skills required. Must be professional, self-motivated, detail oriented, and a team player who can perform multi-tasks in a fast paced practice. Resume w/cvrltr & salary requirements to joew@lafin.com or fax to 505.883.5834.

Services

Research & Writing Assistance –

Former judicial law clerk and ADA, experienced in civil, criminal, trial, and appellate research and writing. Effective, organized, and professional. Email kate.telis@gmail.com or call (202)431-2230 for rates/references.

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3104 Monte Vista Blvd. NE. 1,200 sf sweet remodel a block off Central. Two private offices, large staff area, waiting room, full kitchen, 3/4 bath, hardwood floors, 500 sf partial finished basement, tree-shaded yard, 6 off-street parking spaces. \$1,400 per month with one-year lease. Call or email Beth Mason at 505-379-3220, bethmason56@gmail.com

Available To Rent

Available to rent out 1 furnished office, attached small conference room, and secretarial bay in spacious professional building just west of downtown. Phone and internet service included. Access to large volume copier/scanner and use of larger conference room. Walking distance to courts and downtown. \$750/mo. Contact Grace Contreras at 505-435-9908 if interested.

Miscellaneous

Legal Services Corporation Notice of Availability of Grant Funds for Calendar Year 2019

The Legal Services Corporation (LSC) announces the availability of grant funds to provide civil legal services to eligible clients during calendar year 2019. The Request for Proposals (RFP), which includes instructions for preparing the grant proposal will be available from <http://www.grants.lsc.gov/grants-grantee-resources> during the week of April 9, 2018. In accordance with LSC's multiyear funding policy, grants are available for only specified service areas. On or around the week of March 12, 2018, LSC will publish the list of service areas for which grants are available and the service area descriptions at <https://www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant/lsc-service-areas>. Applicants must file a Notice of Intent to Compete (NIC) and the grant proposal through LSC's online application system in order to participate in the grants process. The online application system will be available at https://lscgrants.lsc.gov/EasyGrants_Web_LSC/Implementation/Modules/Login/LoginModuleContent.aspx?Config=LoginModuleConfig&Page=Login in during the week of April 9, 2018. Please visit <http://www.grants.lsc.gov/grants-grantee-resources> for filing dates, applicant eligibility, submission requirements, and updates regarding the LSC grants process. Please email inquiries pertaining to the LSC grants process to LSCGrants@lsc.gov.

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Contact Marcia Ulibarri,
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For more advertising information, contact:
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