Official Publication of the State Bar of New Mexico

Bar Bulletin

March 21, 2018 • Volume 57, No. 12

Mug Shots—The Ears Have It, by Barbara Meikle Barbara Meikle Fine Art

Inside This Issue

Congratulations, Tomas

Modrall Sperling salutes our friend and colleague, Tomas J. Garcia, for being named one of the Hispanic National Bar Association's Top Lawyers Under 40. Only 33 attorneys from across the nation were selected to receive the award.

A member of the firm's Litigation Department, Tomas was named "Young Lawyer of the Year" by the New Mexico Defense Lawyers Association in 2015. He is immediate past-chair of the State Bar of New Mexico Young Lawyers Division, where he regularly provides much-needed services, such as drafting wills for emergency first responders and powers-of-attorney for low-income senior citizens.

We are proud of his accomplishments and service to our community and look forward to watching as he continues to raise the bar in making a difference for the citizens of New Mexico.

Problem Solving. Game Changing.

Modrall Sperling

Lawyers

www.modrall.com

Albuquerque Santa Fe

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505-797-6000 • 800-876-6227 • Fax: 505-828-3765
address@nmbar.org • www.nmbar.org

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28
Natural Resources, Energy and Environmental Law Section Board
Noon, teleconference

29
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March

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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

About Cover Image and Artist: Barbara Meikle is an artist who paints the simple world outside of her door in Tesuque, N.M. Meikle has been an artist from childhood, sketching the horses she loved and took care of in order to ride. True to her art, in college she earned a bachelor's degree in painting and printmaking at the University of Denver and studied watercolor at Cambridge University in England. Her dream was always to make her living as an artist and in 1990, she returned to New Mexico to pursue that dream. Meikle's art may project peace and harmony exemplified as a colorful burro or explode in the riot of energy of galloping horses. Enveloping skies of yellow, pink and white may hover over a majestic dark blue mountain that smolders with mystery, or stalks of prayerful flowers may reach for distant stars in an attitude of happy reverence. For more of her work, visit Barbara Meikle Fine Art in Santa Fe or www.meiklefineart.com.

Notices

Court News

New Mexico Supreme Court 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 community 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.

Tenth Judicial District Court

Destruction of Exhibits

The Tenth Judicial District court County of Quay will destroy exhibits in domestic relations cases for years 1979-2013. Exhibits may be retrieved through April 30 by calling 575-641-4422.

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.

Professionalism Tip

With respect to my clients:

I will advise my client against pursuing matters that have no merit.

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

U.S. Magistrate Judge Vacancy

The Judicial Conference of the United States has authorized the appointment of a part-time United States Magistrate Judge for the District of New Mexico at Roswell, New Mexico. 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 $56,607 effective April 1 commensurate with the annual caseload for this position. The term of office is four years. The U.S. magistrate judge application form and the full public notice with application instructions are available from the Court's website at www.nmd.uscourts.gov or by calling 575-528-1439. Applications must be submitted no later than April 3.

State Bar News

Attorney Support Groups

- 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#.
- April 16, 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#.

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

Public Law Section

Accepting Award Nominations

The Public Law Section is accepting nominations for the Public Lawyer of the Year Award, which will be presented at the state capitol at 4 p.m. on April 27. Visit www.nmbar.org/publiclaw to view previous recipients and award criteria. Nominations are due no later than 5 p.m. on April 9. Send nominations to Section Chair Chris Melendrez at cmelendrez@cabq.gov. The selection committee will consider all nominated candidates and may nominate candidates on its own.

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.

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 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.

Other Bars

Albuquerque Bar Association

Legislative Preview with Dick Minzner

Dick Minzner will present "Legislative Update" (1.0 G) at the Albuquerque Bar Association's next membership luncheon at noon on April 3 at the Hyatt Regency Albuquerque. Lunch will be from 11:30 a.m.–noon. The cost is $30 for members and $40 for non-members. Register online at www.abqbar.org.

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.

ABA Retirement Funds Program

Free Retirement Savings Webinar

The American Bar Association presents a free webinar "Managing Your Retirement Savings Through Life's Transitions" from 11 a.m.–noon MDT on March 27. In this presentation, presenters will explore options and the steps that can be taken to help make the right decision for each transition including important "to-dos" at each stage. To register, visit https://register.gotowebinar.com/register/4229475274529415170.

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

Continued on page 8

Legal Education

March

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

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

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

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

23 **Lawyer Well-Being: Call to Action – I W.I.L.L Care**
1.0 EP
Live Seminar,
San Juan County Bar
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/despositions

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

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

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

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

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

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

28 **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

29 **Basic Guide to Appeals for Busy Trial Lawyers**
3.0 G
Live 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

5-7 **Trial Skills College**
15.0 G
Live Seminar,
Albuquerque
New Mexico Criminal Defense
Lawyers Assocaition
www.nmcdla.org

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

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

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

13 **Fourth Annual Symposium on Diversity and Inclusion**
Diversity Issues Ripped from the Headlines, II
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
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.

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. It is approved for 15 general hours of CLE credit. 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.

Hearsay

Tyler M. Cuff has received the highest Martindale-Hubbell peer rating. Cuff focuses his practice in the areas of products and general liability defense. He has represented a broad spectrum of clients in products liability and class action matters, breach of warranty claims, wrongful death claims, tort and personal injury claims, professional liability claims and other areas of civil litigation.

Modrall Sperling Named New Mexico Firm of the Year

Benchmark Litigation, a guide to litigation firms and attorneys in North America, named Modrall Sperling New Mexico Firm of the Year. This is the third time Modrall Sperling has received this honor.

In addition to being named New Mexico Firm of the Year, 10 Modrall Sperling attorneys are honored by being included in *Benchmark Litigation's* competitive legal guide:

- **Jennifer Anderson** – Top 250 Women in Litigation (2012 - present), State Litigation Star
- **Martha Brown** – State Litigation Star
- **Timothy Fields** – State Litigation Star
- **Timothy Holm** – State Litigation Star
- **Megan Muirhead**, Future Litigation Star
- **Nathan T. Nieman**, 2017 Under 40 Hotlist
- **Tiffany Roach Martin**, Future Litigation Star, 2016 Under 40 Hotlist
- **Maria O'Brien**, Future Litigation Star
- **Lynn Slade**, State Litigation Star
- **Alex Walker**, Future Litigation Stare, 2016 Under 40 Hotlist

In Memoriam

Tom Clark died age 71. Clark passed away at his home on Feb. 21. after a long battle with cancer. Born on March 9, 1946 in Northampton, Mass., to Betsey Ellinwood and Thomas T. Clark Jr. he was raised in Tucson, Ariz. He attended Milton Academy in Massachusetts and graduated from the University of Arizona in 1969. He was commissioned as an Army officer upon graduation, and served as a combat infantry officer in Vietnam until 1971. He was employed as a research analyst in the Civil Rights Division of the U.S. Department of Justice in Washington where his work focused on prisons and prison reform. He subsequently earned a law degree at California Western School of Law in San Diego. Cali.,. After graduation he married Susan Chase Miller and settled in southern New Mexico. His career began in private law practice after which he served as an assistant district attorney, followed by a long career in Las Cruces, N.M. as a state prosecutor. He was widely known and respected in the legal profession and was honored as New Mexico Prosecutor of the year in 1995. After retiring in 2006, Clark and Susan moved to Salem, Ore., where he enjoyed photography and exploring the outdoors. Clark was a world traveler, an avid hiker and backpacker, a lover of history and the natural world. He was a wonderful husband and father and a true and loyal friend. He is survived by his wife of 39 years, Susan, sons Kyle (Ashleigh) of Portland and Tyler (Chris) of Sydney, Australia, and by his granddaughter, Ayla of Portland, and by his sister Kate Clark of Newmarket, N.H. and her family.

Robert A. "Joe" Johnson died age 84. Johnson passed away peacefully at his home on Feb. 26. He was survived by the love his life Polly, to who he was married to for 57 years. He also survived by daughter, Mary Johnson, her husband Bruce Brown and their daughter Elizabeth Johnson Brown; his son, Hap Johnson, his wife Sherri and their children hayden and Will; his son, Tim Johnson; and his daughter, Theo Johnson, her husband Jonathan Hagmaeir and their children Robbie and Jonah Hagmaier. A graduate of Yale and Hardvard Law School, he was the first bankruptcy judge appointed for the District of New Mexico after the enactment of the Bankruptcy Reform Act of 1978. He practiced law for 54 years and served on the board of trustees of Albuquerque Academy and High Desert Investment Corporation. Johnson enjoyed making dinners for his family. He was revered for his humor and love of puns and would be the first to say any lawyer turned chef is a sue chef. He loved the Red Sox. He was a devoted husband, father and grandfather who leaves behind a beloved wife and world bettered by his countless good deeds, and four children and five grandchildren determined to do as much good in world as he did.

Eugene Carrell Ray was born Oct. 6, 1947, in Crosbyton, Texas. At age five, he moved with his family to Artesia, N.M. In school, he excelled in academics, baseball and football. He helped lead his high school football team to a state championship in 1964 and remained a proud Bulldog to the end. Carrell attended Texas Tech University where he played baseball before transferring to the University of New Mexico. He received his juris doctor degree from the UNM School of Law in 1975. He served as an assistant attorney general for several years in the Child Support Enforcement Division before entering private practice. As an attorney and guardian ad litem, he helped many families and children get through difficult times. He often took on clients at little or no cost and was honored multiple times for his pro bono work. Carrell enjoyed spending time with a good book, watching old B-movies and baseball and football games (especially if he had a little money on them), eating at local hole-in-thewalls and anonymously sending his kids and grandkids random gifts from amazon. He is preceded in death by his mother and father,·Mary and Gail Ray. He is survived by his ex-wife, Gayle Scott, whom he was married to for 33 years, their children Jared Ray, Thad Ray and wife, Camille, Alarie Ray-Garcia and husband Bryan; and grandchildren, Sirena, Devin and Xoari Ray and Jackson, Blake and Scarlett Garcia. Always irreverent, he wrote to his children that when his time came, "we can dispense with the niceties of a funeral·service and burial. An appropriate memorial at a bowling alley of your choice would be my desire." It seems an odd request as we're pretty sure he hadn't stepped foot in a bowling alley in 30 years, and even then, he wasn't particularly good at it. Perhaps he meant it as a reminder that we shouldn't take life so seriously and that the most important thing is spending time with those we love. So as we prepare to lace up our rental shoes and bowl 10 frames in honor of Dad, we encourage all those who knew and loved him to spend some extra time enjoying the company of your loved ones.

Opinions

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

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

Effective March 9, 2018

PUBLISHED OPINIONS

A-1-CA-34272	State v. R Widmer	Reverse/Remand	03/05/2018
A-1-CA-35528	State v. Nehemiah G	Reverse/Remand/Vacate	03/09/2018

UNPUBLISHED OPINIONS

A-1-CA-36187	State v. K Harris	Affirm	03/05/2018
A-1-CA-36437	State v. J Gutierrez	Affirm	03/05/2018
A-1-CA-36449	State v. A Banegas	Affirm	03/05/2018
A-1-CA-36487	State v. D Dunlap	Affirm	03/05/2018
A-1-CA-36510	State v. I Trujillo	Affirm	03/05/2018
A-1-CA-35488	State v. A Baca	Affirm	03/07/2018
A-1-CA-36367	State v. C Burkholder	Affirm	03/08/2018
A-1-CA-36891	CYFD v. Sabrina J	Affirm	03/09/2018

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

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective March 21, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

Please see the special summary of proposed rule amendments published in the March 21, 2018, issue of the Bar Bulletin. The actual text of the proposed rule amendments can be viewed on the Supreme Court's website at the address noted below. The comment deadline for those proposed rule amendments is April 11, 2018.

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

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

From the New Mexico Supreme Court

PROPOSED AMENDMENTS TO SUPREME COURT RULES OF PRACTICE AND PROCEDURE

In accordance with the Supreme Courts annual rulemaking process under Rule 23106.1 NMRA, which includes an annual publication of proposed rule amendments for public comment every spring, the following Supreme Court Committees are proposing to recommend for the Supreme Courts consideration proposed amendments to the rules of practice and procedure summarized below. If you would like to view and comment on the proposed amendments summarized below before they are submitted to the Court for final consideration, you may do so by submitting your comment electronically through the Supreme Courts website at http://supremecourt.nmcourts.gov/openforcomment.aspx, by email to nmsupremecourtclerk@nmcourts.gov, by fax to 505-827-4837, or by mail to

Joey D. Moya, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, New Mexico 875040848

Your comments must be received by the Clerk on or before April 11, 2018, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Courts website for public viewing.

Ad Hoc Committee on Rules for Mental Health Proceedings

Proposal 2018002 - Tribal Court Order Forms for Involuntary Commitments to State Facilities
[New Forms 10-605 and 4-950 NMRA]

The Ad Hoc Committee on Rules for Mental Health Proceedings, in collaboration with the New Mexico Tribal-State Judicial Consortium, proposes adopting new juvenile and adult involuntary commitment order forms for use by tribal courts when committing individuals to state mental health facilities. The proposal seeks to improve access to state mental health services for members of Native American communities and foster cooperation between tribal and state courts through the use of enforceable, model tribal court orders that satisfy legal requirements for involuntary commitments under state law.

Appellate Rules Committee

Proposal 2018003 - Calculating Notice of Appeal Filing Deadlines
[Rules 12-201 and 12-601 NMRA]

The Appellate Rules Committee proposes to amend Rules 12-201 and 12-601 NMRA to clarify that the three (3)-day period set forth in Rule 12-308(B) NMRA applies to certain kinds of service other than mailing and is not added in calculating the time to file a notice of appeal under Rules 12-201 and 12-601.

Proposal 2018004 - Consolidated Briefing
[Rule 12-318 NMRA]

The Appellate Rules Committee proposes to amend Rule 12-318 NMRA to clarify that consolidated answer briefs and consolidated reply briefs are permitted and encouraged when responding to multiple briefs in chief or multiple answer briefs filed by multiple parties.

Proposal 2018005 - Attachments to Rule 12-505 NMRA Pettions for Writs of Certiorari
[Rule 12-505 NMRA]

The Appellate Rules Committee proposes to amend Rule 12-505 NMRA to encourage the attachment of documentary matters of record, in addition to the attachments already required under the rule, that will assist the Court of Appeals in exercising its discretion under the rule.

Board Admission Rules

Proposal 2018-006 - Immigration Status of Bar Applicants
[Rule 15-103 NMRA]

The Court is considering proposed amendments to Rule 15-103(B)(7) NMRA, which concern the effect of an applicants immigration status on qualification for admission to the bar. The proposed amendment provides that an individual residing, but not lawfully present, in the United States may be granted a license to practice law in New Mexico, in the discretion of the Supreme Court, if the applicant is otherwise eligible for admission to practice law under the rules governing admission to the New Mexico bar. Such an admission would be subject to a condition that, in the event of an inability to practice law, the applicant have a contingent plan in place in a form approved by the Lawyers Succession and Planning Committee.

Proposal 2018-007 - Public Access to Bar Admission Proceedings Filed in Supreme Court
[Rule 15-401 NMRA]

The Board of Bar Examiners proposes to amend Rule 15-401(D) NMRA to provide that bar admission proceedings filed in the Supreme Court are a matter of public record and may only be sealed by order of the Supreme Court on motion of a party to the proceeding or the Courts own motion in accordance with the applicable procedures and standards in appellate Rule 12-314 NMRA. The proposed amendments extend to proceedings in the Supreme Court that suspend or revoke an admission previously granted by the Court. The Board does not propose any amendments to the existing provisions in the rule that provide for the confidentiality of records and proceedings of the Board regarding applications for admission and reinstatement to the bar.

Childrens Court Rules Committee

Proposal 2018008 - Identification of Parties When Service by Publication Is Permitted
[Rule 10-103 NMRA and Form 10-515 NMRA]

The Childrens Court Rules Committee proposes to amend Rule 10-103 NMRA and accompanying Form 10-515 NMRA to protect the identities of parties to an abuse and neglect proceeding when service by publication is permitted, by providing that only the full name of the party being served by publication should be listed in the notice of pendency of action and all other parties will be identified only by the initials of their first and last names.

Proposal 2018009 - Probation Order and Agreement Form for Delinquency Proceedings

[Rule 10-261 NMRA and New Form 10-719 NMRA]

The Childrens Court Rules Committee proposes to amend Rule 10-261 NMRA and adopt new Form 10-719 NMRA to provide a statewide, uniform probation order and agreement for use in delinquency proceedings.

Proposal 2018010 - Explanation of Rights in Abuse and Neglect Proceedings Involving an Indian Child

[Rule 10-314 NMRA]

The Childrens Court Rules Committee proposes to amend Rule 10-314 NMRA to ensure that respondents in abuse and neglect proceedings involving an Indian child are informed at their first appearance of unique procedural protections afforded under the Indian Child Welfare Act (ICWA). The proposed amendments seek to encourage the uniform application of ICWA across the state by focusing the court and parties on provisions that are unique to cases involving an Indian child.

Proposal 2018011 - Tribal Representative Access to Abuse and Neglect Proceedings

[Rule 10-324 NMRA]

The Childrens Court Rules Committee proposes to amend Rule 10-324 NMRA to encourage uniform compliance with the spirit and letter of the Indian Child Welfare Act (ICWA) by allowing tribal participation in child welfare proceedings involving an Indian child. The proposed amendments clarify that representatives from an Indian childs tribe or tribes may not be excluding from monitoring or participating in child welfare proceedings in which ICWA may apply.

Code of Professional Conduct Committee

Proposal 2018-012 - Succession Planning Required for Practicing Lawyers

[New Rule 16-119 NMRA]

The Code of Professional Conduct Committee proposes to adopt new Rule 16-119 NMRA, which would require a practicing lawyer to create a succession plan to protect the interests of clients in the event of sudden, unexpected circumstances, such as death or incapacity, that would prevent the lawyer from continuing the practice of law.

Proposal 2018-013 - Intervention Requirements When Lawyer Is Severely Impaired

[Rule 16-501 NMRA]

The Code of Professional Conduct Committee proposes to amend Rule 16-501 NMRA to require lawyers with managerial or direct supervisory authority to take action when there is a concern that a lawyer under their managerial or supervisory authority is exhibiting signs of severe impairment of the lawyers cognitive function. Intervention measures could include speaking directly with the lawyer to encourage him or her to seek assistance or making confidential reports to the New Mexico Judges and Lawyers Assistance Program or Office of Disciplinary Counsel.

Disciplinary Board

Proposal 2018-014 - Reinstatement Procedure for Attorney Suspended for Delinquent Child support payments

[Rule 17-203 NMRA]

The Disciplinary Board proposes to amend Rule 17-203 NMRA to address reinstatement procedures for attorneys who are suspended from the practice of law because of delinquent child support payments. The proposed amendments seek to ensure that attorneys suspended for six months or longer demonstrate fitness to return to the practice of law, in addition to compliance with child support obligations, as conditions to reinstatement.

Proposal 2018-015 - Formal Diversion Program for Minor Ethics Violations

[Rule 17-206 NMRA]

The Disciplinary Board proposes to amend Rule 17-206 NMRA to create a formal diversion program for minor violations of the Rules of Professional Conduct. The diversion program would focus on Aeducation to compliance@ initiatives that allow an attorney to improve his or her practice through meaningful remedial measures designed and monitored by the Office of Disciplinary Counsel.

Proposal 2018-016 - Reinstatement Following Reciprocal Discipline

[Rule 17-210 NMRA]

The Disciplinary Board proposes to amend Rule 17-210 NMRA to clarify the procedure that an attorney must follow when seeking reinstatement after the imposition of reciprocal discipline.

Proposal 2018- 017 - Reinstatement to Non-probationary Status

[Rule 17-214 NMRA]

The Disciplinary Board proposes to amend Rule 17-214 NMRA to clarify the procedure that an attorney who is placed on deferred suspension or probation must follow when seeking reinstatement to non-probationary status.

Proposal 2018-018 - Deadlines for Disciplinary Decisions

[Rules 17-313 and 17-315 NMRA]

The Disciplinary Board proposes to amend Rules 17-313 and 17-315 NMRA to confirm that the deadline for the hearing committee to submit findings of fact and conclusions of law, and the deadline for the Disciplinary Board or board panel to render a decision following a hearing, are non-jurisdictional deadlines

Probate Court Rules Committee

Proposal 2018-019 - New Probate Court Rules and Forms

[New Rules 1B-101 to -1B701 NMRA; New and Recompiled and Amended Forms 4B-101 to 4B-1001 NMRA; and Witdrawn Forms 4B-302, -503, and 504 NMRA]

The Probate Court Rules Committee proposes to adopt a comprehensive set of new rules to govern proceedings in the probate courts, and to adopt, recompile, and amend forms for use in the probate courts. The proposed rules and forms provide guidance and uniformity for judges and practitioners in New Mexicos probate courts regarding how to take a probate matter from beginning to end in a probate court, including the circumstances to consider and steps to take when a probate court no longer has jurisdiction over a probate matter that must be transferred to the district court.

UJICivil Committee

Proposal 2018020 - Contracts and UCC Sales

[Chapter 8 Introduction and UJIs 13-807, 13-808, 13-812, 13-817, 13-824, 13-826, 13-827, 13-828, 13-831, 13-832, 13-840, 13-843, 13-843A, and 13-860 NMRA; and Withdrawn UJI 13 809, 13-844, 13-845, 13-846, 13-847, 13-848, and 13-849 NMRA]

The UJICivil Committee proposes to amend Chapter 8 of the Civil Uniform Jury Instructions, which currently encompasses common law contracts cases and UCC sales cases. To address inconsistencies, inaccuracies, and confusing omissions relating to contracts for the sale of goods under the Uniform Commercial Code, the committee is proposing to completely eliminate all provisions in Chapter 8 related to UCC sales. The committee decided to recommend retiring, rather than revising, UCC sales provisions in Chapter 8 because UCC sales actions rarely go to

trial and, when necessary, jury instructions for such cases can be patterned after the comprehensive provisions in the UCC itself.

The committee recognizes that many of the provisions in Chapter 8 also are in need of revision to correct inconsistencies, inaccuracies, and omissions related to common law contracts actions. To that end, the committee has already recommended some revisions that were adopted by the Court in 2014 and 2015, see UJIs 13-805 (Offer; definition), 13-806 (Offer; revocation; effect of performance), 13-823 (Breach of contract; failure to perform), 13-843 (Contract; measure of damages; general instruction), and 13-843A (Special or consequential damages), and the committee continues its ongoing, comprehensive review of Chapter 8 to identify other revisions to the instructions needed for common law contract cases. At this time, however, the committees proposal is limited to removing all provisions in Chapter 8 intended for use in UCC sales cases, and public comment is sought on whether UCC provisions should be removed from Chapter 8 and, if so, the extent to which the proposed amendments accomplish that objective. As the committee completes its work on Chapter 8 as it relates to common law contract actions, the committee anticipates submitting additional recommendations to the Supreme Court to publish for public comment.

UJICriminal Committee

Proposal 2018021 - Essential Elements for Child Abandonment

[UJIs 14606, 14-607, and 14-623 NMRA; and New UJI 14-626 NMRA]

The UJICriminal Committee proposes to amend UJIs 14-606 and -607 NMRA in light of the Supreme Courts ruling in State v. Stephenson, 2017-NMSC-002, & 16, 389 P.3d 272, which held that NMSA 1978, Section 30-6-1 (2009), criminalizes the intentional leaving or abandoning of a child under circumstances where the child was exposed to a risk of harm. The Committee also proposes to adopt new UJI 14-626 to capture the definition of Aintentionally@ adopted by the Court of Appeals in State v. Granillo, 2016-NMCA-094, & 17, 384 P.3d 1121, which held Athat the mens rea for intentional child abuse by endangerment requires a conscious objective to achieve a resultCendanger the child.@ The Committee also proposes to amend Use Note 3 in UJI 14-623 to require use of the new definition in proposed new UJI 14-626 instead of the general intent instruction in UJI 14-141 NMRA.

Proposal 2018022 - Essential Elements for Criminal Sexual Contact

[UJIs 14902 to 14-915 NMRA and UJIs 14-921 to 14-936 NMRA]

The UJICriminal Committee proposes to amend UJIs 14-902 to -915 NMRA and UJIs 14-921 to -936 NMRA to avoid conflating criminal sexual contact offenses with criminal sexual penetration offenses as cautioned in State v. Tapia, 2015-NMCA-048, && 21, 25, 347 P.3d 738. To ensure that there is a clear distinction between criminal sexual contact and the greater offense of criminal sexual penetration, the committee proposes to remove Avagina@ from the list of body parts provided for criminal sexual contact offenses. Id., & 27.

Please also see Proposal 2018-023, regarding an overlapping proposed amendment to UJI 14-926 NMRA.

Proposal 2018023 - Position of Authority Element for CSCM or CSPM Offenses

[UJIs 14926 and 14-945 NMRA]

The UJICriminal Committee proposes to amend UJIs 14-926 and -945 NMRA to clarify the burden for proving a position of authority for criminal sexual contact of a minor and criminal sexual penetration of minor offenses in light of State v. Erwin, 2016-NMCA-032, 367 P.3d 905.

Please also see Proposal 2018-022, regarding an overlapping proposed amendments to UJI 14-926 NMRA.

Proposal 2018024 - Essential Elements for Possession of Drug Paraphernalia

[New UJI 143108 NMRA]

The UJICriminal Committee proposes to adopt new UJI 14-3108 NMRA to offer courts and practitioners a uniform instruction for possession of drug paraphernalia, a misdemeanor offense that is frequently instructed alongside trafficking offenses or as a lesser-included offense of drug possession. The proposed new instruction tracks the statutory language in NMSA 1978, Section 30-31-25.1, and also relies on the existing definitional instruction for possession itself in UJI 14-130 NMRA. The proposed committee commentary also seeks to address common issues arising in drug paraphernalia cases.

Proposal 2018025 - Defense of Self or Another Using Nondeadly Force Resulting in Death

[UJIs 145181 and 14-5182 NMRA]

The UJICriminal Committee proposes to amend UJIs 14-5181 and -5182 NMRA consistent with the holding in State v. Romero, 2005-NMCA-060, & 13, 137 N.M. 456, 112 P.3d 1113, which recognizes that a nondeadly self-defense or defense of another instruction would be appropriate in a homicide case where the force used by the defendant ordinarily would not create a substantial risk of death or great bodily harm but where death nevertheless results.

Proposal 2018026 - Duty to Retreat and First Aggressor Burdens in Self-defense Instructions

[UJIs 145190 and 14-5191 NMRA]

The UJICriminal Committee proposes to amend UJI 14-5190 NMRA in response to State v. Anderson, 2016-NMCA-007, & 13, 364 P.3d 30, which held that the instruction was critical to a jurys ability to understand the objective Areasonable person@ prong of self defense and akin to an elements instruction. Accordingly, a proposed new use note recognizes that use of the instruction is mandatory in cases where it is in issue. The proposed amendments to UJI 14-5190 also facilitate its use in cases involving defense of another or defense of property.

The Committee also proposes to amend UJI 14-5191 NMRA to account for conduct other than Astarting a fight@ or Aagreeing to fight,@ and to clarify the burden of proof. Like the proposed amendments for UJI 14-5190, the committee also proposes to add a use note to indicate that the first aggressor instruction is mandatory if in issue.

THE PROPOSED RULE AMENDMENTS SUMMARIZED ABOVE
CAN BE VIEWED IN THEIR ENTIRETY AT THE
NEW MEXICO SUPREME COURT WEBSITE
http://supremecourt.nmcourts.gov/openforcomment.aspx

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-003

No. S-1-SC-35629 (filed December 21, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ALEJANDRO RAMIREZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
John A. Dean, Jr., District Judge

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

KATHLEEN MCGARRY
MCGARRY LAW OFFICE
Glorieta, New Mexico
for Appellant

Opinion

Judith K. Nakamura,

Chief Justice

{1} A jury found that Defendant Alejandro Ramirez shot and killed Johnny Vialpando. Ramirez was convicted of several offenses, including first-degree murder, and the district court sentenced Ramirez to life imprisonment plus an additional sixty-five and one-half years. Ramirez appeals directly to this Court. He asserts that (1) there was insufficient evidence presented to support his convictions; (2) his right to due process was violated when the district court permitted several eyewitnesses to identify him in court as the shooter; and (3) his convictions violated the double-jeopardy guarantee against multiple punishments.

{2} We hold that the evidence is sufficient to support the convictions, the district court did not violate Ramirez's right to due process by allowing the in-court identifications, and double jeopardy precluded the district court from convicting Ramirez of first-degree murder and shooting at a motor vehicle. We examine the unit of prosecution for child abuse by endangerment as a matter of first impression and hold that Ramirez's multiple child abuse convictions are statutorily authorized. Consequently, we vacate only the shooting-at-a-motor-vehicle conviction and remand to the district court for resentencing.

I. BACKGROUND

{3} Vialpando was shot nine times while sitting in a vehicle with his spouse and three children and died from the injuries he sustained. The State charged Ramirez with one count of first-degree murder, NMSA 1978, § 30-2-1(A)(1) (1994); one count of conspiracy to commit first-degree murder, NMSA 1978, § 30-28-2 (1979), § 30-2-1(A)(1); one count of shooting at or from a motor vehicle, NMSA 1978, § 30-3-8(B) (1993); three counts of child abuse, NMSA 1978, § 30-6-1(D) (2009); one count of tampering with evidence, NMSA 1978, § 30-22-5 (2003); one count of aggravated assault with a deadly weapon, NMSA 1978, § 30-3-2(A) (1963); and one count of possession of a firearm by a felon, NMSA 1978, § 30-7-16 (2001). Ramirez pleaded not guilty to all of these charges.

{4} At Ramirez's trial, five eyewitnesses testified that Ramirez was the gunman who shot and killed Vialpando, and he was found guilty on all counts. The State abandoned the felon-in-possession-of-a-firearm count. The district court entered convictions on the remaining counts and sentenced Ramirez. Article VI, Section 2 of the New Mexico Constitution grants us exclusive jurisdiction over his appeal.

II. DISCUSSION

A. Sufficiency of the Evidence

{5} Ramirez contends that the State failed "to present sufficient evidence from which the jury could have found beyond a reasonable doubt that [he] committed the crimes . . . ." Ramirez makes several specific claims as to how the evidence was insufficient. We address these arguments in turn but begin by stating the standards that govern our review.

{6} When reviewing a jury's verdict for sufficient evidence, this Court determines whether substantial evidence, either direct or circumstantial, exists to support every element essential to a conviction beyond a reasonable doubt. *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057. "Evidence is viewed in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *Id.* (internal quotation marks and citation omitted). This Court will not second-guess the jury's decision concerning the credibility of witnesses, reweigh the evidence, or substitute its judgment for that of the jury. *Id.* "So long as a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction, [this Court] will not upset a jury's conclusions." *Id.* (internal quotation marks and citations omitted).

1. Identity evidence

{7} Ramirez contends that "the evidence of identity is insufficient in this case." He claims that the jury could not have found beyond a reasonable doubt that he was the shooter as the eyewitness testimony was "unreliable." Because there was no reliable evidence to prove that he was the shooter, Ramirez asserts, the first-degree murder conviction—and any other conviction necessarily predicated on the fact that he was the individual who shot Vialpando—"cannot stand." We reject this line of argument.

{8} Vialpando's wife, Rhiannon, offered the following testimony at trial. The day of the shooting was sunny. In the moments immediately before the shooting, she was seated in the driver's seat of her Dodge Durango. Vialpando was in the front passenger's seat. Two of the children, Carmen and Nikki, sat in the back seat. Carmen sat directly behind Vialpando. The third child, Michael, sat in the third row of seats. As Rhiannon was preparing to back out of their parking spot at

the Animas Mall in Farmington, New Mexico, a man she had not seen before approached the front passenger-side window of the Durango and began speaking to Vialpando. As he talked to Vialpando, the man looked around, avoided eye contact with Vialpando, and texted on his cell phone. The conversation lasted approximately five minutes. The man was very small, Hispanic, and had shoulder-length, curly hair. She asked Vialpando, "Who is this?" Vialpando replied, "Little Alex." Little Alex asked for a ride, but she said no. A white Chevy Blazer abruptly pulled in behind the Durango and blocked it from moving. Little Alex indicated that his brother was the driver of the Blazer and then walked to the driver's side of the Blazer, spoke with the driver, and received an object from the driver. Little Alex then walked quickly back to the passenger side of the Durango, said "This is for Gary," and began firing a gun at Vialpando. While the shooting took place, she was only four feet from Little Alex. She identified Ramirez as "Little Alex." This was the second time Rhiannon had identified Ramirez as the shooter. She first identified him as the shooter at a preliminary hearing "a week or two" after the shooting.

{9} Officer Heather Chavez testified at trial that Gary Martinez was murdered in a drive-by shooting in Farmington in 2008. Vialpando was a person of interest in the murder because he had a vehicle similar to the one used to commit the crime; however, he was never charged and the homicide remains unsolved.

{10} Carmen, Nikki, and Michael also testified at trial. Carmen was sixteen at the time of Vialpando's murder. She described the man who spoke with and shot Vialpando as small with long hair. She was so near to this man that if she had rolled down her window she could have touched him. She had a "very clear" look at this man when the shooting began. She identified Ramirez as the man who spoke with and shot Vialpando. Like Rhiannon, Carmen also heard Ramirez say "This is for Gary" immediately before Ramirez shot Vialpando. During cross-examination, Carmen admitted that she had seen photographs of Ramirez in the newspaper but explained that she had also "seen him with [her] eyes." Nikki, who was fourteen at the time of the shooting, and Michael, who was eleven at the time of the incident, both also identified Ramirez as the person who conversed with and then shot Vialpando.

{11} Shanley Lujan, a bystander, offered the following account of the murder. She was sitting in her car at the time of the shooting, and Vialpando was shot right in front of her. She described the man who spoke with and then shot Vialpando as Hispanic with wavy, shoulder-length hair. She identified Ramirez as the shooter. After the shooting, she saw Ramirez enter a white SUV that had blocked the Durango in and watched the SUV speed away "crazy fast."

{12} The following additional evidence was presented to the jury. Ramirez is relatively small—he is five feet two inches tall and weighs 110 pounds—and was this height and weight at the time of the shooting. For a man, his hair is longer than average. State investigators recovered a latent print of Ramirez's palm near the window's edge of the front passenger-side door of the Durango. Ramirez owned a white Chevy Blazer at the time of the shooting, and shortly after the shooting, he was arrested in a white Chevy Blazer. After Ramirez was apprehended, the police observed that he had an injury on his left hand, near the webbing of the fingers. Ramirez is left-handed. When a person fires a semiautomatic gun, it will recoil. If the shooter lacks a strong grip, the gun will rotate and, upon recoil, the hammer or the slide might injure the shooter's hand. On the day of the shooting, Shane Fletcher, a flooring installer, recovered a gun not far from where police officers first encountered the Chevy Blazer. That gun was retrieved by law enforcement and was identified as a Czechoslovakian semiautomatic pistol with an external hammer that could strike the skin when discharged. A firearms expert testified that the bullets and casings recovered at the crime scene were fired from this gun.

{13} This evidence more than adequately establishes Ramirez's identity as the person who shot Vialpando. *See State v. Hunter*, 1933-NMSC-069, ¶ 6, 37 N.M. 382, 24 P.2d 251 ("[T]he testimony of a single witness may legally suffice as evidence upon which the jury may found a verdict of guilt."). Ramirez's contention that the first-degree murder charge is not supported by sufficient evidence because the eyewitness testimony is "unreliable" is unavailing. The jury was free to accept or reject the eyewitness accounts. *See State v. McAfee*, 1967-NMSC-139, ¶ 8, 78 N.M. 108, 428 P.2d 647 ("It was for the jury to determine the weight to be given the testimony and determine the credibility of the witnesses[.]" (citations omitted)). Similarly, Ramirez achieves very little by emphasizing the evidence presented at trial in support of his theory that he was not the shooter. "Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject Defendant's version of the facts." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

2. Tampering with evidence

{14} Ramirez contends that there was insufficient evidence offered to support his conviction for tampering with evidence because "[t]he State never tied the weapon to Alejandro Ramirez." This argument fails. As we have already explained, there was sufficient evidence offered to support the jury's determination that Ramirez was the shooter. The following additional evidence connects Ramirez to the gun used to kill Vialpando.

{15} A gun was recovered not far from where police officers first encountered Ramirez in the Chevy Blazer. This gun fired the bullets that killed Vialpando and discharged the casings found at the crime scene. From this evidence, the jury was free to infer that Ramirez discarded this gun after killing Vialpando and fleeing the scene. *See State v. Carrillo*, 2017-NMSC-023, ¶ 46, 399 P.3d 367 (rejecting the defendant's sufficiency challenge to tampering with evidence and observing that the jury could logically deduce or infer, from the facts presented, that the defendant hid or otherwise disposed of a gun to prevent apprehension, prosecution, or conviction).

3. Shooting at a motor vehicle

{16} Ramirez argues that there was "insufficient evidence to prove that [he] was guilty of shooting at a motor vehicle." Because we conclude in a subsequent section of this opinion that the shooting-at-a-motor-vehicle conviction must be vacated on double jeopardy grounds, we need not address this sufficiency claim.

4. Child abuse

{17} Ramirez asserts that there was insufficient evidence presented to support the child abuse convictions because "none of the three children were physically harmed in any way" and "there was no evidence to support that [he] intended to harm any of the children." Ramirez does not question the validity of the child abuse jury instruction. *See State v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.3d 409 ("[T]he [j]ury instructions become the law of the case against which the sufficiency of the evidence is to be measured." (alterations in original) (internal

quotation marks and citation omitted)). The instruction did not require the jury to find that Ramirez intended to harm the children or that Ramirez actually physically harmed the children. Rather, the instruction required the jury to find that Ramirez "caused [the child] to be placed in a situation that endangered the life or health of [the child]" and that "Ramirez showed a reckless disregard for the safety or health of [the child]."

{18} The jury heard evidence that Ramirez fired a gun at Vialpando nine times at point-blank range, that Vialpando was seated in the front passenger seat of the Durango, and that the children were sitting in the back seats of the Durango in immediate proximity to Vialpando. The jury also learned that, although Vialpando was shot nine times, only five of the bullets were found inside of his body. Several of the bullets Ramirez fired traveled through Vialpando and continued onward. One of those bullets traveled through the driver's-side window in the second row of seats of the Durango and another bullet was recovered from the headliner or inside roof of the Durango. From this evidence, the jury could reasonably infer that it was sheer luck that the children were not struck by one of the bullets Ramirez fired at Vialpando. Thus, we have no doubt that the evidence presented is sufficient to support the jury's determination that Ramirez placed the three children in a situation that endangered their lives and that Ramirez showed a reckless disregard for their safety and health.

5. Aggravated assault

{19} Ramirez contends that "[t]here was insufficient evidence to prove that [he] committed aggravated assault against [Rhiannon] Vialpando." He makes two arguments to support this claim. First, Ramirez contends that the evidence was insufficient because the State did not establish that Ramirez pointed the gun at Rhiannon or fire it in her direction and, because he did not point the gun in her direction, Rhiannon's "'fear' for *her life* was not reasonable." Second, he argues that "there was no evidence that the shooter willfully and intentionally assaulted [Rhiannon] Vialpando." We reject both arguments.

{20} The jury was instructed that, to find Ramirez guilty of aggravated assault, they had to find that Ramirez "discharged a firearm in the direction of Rhiannon Vialpando," that this "conduct caused Rhiannon Vialpando to believe [that Ramirez] was about to intrude on Rhiannon Vialpando's bodily integrity or personal safety by touching or applying force to Rhiannon Vialpando in a rude, insolent or angry manner," and that "[a] reasonable person in the same circumstances as Rhiannon Vialpando would have had the same belief." The jury so found and the evidence was sufficient to support this finding.

{21} Ramirez's contention that there was no evidence to suggest that the firearm was aimed in Rhiannon's direction arises from a formalistic and conceptually flawed understanding of what it means to "discharge[] a firearm in the direction of" someone. Ramirez fired nine shots into the front passenger-side window of the Durango. Rhiannon was seated in the driver's seat of the Durango. When the shooting began, Rhiannon grabbed Vialpando's arm and closed her eyes. She believed that she and all of her family would die.

{22} A shooting conducted in very close quarters endangers anyone in proximity to the intended target. In other words, when Ramirez pointed the gun at Vialpando, he was simultaneously pointing it "in the direction of" Rhiannon. To conclude otherwise would require us to accept Ramirez's argument that Rhiannon's fear for her life and safety during the shooting was unreasonable as she was not the intended target. This we will not do. The evidence presented was sufficient to support the jury's determination that Ramirez fired a gun in Rhiannon's direction, that Rhiannon believed she was in danger of receiving an immediate battery and that this belief was reasonable. *See* § 30-3-1(B).

{23} This Court's decision in *State v. Manus* disposes of Ramirez's second argument—that there was no evidence he willfully and intentionally assaulted Rhiannon. 1979-NMSC-035, ¶¶ 12-14, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, ¶¶ 9-10, 98 N.M. 786, 653 P.2d 162. In *Manus*, an officer had arrested Mrs. Manus in front of the Manus home. *Id.* ¶ 3. While a bystander was helping the officer complete an accident report, Mr. Manus emerged from the home wielding a loaded gun. *Id.* ¶ 5. Mr. Manus pointed the gun in the direction of the officer and bystander and shot and killed the officer. *Id.* The jury convicted Mr. Manus of aggravated assault against the bystander. *Id.* ¶ 1. We affirmed that conviction and held that the state was not required to prove that Mr. Manus specifically intended to assault the bystander but only that Mr. Manus had committed an unlawful act with general criminal intent that caused the bystander to believe that she was in danger of receiving an immediate battery. *Id.* ¶ 14; *see also State v. Branch*, 2016-NMCA-071, ¶ 16, 387 P.3d 250 ("Liability under the statute is only limited by the requisite mental state of conscious wrongdoing and by the requirement that the victim's fear must be reasonable."). Ramirez acknowledges that the mens rea element necessary to establish aggravated assault is general criminal intent, i.e., conscious wrongdoing. Ramirez's second argument fails. There was sufficient evidence to support Ramirez's aggravated assault conviction.

B. Suppression of the Identification Testimony

{24} Prior to trial, Ramirez filed a motion requesting suppression of "all out-of-court identifications" and "all in-court identifications" by "any alleged eye witness." Ramirez argued that there was a "grave danger" the anticipated eyewitnesses would offer "irreparable misidentification[s]," a result that Ramirez claimed would be a "miscarriage of justice" and "a violation of [his right to] due process." Ramirez's motion also requested that the court conduct a hearing on these matters. The district court rejected Ramirez's arguments and denied the motion. On appeal, Ramirez argues that the district court should have granted the motion, that in failing to do so it denied him his right to due process, and that this error is grounds for reversal of his convictions. We are not persuaded, and to explain why we must first carefully examine the arguments presented to the district court.

{25} Ramirez asserted in district court that the eyewitness accounts of the shooting served as the foundation for the charges against him and that those eyewitness accounts are "unreliable" and "inadmissible." They are unreliable and inadmissible, he argued, because "any in-court identification by any alleged eyewitness is tainted by the out-of-court identification . . . ." Ramirez in turn asserted that "the out-of-court identification procedures used . . . were so impermissibly unreliable as to give rise to a very substantial likelihood of irreparable misidentification." Ramirez pointed out that "[n]o witness was provided with an opportunity to participate in a show-up, line-up, photo array or other type of identification proceeding following their initial observation at the time of the shooting." Ramirez also pointed out that Rhiannon identified him as the shooter at the preliminary hearing.

{26} It seems Ramirez intended to convey that the *absence* of out-of-court identification procedures together with the fact that Rhiannon was poised to testify that she had previously identified him as the shooter at a preliminary hearing might somehow taint the eyewitnesses' trial testimony and lead the eyewitnesses to identify him as the shooter regardless of whether or not they actually saw him shoot Vialpando. This outcome seemed all too likely, or so Ramirez claimed, given the lengthy span of time between the shooting and trial—a period of more than two years—during which memories of the features of the shooter would have faded. This understanding of the arguments appears to be precisely how the district court construed them, and the court was unpersuaded.

{27} The district court rejected Ramirez's claim that law enforcement's decision to abstain from engaging in any form of out-of-court identification procedure could somehow taint the anticipated in-court identifications. Where there is no out-of-court identification procedure, the court reasoned, that nonexistent procedure cannot taint later in-court identifications. Similarly, the court dismissed Ramirez's contention that permitting Rhiannon to testify at trial about her in-court identification at a preliminary hearing might somehow taint the other anticipated in-court identifications at trial. In the court's view, these claims had no bearing on the admissibility of the anticipated eyewitness testimony but were actually arguments directed at the weight Ramirez believed the jury should give the identifications. The court determined that "[a]ny weakness in the testimony can be revealed during cross-examination. It is the function of the jury as fact finder, not this Court as a gatekeeper, to determine the credibility and reliability of trial witnesses." In the end, the district court permitted Rhiannon, the three children, and Lujan to give eyewitness testimony at trial. They all identified Ramirez as the shooter. Rhiannon was also permitted to testify that she had earlier identified Ramirez as the shooter at a preliminary hearing.

{28} On appeal, Ramirez asserts that the court erred in permitting the in-court identifications, but the focus of his arguments has changed. He continues to assert that the in-court identifications were "tainted" but now emphasizes that media reports in the aftermath of the shooting indicated that he was the suspected shooter, and he argues that these reports necessarily tainted the eyewitnesses' identifications. He asserts that "[t]he fact that the taint was not caused by the police, does not lessen the problem in this day of instant social media." He also contends that the very fact that the in-court identifications happened in a courtroom is significant. Witnesses, Ramirez points out, know where the defendant sits and who he is. Ramirez further suggests that his ethnicity and gender are significant. He notes that he was the only Hispanic male seated in the area of the courtroom reserved for attorneys. For these reasons, Ramirez claims that the eyewitness identifications at trial were the product of suggestion, are unreliable, and, thus, permitting the eyewitnesses to offer the identification testimony violated his right to due process.

{29} Because Ramirez argues that the district court's decision to deny his motion to suppress violated his right to due process, our review is de novo. *See State v. Belanger*, 2009-NMSC-025, ¶ 8, 146 N.M. 357, 210 P.3d 783 ("This appeal implicates . . . the Fourteenth Amendment right to due process of law, including the right to a fair trial, and therefore our review is de novo.").

{30} Our treatment of the issue presented by Ramirez is guided by *Perry v. New Hampshire*, 565 U.S. 228 (2012). *See United States v. Thomas*, 849 F.3d 906, 910 (10th Cir. 2017) (acknowledging the debate whether *Perry* "overruled circuit-level precedent requiring inquiries into the suggestiveness and reliability of in-court identifications" and embracing the conclusion that "*Perry* applies not only to pretrial identifications but also to in-court identifications"), *cert. denied*, *Thomas v. United States*, ___ S.Ct. ___, 2017 WL 2363067 (U.S. Oct. 10, 2017). The defendant in *Perry* challenged the admissibility of a prejudicial out-of-court identification that was not arranged by the police and argued that due process required the trial court to assess the reliability of *any* eyewitness identification made under suggestive circumstances. 565 U.S. at 232-33, 240-41. The Court rejected this argument and held that due process "does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Id.* at 248. In reaching this conclusion, the *Perry* Court surveyed the existing body of case law regarding the admissibility of eyewitness identifications.

{31} *Perry* noted that in *Manson v. Brathwaite*, 432 U.S. 98 (1977), and *Neil v. Biggers*, 409 U.S. 188 (1972), the Court set forth an approach to determine whether due process requires suppression of eyewitness identification. *See Perry*, 565 U.S. at 238. *Perry* clarified that this approach embraces a crucial precondition: "due process concerns arise *only* when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Id.* at 238-39 (emphasis added); *see also id.* at 241 ("The due process check for reliability . . . comes into play *only* after the defendant establishes improper police conduct." (emphasis added)). *Perry* further clarified that, under the line of precedent beginning with *Stovall v. Denno*, 388 U.S. 293 (1967), "the Court has linked the due process check, not to suspicion of eyewitness testimony generally, but only to improper police arrangement of the circumstances surrounding an identification." *Perry*, 565 U.S. at 242; *see also State v. Flores*, 2010-NMSC-002, ¶ 56, 147 N.M. 542, 226 P.3d 641 (acknowledging authority limiting suppression of in-court identifications to only those cases where the in-court identification "follows an allegedly suggestive pretrial encounter" that itself resulted "from some type of government action." (quoting Lynn M. Talutis, *Admissibility of In-Court Identification as Affected by Pretrial Encounter That Was Not Result of Action by Police, Prosecutors, and the Like*, 86 A.L.R. 5th 463 (2001))).

{32} The in-court, eyewitness identifications here were not the result of impermissible, suggestive, pretrial, law-enforcement-orchestrated procedures. No such procedures occurred. Indeed, to ensure that Ramirez was not unfairly prejudiced, the police abandoned a planned, pretrial photographic lineup when they discovered that the media had already published photos of Ramirez. Ramirez's own eyewitness identification expert testified that the police acted properly by not proceeding with the lineup.

{33} Ramirez's contention that it does not matter that the alleged taint in his case arose from media coverage rather than improper police influence is simply incorrect. The source of the alleged taint does matter. It is only when law enforcement are the source of the taint that due process concerns arise.

{34} Ramirez's objection to the fact that the in-court identifications occurred in a courtroom, his claim that his seat position in the courtroom and his ethnicity and

gender were all suggestive, and his argument that the eyewitnesses' memories of the features of the shooter likely faded given the delay between the offense and trial are all equally unavailing. These facts do nothing to establish that the alleged taint, if there was any, arose as a consequence of improper law enforcement influence. *See Thomas*, 849 F.3d at 911 (rejecting the argument that an in-court identification was unduly suggestive because the defendant was the only African-American man at counsel table, the eyewitness had never been asked to identify the robber, and the in-court identification occurred more than nineteen months after the crime, as these are not circumstances attributable to improper law enforcement conduct). To the extent Ramirez means to criticize identification testimony more broadly as an inherently problematic and unreliable form of evidence, his attack necessarily fails in light of the discussion in *Perry*.

{35} *Perry* recognized that "[m]ost eyewitness identifications involve some element of suggestion[; i]ndeed, all in-court identifications do[,]" and acknowledged that "the annals of criminal law are rife with instances of mistaken identification." 565 U.S. at 244-45 (internal quotation marks and citation omitted). Nevertheless, *Perry* concluded that "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing a jury to assess its creditworthiness." *Id.* at 245. Moreover, *Perry* emphasized that other constitutional safeguards provide a criminal defendant sufficient protection against any fundamental unfairness resulting from eyewitness identifications. *Id.*; *cf. State v. Cheadle*, 1983-NMSC-093, ¶ 15, 101 N.M. 282, 681 P.2d 708 ("Once a court finds that the evidence is admissible, it becomes a jury determination as to the accuracy of a witness' identification."), *overruled on other grounds by Belanger*, 2009-NMSC-025, ¶ 36. These include the right to have a jury evaluate the testimony of witnesses, the right to confront eyewitnesses, the right to the effective assistance of an attorney who can expose the flaws of eyewitness testimony on cross-examination and focus the jury's attention on such flaws during opening and closing arguments, the right to present testimony about the unreliability of eyewitness identification made under certain circumstances, and the requirement that the state prove guilt beyond a reasonable doubt. *Perry*, 565 U.S. at 245-47. Ramirez utilized and benefitted from these various safeguards at his trial.

{36} Ramirez deftly cross-examined those witnesses who made in-court identifications and drew attention to the potential unreliability of their accounts of the shooting. And as noted, he also called an expert witness in eyewitness identification and eyewitness identification procedure. That expert testified about the circumstances of memory formation, retention, recall, and maintenance; the conditions that render procedures of identification more or less reliable; the role of available media depictions as independent sources in the formation of memory and the consequent effect on the reliability of subsequent eyewitness identifications; and the unreliability of in-court eyewitness identifications, both generally and in this case. Ramirez's jury was thoroughly informed about the shortcomings of eyewitness testimony when it considered the specific eyewitness testimony presented at Ramirez's trial and determined that Ramirez was the person who shot and killed Vialpando.

{37} For these reasons, we hold that the district court did not err when it denied Ramirez's motion to suppress all out-of-court and in-court identifications. Nor did it err in denying Ramirez a hearing on the question of the admissibility of the identifications.

C. Double Jeopardy

{38} "The Double Jeopardy Clause of the Fifth Amendment, enforced against the states by the Fourteenth Amendment, protects defendants from receiving multiple punishments for the same offense." *State v. DeGraff*, 2006-NMSC-011, ¶ 25, 139 N.M. 211, 131 P.3d 61 (internal quotation marks and citation omitted). The protection this clause provides, however, is limited. "[T]he only function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended." *Herron v. State*, 1991-NMSC-012, ¶ 6, 111 N.M. 357, 805 P.2d 624 (emphasis, internal quotation marks, and citations omitted).

{39} "There are two classifications of double jeopardy multiple-punishment cases." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747. "The first is the double-description case, where the same conduct results in multiple convictions under different statutes." *Id.* "The second is the unit-of-prosecution case, where a defendant challenges multiple convictions under the same statute." *Id.* Ramirez makes both types of double jeopardy multiple-punishment challenges.

1. Double-description claims

{40} Ramirez first argues that this Court should vacate the shooting-at-a-motor-vehicle count because it violates double jeopardy under a double-description theory. The State concedes that Ramirez is correct and that the shooting-at-a-motor-vehicle conviction must be vacated because it was subsumed by the first-degree murder charge. *State v. Montoya*, 2013-NMSC-020, ¶¶ 2, 54, 306 P.3d 426. We agree that Ramirez's conviction for shooting at a motor vehicle must be vacated.

{41} Ramirez next makes a cursory double-description challenge to his convictions for both child abuse and aggravated assault. He contends that these counts should also be merged into the first-degree murder charge. We reject this claim.

{42} Double-description challenges are subject to the two-part test set forth in *Swafford v. State*, 1991-NMSC-043, ¶¶ 25-34, 112 N.M. 3, 810 P.2d 1223. Under that inquiry, this Court must determine whether the conduct underlying the multiple offenses was unitary and whether, considering the statutes at issue, the Legislature intended to create separately punishable offenses. *Id.* ¶ 25. Ramirez cannot carry the burden imposed by the second prong of the *Swafford* test. The Legislature intended to punish the separate crimes of child abuse, aggravated assault, and murder separately.

{43} "If each statute requires proof of a fact that the other does not, it may be inferred that the Legislature intended to authorize separate punishments under each statute." *Swick*, 2012-NMSC-018, ¶ 13 (citing *Swafford*, 1991-NMSC-043, ¶ 12). Comparing the elements of the three statutes at issue, each statute requires proof of a fact that the other two statutes do not require. *Compare* § 30-2-1(A)(1) (requiring the State to prove a deliberate intent to kill), *with* § 30-3-2(A) (requiring the state to prove that the offender's conduct caused the victim to believe that the defendant was about to intrude on the victim's bodily integrity or personal safety by touching or applying force to the victim in a rude, insolent, or angry manner), *and* § 30-6-1(D) (requiring the state to prove that the offender placed a child in a situation that endangered the child's life). Other indi-

cia of legislative intent also suggest that the Legislature intended to punish these crimes separately. *See Swafford*, 1991-NMSC-043, ¶ 31 (clarifying that "if the elements of the statutes are not subsumed one within the other, then the *Blockburger* test raises only a presumption that the statutes punish distinct offenses . . . [which] may be overcome by other indicia of legislative intent" like "the language, history, and subject of the statutes"). Here, the three statutes are quite different and address distinct social evils. The presumption by the *Blockburger* strict-elements test is not overcome. Ramirez's double-description challenges to the child-abuse and aggravated-assault convictions fail.

2. Unit of prosecution

{44} Ramirez also argues that the separate punishments for the three counts of child abuse by endangerment violate double jeopardy under a unit-of-prosecution theory. He contends that the three counts should have merged into one single count. For the reasons that follow, we reject this argument.

a. Controlling legal standards

{45} In a unit-of-prosecution case, "the defendant has been charged with multiple violations of a single statute based on a single course of conduct. The relevant inquiry . . . is whether the legislature intended punishment for the entire course of conduct or for each discrete act." *Swafford*, 1991-NMSC-043, ¶ 8. "[T]he only basis for dismissal is proof that a suspect is charged with more counts of the same statutory crime than is statutorily authorized." *State v. Bernal*, 2006-NMSC-050, ¶ 13, 140 N.M. 644, 146 P.3d 289. "The issue, though essentially constitutional, becomes one of statutory construction." *Herron*, 1991-NMSC-012, ¶ 6.

{46} "[T]he unit of prosecution for a crime is the actus reus, the physical conduct of the defendant." *United States v. Prestenbach*, 230 F.3d 780, 783 (5th Cir. 2000). "Courts consider the elements of a crime more often than a criminal statute's unit of prosecution. The two can easily be confused but are conceptually distinct." *United States v. Rentz*, 777 F.3d 1105, 1117 (10th Cir. 2015) (Matheson, J., concurring). "The elements of an offense define what must be proved to convict a defendant of a crime." *Id.* "By contrast, the unit of prosecution defines *how many* offenses the defendant has committed. It determines whether conduct constitutes one or several violations of a single statutory provision." *Id.* (internal quotation marks and citation omitted).

{47} To determine the Legislature's intent with respect to the unit of prosecution for a criminal offense, we apply a two-step test. *Bernal*, 2006-NMSC-050, ¶ 14. "First, we review the statutory language for guidance on the unit of prosecution." *Id.* "The plain language of the statute is the primary indicator of legislative intent." *State v. Olsson*, 2014-NMSC-012, ¶ 18, 324 P.3d 1230. "If the statutory language spells out the unit of prosecution, then we follow the language, and the unit-of-prosecution inquiry is complete." *Bernal*, 2006-NMSC-050, ¶ 14. "If the language is not clear, then we move to the second step, in which we determine whether a defendant's acts are separated by sufficient indicia of distinctness to justify multiple punishments under the same statute." *Id.* (internal quotation marks and citation omitted). "If the acts are not sufficiently distinct, then the rule of lenity mandates an interpretation that the legislature did not intend multiple punishments, and a defendant cannot be punished for multiple crimes." *Id.*

b. Step one: plain language

{48} Section 30-6-1(D)(1) provides as follows: "Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be . . . placed in a situation that may endanger the child's life or health . . . ." Can we discern from this language what our Legislature intended as to the unit of prosecution? We see two possibilities. But before turning to those possibilities, we make two observations.

{49} We first observe that the New Mexico appellate courts have never squarely addressed whether the statutory language of Section 30-6-1(D)(1) clearly articulates a unit of prosecution. Review of the Court of Appeals' treatment of this issue reveals that step one has been overlooked. In *State v. Castañeda*, the Court correctly identified the two-step unit-of-prosecution analysis, but skipped step one without explanation. 2001-NMCA-052, ¶¶ 12-18, 130 N.M. 679, 30 P.3d 368. Then, in *State v. Chavez*, the Court cited *Castañeda* as having sufficiently settled step one of the analysis. *Chavez*, 2008-NMCA-126, ¶ 18, 145 N.M. 11, 193 P.3d 558, *rev'd on other grounds by* 2009-NMSC-035, ¶¶ 3, 53, 146 N.M. 434, 211 P.3d 891. *Castañeda* did not settle the analysis.

{50} We also observe that Section 30-6-1(D)(1) encompasses abuse by endangerment that results in physical or emotional injury as well as those circumstances where the abused child suffers no injury of any kind at all. *Compare State v. Lujan*, 1985-NMCA-111, ¶¶ 5, 16, 103 N.M. 667, 712 P.2d 13 (concluding that the defendant endangered a child's life in violation of the abuse by endangerment statute where he and several companions, while driving, threw bottles and other objects at the occupants of another moving vehicle and hit the infant-victim-occupant on the head when one of the thrown objects entered the targeted vehicle and ricocheted in the infant's direction), *and State v. Trujillo*, 2002-NMCA-100, ¶ 20, 132 N.M. 649, 53 P.3d 909 ("[T]here may be instances when the risk of emotional harm from a similar incident might be sufficient to support a conviction based on endangerment."), *with Castañeda*, 2001-NMCA-052, ¶ 15 ("Pursuant to the statute, a person may be guilty of child abuse even if the child is not actually harmed."); *see also* § 30-6-1(E), (F), (G), (H) (apportioning different penalties for those who commit abuse of a child depending upon whether the abuse *does not* cause great bodily harm, *does* cause great bodily harm, or causes death).

{51} Returning now to whether the unit of prosecution is clear from the plain language of the statute, the first possible resolution to this issue arises from the fact that, as we have just observed, a defendant may be convicted of abuse by endangerment even where there is no evidence the abused child was injured. Indeed, the endangered child may be entirely oblivious to the endangerment. This fact suggests that Section 30-6-1(D)(1) is not concerned with resultant consequences, and this view finds support in our case law. We have previously explained that "the legislative purpose that animates the child endangerment statute [is] to punish *conduct* that creates a truly significant risk of serious harm to children." *Chavez*, 2009-NMSC-035, ¶ 22 (emphasis added). Thus, one reading of the statute is that its gravamen is the prohibition of conduct. *See United States v. Evans*, 854 F.2d 56, 60 (5th Cir. 1988) (considering the gravamen of a criminal statute to determine that statute's unit of prosecution); *State v. House*, 2001-NMCA-011, ¶ 20, 130 N.M. 418, 25 P.3d 257 (same); *Harris v. State*, 359 S.W.3d 625, 632 (Tex. Crim. App. 2011) (same). In other words, Section 30-6-1(D)(1) achieves its purposes by focusing on and prohibiting a course of conduct and not by focusing on the resultant consequences of that prohibited conduct. *Cf. Ebeling v. State*, 91 P.3d 599, 601 (Nev. 2004) (concluding that the district court erred in

sentencing the defendant to two counts of indecent exposure—one count for each of the two victims to which the defendant exposed himself—because Nevada's indecent exposure statute "does not require proof of intent to offend an observer" or proof "that the exposure was observed" but requires only "that the public sexual conduct or exposure was intentional" (internal quotation marks and citation omitted)); *Harris*, 359 S.W.3d at 632 (concluding that "the gravamen of the offense of indecency with a child by exposure is the act of exposure[,]" that "[t]he allowable unit of prosecution for the offense is the act of exposure," and that the defendant committed only one act of indecency despite the fact that "he exposed himself to three children at the same time"). Specifically, the statute prohibits *causing* or *permitting* a child to be placed in a situation that endangers that child's life or health. Stated in grammatical terms, the unit of prosecution for Section 30-6-1(D)(1) is bound up in the verbs "causing" or "permitting." *See Rentz*, 777 F.3d at 1109 ("When seeking a statute's unit of prosecution . . . the feature that naturally draws our immediate attention is the statute's verb. This comes as no surprise, of course, as the verb supplies the action or doing part of most any sentence, statutory or otherwise.").

{52} The second possibility we perceive as to what the unit of prosecution might be based on the plain language of the statute rests on the fact that defendants can only engage in abuse of a child by endangerment if they cause or permit *a child* to be placed in a situation of endangerment. Stated grammatically, the statute contains a direct object that is the recipient of the actions of Section 30-6-1(D)(1)'s verbs, and that direct object is a singular noun. This suggests that our Legislature intended the protections of Section 30-6-1(D)(1) to attach to *each child* endangered, and this, in turn, suggests that the unit of prosecution for Section 30-6-1(D)(1) is *by child*. *See Harris*, 359 S.W.3d at 630 ("[A] legislative reference to an item in the singular suggests that each instance of that item is a separate unit of prosecution." (internal quotation marks and citation omitted)); *see also People v. San Nicolas*, 2001 Guam 4 ¶ 21 (observing that Guam's child abuse statute "refers to a person's actions with regard to 'a child'" and, therefore, concluding that "it is evident that the legislature intended that each separate child be the appropriate unit of prosecution"); *cf. People v. Arzabala*, 2012 COA 99 ¶¶ 27, 29 (concluding that the unit of prosecution for Colorado's statute criminalizing leaving the scene of an accident is per accident scene because the compound noun "accident scene" appears repeatedly in singular form and is preceded by a definite article).

{53} Significantly, our Legislature chose not to employ the phrase "any child" or the word "children" in place of "a child." Had it done so, Section 30-6-1(D)(1) would have expressly contemplated that more than one child may be affected by a single course of abuse by endangerment and this, in turn, would suggest that the focus of the statute is the prohibition of conduct towards a particular class of persons. *See State v. Greenwood*, 2012-NMCA-017, ¶ 38, 271 P.3d 753 ("[T]he Legislature knows how to include language in a statute if it so desires." (alteration in original) (internal quotation marks and citation omitted)). Our Legislature did not do this and instead specifically prohibited the commission of certain acts against a singular and discrete entity: "a child." It is well established—so much so that the proposition is repeatedly expressed in non-precedential opinions—that where a statute prohibits the doing of some act to a victim specified by a singular noun, "a person" for example, then "the person" is the unit of prosecution. *See State v. Vega*, No. 33,363, dec. ¶ 60 (N.M. Sup. Ct. Jan. 9, 2014) (non-precedential) ("[W]e agree with the State that, under our first-degree murder statute, the unit of prosecution is unambiguous: the killing of one human being by another. . . . The number of murder charges depends on the number of victims. The notion that one death should result in only one homicide conviction is firmly embedded in our jurisprudence." (internal quotation marks and citation omitted)); *State v. Armendariz*, No. 29,101, mem. op. ¶ 23 (N.M. Ct. App. May 1, 2012) (non-precedential) ("The nature of assault offenses encapsulates their personal nature and the individual victim as the proper unit of prosecution."); *State v. Clymo*, No. 30,005, mem. op. ¶ 29 (N.M. Ct. App. Aug. 16, 2010) (non-precedential) ("It appears that the wording of the statute evinces a legislative intent to punish each act of false imprisonment against each person."); *House*, 2001-NMCA-011, ¶ 20 ("[T]he subject of punishment of vehicular homicide is *the killing of another*, not the unlawful operation of a motor vehicle." (emphasis added)). All of this points to the conclusion that the unit of prosecution for Section 30-6-1(D)(1) is by child.

{54} Policy considerations further support this latter interpretation of the statute. *See State v. Ogden*, 1994-NMSC-029, ¶ 27, 118 N.M. 234, 880 P.2d 845 ("[T]he language of penal statutes should be given a reasonable or common sense construction consonant with the objects of the legislation, and the evils sought to be overcome should be given special attention."). "[W]here there is but a single violent act and multiple victims, the societal harm is greater. And, thus, the greater the harm, the greater the need to deter such conduct. To hold otherwise would encourage single-act-multiple-victim-type crimes." *State v. Johnson*, 1985-NMCA-074, ¶ 41, 103 N.M. 364, 707 P.2d 1174. To define the unit of prosecution for Section 30-6-1(D)(1) by course of conduct could encourage would-be perpetrators of child abuse by endangerment to endanger as many children as possible if they endanger any child at all. Our Legislature could not have meant this. Rather, it must have intended that there be a correlation between the number of children endangered and the total exposure to punishment. This reasoning has particular force in this context given that our Legislature has concluded that crimes against children suggest heightened culpability and that one purpose of the child-abuse-by-endangerment statute is to assure the protection of children, a highly vulnerable population. *State v. Santillanes*, 2001-NMSC-018, ¶ 24, 130 N.M. 464, 27 P.3d 456.

{55} Our discussion of these two possible interpretations of Section 30-6-1(D)(1)'s unit of prosecution demonstrates there are two equally valid ways of thinking about the unit of prosecution for this statute: either by conduct or by outcome. As arguments on either side have equal force and validity, we conclude that the statutory language is ambiguous as to the unit of prosecution. *See Maestas v. Zager*, 2007-NMSC-003, ¶ 9, 141 N.M. 154, 152 P.3d 141 ("A statute is ambiguous when it can be understood by reasonably well-informed persons in two or more different senses." (internal quotation marks and citation omitted)). We move to step two of the unit-of-prosecution analysis.

c. Step 2: indicia of distinctness

{56} Under the second step of the unit-of-prosecution analysis, we "determine whether a defendant's acts are separated by sufficient indicia of distinctness to justify multiple punishments under the same statute." *Bernal*, 2006-NMSC-050, ¶ 14 (internal quotation marks and citation omitted). Our case law instructs that we consider

the temporal proximity of the acts, the location of the victim(s) during each act, the existence of an intervening event, the sequencing of acts, the defendant's intent as evinced by his or her conduct and utterances, and the number of victims. *See id.* ¶¶ 15, 17; *Herron*, 1991-NMSC-012, ¶ 15. If our analysis indicates that Ramirez's conduct constitutes "separate offenses under the statute, we will presume that to be the legislative intent, until the Legislature amends the statute to indicate otherwise." *State v. Morro*, 1999-NMCA-118, ¶ 11, 127 N.M. 763, 987 P.2d 420.

{57} We have previously observed that the number-of-victims factor has special significance: "[M]ultiple victims will likely give rise to multiple offenses." *Herron*, 1991-NMSC-012, ¶ 15; *see also Bernal*, 2006-NMSC-050, ¶ 18 ("While the existence of multiple victims does not, itself, settle whether conduct is unitary or distinct, it is a strong indicator of legislative intent to punish distinct conduct that can only be overcome by other factors."). This case involved multiple child victims who suffered distinct mental injuries as a consequence of Ramirez's actions. Carmen, Nikki, and Michael each testified to the mental anguish they individually experienced while Ramirez shot Vialpando nine times. Carmen testified that, at the time of the shooting, she thought that she and her family would all die. It was patently reasonable for her to fear this potentiality. All three children testified that they were in fear and shock as they witnessed Ramirez shoot into the vehicle in which they and Vialpando were sitting and kill Vialpando. The number of shots fired is significant. Bullets entered and exited Vialpando. The chance that any one of the children might have been struck by one of the bullets fired into and through Vialpando increased as the number of shots fired increased. In light of these facts, we are persuaded that our Legislature intended multiple punishments in this case.

d. Conclusion: unit of prosecution

{58} In the circumstances of this case in which each of the three children separately testified to the fear and shock they respectively suffered as a result of Ramirez's wanton conduct, we hold that the Legislature intended prosecution for three counts of child abuse by endangerment. Ramirez's three convictions for child abuse do not violate double jeopardy.

III. CONCLUSION

{59} Ramirez's conviction for shooting at a motor vehicle is vacated. His remaining convictions are affirmed. We remand this matter to the district court for resentencing.

{60} IT IS SO ORDERED.
JUDITH K. NAKAMURA, Chief Justice

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

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-004

No. S-1-SC-36786 (filed December 28, 2017)

STATE OF NEW MEXICO
Plaintiff-Appellant,
v.
MARIAH FERRY,
Defendant-Appellee.

APPEAL OF DISTRICT COURT ORDER
Reed S. Sheppard, District Judge

THOMAS M. CLARK
CLARK, JONES & PENNINGTON, LLC
Santa Fe, New Mexico
for Appellee

RAÚL TORREZ,
District Attorney
JAMES W. GRAYSON,
Assistant District Attorney
Albuquerque, New Mexico
for Appellant

Opinion

Edward L. Chávez, Justice

{1} The State filed a Motion for Pretrial Detention in this case involving a charge of first-degree murder, which was denied by the district court judge after an evidentiary hearing. The State appealed to this Court pursuant to Rule 12-204(C) NMRA and consistent with *State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821 (holding that "the legislature intended for [the Supreme Court] to have jurisdiction over interlocutory appeals in situations where a defendant may possibly be sentenced to life imprisonment or death"). On page 3 of its Motion, the State contends that the district court judge, relying on *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276, "apparently determined that the charges themselves—no matter how serious the crime and how dangerous a manner in which it is committed—are never sufficient to detain." The State also contends that the district court judge abused his discretion and asks us to clarify that a district court judge "should neither disregard the nature or circumstances of the crime nor consider the charges to the exclusion of all other factors."

{2} Discretion is the authority of a district court judge to select among multiple correct outcomes. Appellate courts analyze a district court judge's discretionary decisions by first, without deferring to the district court judge, deciding whether proper legal principles were correctly applied. If proper legal principles correctly applied only lead to one correct outcome there is no discretion for the district court judge to exercise. If the district court judge arrives at the only correct outcome, the district court judge is affirmed; otherwise the district court judge is reversed. If proper legal principles correctly applied may lead to multiple correct outcomes, deference is given to the district court judge because if reasonable minds can differ regarding the outcome, the district court judge should be affirmed. In this case the dominating issue is whether the district court judge correctly applied proper legal principles.

{3} Article II, Section 13 provides that "[b]ail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority . . . proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community." We previously announced that the prosecuting authority—and defense counsel—may offer evidence in many different forms during a detention hearing. The litigants may introduce live testimony and proffer documentary evidence in a form that carries sufficient indicia of reliability, and the Rules of Evidence do not apply. *See* Transcript of Bench Ruling by New Mexico Supreme Court in *Torrez v. Whitaker*, No. S-1-SC-36379, at 9.[1] The prosecuting authority has the burden of proving by clear and convincing evidence that (1) the defendant poses a future threat to others or the community, and (2) no conditions of release will reasonably protect the safety of another person or the community. *See id.*

{4} In this case Detective Jodi Gonterman testified concerning her investigation of two separate alleged crimes involving Defendant, Mariah Ferry. The State also tendered, without objection, documentary exhibits which included the criminal complaints in two cases filed against Ferry; a prior court order releasing Defendant on specific supervisory conditions; and a letter from the mother of one of the victims. In the first case Ferry is alleged to have participated in the kidnapping and beating of a victim, and in the present case she is alleged to have participated in the kidnapping, mutilation, and murder of another victim and to have tampered with evidence. The details of the crimes in this case are adequately set forth in paragraphs 2 through 7 of the Order Denying State of New Mexico's Expedited Motion For Pretrial Detention. The district court judge also specified in paragraph 13 of his Order[2] that

> [t]he State argues that no conditions of release can protect the community based on the nature of the charges. While the Court

[1]available at www.nmcourts.gov/Court-Decisions-on-Pretrial-Release-and-Detention-Reform.aspx (last visited December 28, 2017)

[2]The judge's written Order governs in these proceedings. *See* Rule 5-409(G) NMRA (requiring a written order). *See also State v. Diaz*, 1983-NMSC-090, ¶ 4, 100 N.M. 524, 673 P.2d 501 ("It is well established that an oral ruling by the trial court is not a final judgment, and that the trial court can change such ruling at any time before the entry of written judgment.").

> agrees the nature of the charges are disturbing, the New Mexico Supreme Court has explained that the court may not base a pretrial release decision entirely on a single factor—like the seriousness of the current charges—"to the exclusion of all other factors."

(quoting *State v. Brown*, 2014-NMSC-038, ¶ 51, 338 P.3d 1276).

{5} We understand the State to interpret the district court judge's ruling to mean that the seriousness of the nature and circumstances of the underlying crime can never in and of itself be sufficient to prove a defendant's future dangerousness. We believe this is one reasonable interpretation of paragraph 13. However, another reasonable interpretation, as will be explained in paragraph 8, *infra*, is that the district court judge did consider the seriousness of the underlying nature and circumstances of the crime but was persuaded by other evidence that certain conditions of release could reasonably protect the safety of others and the community. The fact that there are two reasonable interpretations of the district court judge's Order leads us to conclude that a remand is necessary to allow the district court judge to clarify what he intended by his written Order.

{6} We also conclude that it is necessary to make clear that the nature and circumstances of a defendant's conduct in the underlying charged offense(s) may be sufficient, despite other evidence, to sustain the State's burden of proving by clear and convincing evidence that the defendant poses a threat to others or the community. If the State meets this initial burden of proof the State must still prove by clear and convincing evidence, under Article II, Section 13, that "no release conditions will reasonably protect the safety of any other person or the community." For example, the State may introduce evidence of a defendant's defiance of restraining orders; dangerous conduct in violation of a court order; intimidation tactics; threatening behavior; stalking of witnesses, victims, or victims' family members; or inability or refusal to abide by conditions of release in other cases. The potential evidence of a person's dangerous inability or refusal to abide by the directives of an authority figure are so variable that it is difficult to catalog all of the circumstances that might satisfy the State's burden of proof.

{7} We emphasize that the litigants and the court must not automatically consider any one factor to be dispositive in pretrial detention hearings. For this reason district court judges are required to file written findings of the individualized facts justifying the detention of the defendant or the denial of the detention motion. Rule 5-409(H)-(I). Of course the district court judge's decision will be limited by what evidence the litigants present.

{8} In this case the district court judge verbally announced that he had considered all of the factors he was required to consider, noting that the crimes charged are very gruesome and heinous. The judge also stated that the gruesome nature of the crime could not be the only factor to consider in rendering a detention decision. The judge considered Defendant's age and that she had previously been released with supervision without any violations as evidenced by no one from pretrial services stating otherwise. Finally the judge stated that he considered the Public Safety Assessment provided to the court. Based on the information the judge considered, he continued the previous conditions of release imposed on Defendant weeks earlier by a different district court judge. The conditions included (1) no contact whatsoever with the codefendants, the victims or their family members, presumably directly or indirectly;[3] (2) no possession or use of alcohol or prohibited substances; (3) no possession of firearms, dangerous weapons, knives, or objects that can be considered deadly weapons; and (4) the requirement that Defendant wear an ankle bracelet at all times while released. At the request of the State, the district court judge announced there would be zero tolerance for any violation of the conditions of release no matter how small the violation. The prosecuting authority did not offer any reasons why the conditions of release were inadequate to reasonably provide for the safety of a person or the community. Had the district court judge been as clear in his written Order, as he was in his oral ruling, the written Order before this court likely would not have been subject to more than one reasonable interpretation. For this reason we encourage judges to carefully reduce to writing all reliable information they have considered when deciding to detain or not to detain a defendant.

{9} However, because of the ambiguity in the written Order we remand to the district court judge to clarify his written Order. If the district court judge interpreted *State v. Brown* as precluding the court from finding that reliable evidence of the nature and circumstances of the crime can never, in and of itself, be sufficient for the State to meet its burden of proving a defendant's future dangerousness, the court misinterpreted *Brown*. We also note that our *Brown* opinion was concerned with money bail. The concern for the danger to the public does not justify setting money bail at any amount because defendants do not forfeit money bail when they commit new offenses. *See Brown*, 2014-NMSC-038, ¶ 21. But as we have explained, the nature and circumstances of a defendant's conduct in the underlying charged offense(s) may be sufficient, despite other evidence, to sustain the State's burden of proving by clear and convincing evidence that the defendant poses a threat to others or the community. If the court so finds, the court must also be persuaded by clear and convincing evidence that there are no conditions of release that will reasonably protect the safety of others or the community before the court may enter an order for the pretrial detention of a defendant.

{10} IT IS SO ORDERED.
EDWARD L. CHÁVEZ, Justice

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

JUDITH K. NAKAMURA, Chief Justice, not participating

[3]Whether Defendant was required to report to her supervising officer if her codefendants contacted or attempted to contact her directly or through others is not clear in the Order.

Certiorari Denied, December 6, 2017, No. S-1-SC-36662

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-010

No. A-1-CA-34999 (filed July 26, 2017)

RENZENBERGER, INC.,
Plaintiff-Appellant,
v.
STATE OF NEW MEXICO TAXATION
AND REVENUE DEPARTMENT,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
David K. Thomson, District Judge

HECTOR H. BALDERAS,
Attorney General
NEW MEXICO TAXATION AND
REVENUE DEPARTMENT
ELENA ROMERO MORGAN,
Special Assistant Attorney General
Santa Fe, New Mexico
for Appellee

BENJAMIN C. ROYBAL
BETZER, ROYBAL & EISENBERG, PC
Albuquerque, New Mexico

ROBERT J. DESIDERIO
SANCHEZ, MOWRER & DESIDERIO,
PC
Albuquerque, New Mexico
for Appellant

HELEN HECHT,
General Counsel
MULTISTATE TAX COMMISSION
BRUCE FORT,
Counsel
Washington, D.C.
Amicus Curiae

Opinion

James J. Wechsler, Judge

{1} We determine in this appeal that a taxpayer's transport as a motor carrier of an interstate railroad's employees from point to point in New Mexico is not "transportation of a passenger traveling in interstate commerce by motor carrier" in order to preempt New Mexico gross receipts tax under a federal statute, 49 U.S.C. § 14505(2) (2012). We therefore affirm the district court's summary judgment denying a refund of taxes paid.

BACKGROUND

{2} Renzenberger, Inc. (Taxpayer) contracted with Union Pacific Railroad and Burlington Northern Santa Fe (the railroads) to transport railroad employees to and from railroad trains both within New Mexico and from New Mexico to another state.[1] The railroads carried freight across state lines in the United States. Taxpayer asserted that its service was necessary because interstate railroad carriers needed to comply with federal safety regulations and union rules concerning crew hours and that Taxpayer's service enables railroads to "provide relief services to allow the railroads to continue to operate without undue delay."

{3} Defendant State of New Mexico Taxation and Revenue Department (the Department), after an audit, assessed Taxpayer for gross receipts tax, penalties, and interest for the period from March 31, 2005 through August 31, 2010. The Department assessed liability only for gross receipts tax on revenue derived from transportation between locations in New Mexico, not for transportation from a location in New Mexico to a location in another state. Taxpayer timely paid the assessed liability, penalties, and interest in full and filed an application for refund with the Department for the amounts paid. The Department denied the application, and Taxpayer filed a complaint for tax refund in the First Judicial District Court.

{4} In the district court, the parties filed cross-motions for summary judgment. After a hearing, the district court denied Taxpayer's motion and granted the Department's motion.

49 U.S.C. § 14505

{5} In 1995, Congress passed the Interstate Commerce Commission Termination Act (the ICCTA) with the intent of deregulating certain industries. 49 U.S.C. §§ 101-80504 (2012). Within the ICCTA, Congress enacted 49 U.S.C. § 14505 to restrict states and local subdivisions from burdening interstate passenger travel by motor carrier. Title 49 U.S.C. § 14505 reads:

> A State or political subdivision thereof may not collect or levy a tax, fee, head charge, or other charge on—
> (1) a passenger traveling in interstate commerce by motor carrier;
> (2) the transportation of a passenger traveling in interstate commerce by motor carrier;
> (3) the sale of passenger transportation in interstate commerce by motor carrier; or
> (4) the gross receipts derived from such transportation.

In recognition of the Supremacy Clause of the United States Constitution, the New Mexico Legislature enacted NMSA 1978, Section 7-9-55(A) (1993), providing that "[r]eceipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States [C]onstitution."

{6} There is no question in this case that the Department deducted receipts from Taxpayer's service revenues that included transportation between locations in New Mexico and locations in other states. The issue of this appeal is, rather, whether 49 U.S.C. § 14505 preempts the Department's assessment of gross receipts tax on the revenues from Taxpayer's service between locations in New Mexico. If 49 U.S.C. § 14505 applies, Taxpayer would have been entitled to also deduct revenues for transportation between locations in New Mexico.

[1]Taxpayer also provided other services that are not material to this opinion.

STANDARD OF REVIEW

{7} Because the outcome of this appeal depends on our interpretation of 49 U.S.C. § 14505, and because the district court made its interpretation by way of summary judgment, we review the district court's ruling de novo. *See Maestas v. Zager*, 2007-NMSC-003, ¶ 8, 141 N.M. 154, 152 P.3d 141. When interpreting a statute, our primary goal is to give effect to the legislative intent. *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 13, 121 N.M. 764, 918 P.2d 350. We endeavor to do so by first examining the plain language of the statute. *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). If there is an ambiguity or a lack of clarity, we will turn to other aspects of statutory construction, including the purpose of the statute and its legislative history. *See Marbob*, 2009-NMSC-013, ¶ 9.

{8} Additionally, because we are interpreting a federal statute that is designed to preempt state taxation, the United States Supreme Court has indicated that the party advocating preemption has the burden of demonstrating the congressional intent "to supplant state law." *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (internal quotation marks and citation omitted). The Court has recognized in such cases that principles of federalism support state sovereignty with regard to its taxing authority and has applied a "presumption against pre-emption" that requires "the clear and manifest purpose of Congress" for preemption. *Id.* at 813 n.8 (internal quotation marks and citation omitted); *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 344-45 (1994).

{9} The parties dispute the import of this presumption in this case. While the Department and Amicus Curiae Multistate Tax Commission advance the use of the presumption, Taxpayer asserts that the United States Supreme Court "is currently split as to the existence of a presumption against preemption[,]" and, regardless, if there is such a presumption in this case, it only means that "Taxpayer has the burden of persuading [this] Court that, as a matter of law, the unambiguous language" of 49 U.S.C. § 14505 prohibits the imposition of the tax at issue.

{10} We need not address either the existence or the scope of this federal presumption because we apply a similar presumption concerning the interpretation of state-established exemptions and deductions. In *Security Escrow Corp. v. New Mexico Taxation & Revenue Department*, 1988-NMCA-068, ¶ 8, 107 N.M. 540, 760 P.2d 1306, we stated that "[w]here an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." We see no reason to not employ such a construction in considering whether our state statute is preempted by federal law.

STATUTORY INTERPRETATION ANALYSIS

{11} The focus of our statutory interpretation inquiry is the language of Subsection 2 of 49 U.S.C. § 14505, "a passenger traveling in interstate commerce by motor carrier[.]" The phrases "traveling in interstate commerce" and "by motor carrier" and the word "passenger" all have bearing on our analysis. We first turn to the phrase "traveling in interstate commerce," and we subsequently address the use of the phrase "by motor carrier" and the word "passenger."

"Traveling in Interstate Commerce"

{12} The district court interpreted "traveling in interstate commerce" to require "at the very least . . . trips across a state line by motor carrier carrying passengers[.]" Taxpayer advances a broader approach. According to Taxpayer, the statutory language "in interstate commerce" includes "all activities that have a substantial affect on interstate commerce, including activities that are solely intrastate." Under Taxpayer's approach, 49 U.S.C. § 14505 preempts even Taxpayer's transportation of railroad crew members from point to point in New Mexico from New Mexico gross receipts taxation because the transportation is "in interstate commerce" as an integral part of the railroads' activity in interstate commerce.

A. Effect on Commerce

{13} Taxpayer relies on *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984). *Yellow Cab* involved a complaint alleging violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (2004), which prohibits "unreasonable restraints on interstate commerce[.]" *Yellow Cab*, 332 U.S. at 225; *see* 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations, is declared to be illegal."). As pertinent to this case, in *Yellow Cab*, there were allegations of a conspiracy to restrict competition for contractual taxicab services to transport interstate railroad passengers with their luggage from one railroad station to another within Chicago. 322 U.S. at 228. Stating that such transportation was "clearly a part of the stream of interstate commerce" and "an integral step in the interstate movement[,]" the Supreme Court held that the service was subject to the Sherman Act. *Id.* at 228-29.

{14} Taxpayer has expanded on the language of *Yellow Cab* to advance an even broader scope of "in interstate commerce" because *Yellow Cab* was a Sherman Antitrust Act case. The United States Supreme Court has consistently held that federal jurisdiction under the Sherman Antitrust Act may be invoked if the activity involved substantially affects interstate commerce. *See, e.g.*, *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980) ("It can no longer be doubted, however, that the jurisdictional requirement of the Sherman Act may be satisfied under either the 'in commerce' or the 'effect on commerce' theory."); *Hosp. Bldg. Co. v. Tr. of Rex Hosp.*, 425 U.S. 738, 743 (1976) ("As long as the restraint in question substantially and adversely affects interstate commerce, the interstate commerce nexus required for Sherman Act coverage is established." (internal quotation marks and citations omitted)). Taxpayer has therefore interpreted the phrase "in interstate commerce" to embrace any activity that affects interstate commerce. According to Taxpayer, it is the generally accepted use of the phrase such that "it is axiomatic throughout the entire gambit of commerce clause jurisprudence that 'in interstate commerce' captures any activity . . . that affects or is an integral part or provides necessary support to interstate commerce."

{15} We do not disagree with Taxpayer that the Commerce Clause of the United States Constitution permits Congress to regulate intrastate activity that substantially affects or performs an integral part of, interstate commerce. We also do not disagree with Taxpayer that the facts Taxpayer asserts as to its service may well have such an effect on the railroads' interstate transportation. We part company

with Taxpayer, however, with regard to its contention that commerce clause jurisprudence requires an analysis of the effect on interstate commerce whenever Congress uses the term "in interstate commerce," as it has done in 49 U.S.C. § 14505.

{16} The United States Supreme Court has taken two differing approaches. On the one hand, the United States Supreme Court has recognized a distinct difference between the ways in which Congress chooses to create federal jurisdiction through the use of its commerce clause authority. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) ("Congress uses different modifiers to the word 'commerce' in the design and enactment of its statutes."). Over time, as Taxpayer has intimated, the different terms Congress has used have become terms of art. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995) (stating that the words "in commerce" are "words of art"); *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 280 (1975) (recognizing the term "engaged in commerce" as a "term of art"), *superseded by statute on other grounds as stated in United States v. Gillies*, 851 F.2d 492, 493 (1st Cir. 1988).

{17} In construing Congress's language in connection with its use of its commerce clause power, the Supreme Court has understood the terms "affecting interstate commerce" and "involving interstate commerce" to mean that Congress is exercising the full extent of its commerce clause power in the breadth of the activity it intends to embrace. *See Circuit City*, 532 U.S. at 115 ("The phrase 'affecting commerce' indicates Congress['s] intent to regulate to the outer limits of its authority under the Commerce Clause."); *Allied-Bruce Terminix*, 513 U.S. at 273-74 (stating that the term "affecting commerce . . . normally signals Congress['s] intent to exercise its Commerce Clause powers to the full" and concluding that " 'involving' is . . . the functional equivalent of 'affecting' ").

{18} On the other hand, the United States Supreme Court has held that Congress's use of the terms "in interstate commerce" and "engaged in commerce" means that Congress intends to use a more limited extent of its commerce power. In *American Building Maintenance*, for example, the Court directly addressed the question of whether the phrase "engaged in commerce" included activities that substantially affect interstate commerce. 422 U.S. at 275. The statute involved was Section 7 of the Clayton Act, 15 U.S.C. § 18 (1950), which prohibited certain acquisitions by a corporation "engaged in commerce." *Am. Bldg. Maint.*, 422 U.S. at 275. The Court rejected the argument of the United States that, like the Sherman Act, the Clayton Act should be interpreted to "be coextensive with the reach of congressional power under the Commerce Clause[,]" stating that, at the time the Clayton Act was reenacted in 1950, "the phrase 'engaged in commerce' had long since become a term of art, indicating a limited assertion of federal jurisdiction." *Id.* at 277-80; *but see United States v. Darby*, 312 U.S. 100, 109 n.1, 117-18, 123 (1941) (holding, in 1941, that conduct that had the necessary effect on interstate commerce fell within Congress's commerce clause authority under the Fair Labor Standards Act, 29 U.S.C. § 202 (1938), encompassing "industries engaged in commerce or in the production of goods for commerce"). Congress subsequently amended Section 7 of the Clayton Act to expand its coverage to activities "affecting commerce." *Gillies*, 851 F.2d at 493 (citing 1980 U.S. Code Cong. & Ad. News 2732, which explained that "[t]he purpose of [the amendment] is . . . to apply the antimerger provisions of the Clayton Act to firms whose activities are 'in commerce' or 'affect' interstate commerce").

B. In Commerce

{19} The extent of federal jurisdiction when Congress uses the phrase "in commerce," however, is not as clear as when it exercises its full authority. And, as stated by the United States Supreme Court, the phrase does not "necessarily have a uniform meaning whenever used by Congress." *Am. Bldg. Maint.*, 422 U.S. at 277. The Court has, nonetheless, interpreted the phrase to be "only persons or activities within the flow of interstate commerce." *Id.* at 276 (internal quotation marks and citation omitted); *Allied-Bruce Terminix*, 513 U.S. at 273. And, it has further defined the flow of interstate commerce as "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." (internal quotation marks and citation omitted); *Am. Bldg. Maint.*, 422 U.S. at 276. Of course, "interstate" means movement "[b]etween two or more states." *Black's Law Dictionary* 896 (9th ed. 2009).

{20} Taxpayer also argues, in connection with its argument that its service is in interstate commerce because it "affects" commerce, that the phrase "in commerce" includes activity that, although intrastate, is "integral or necessary to" interstate commerce. Taxpayer states: "The well-defined body of law is explicit that the statutory phrase 'in interstate commerce' includes activity that is solely intrastate so long as that activity substantially affects, or is integral or necessary to, interstate commerce." In support of its contention, Taxpayer cites *Yellow Cab* and the unreported decision *Brown's Crew Car of Wyoming LLC v. Nevada Transportation Authority*, No. 2:08-CV-00777-RLH-LRL, 2009 WL 1240458 (D. Nev. May 1, 2009).

{21} In *Yellow Cab*, the Supreme Court held that pre-arranged transportation of interstate passengers and their luggage between railroad stations within Chicago was "part of the stream of interstate commerce." 332 U.S. at 228. The Court reached that conclusion because the passengers were moving from "a point of origin in one state to a point of destination in another," and the fact that there was a link within one state did not alter the interstate nature of the entire journey. *Id.* It viewed the intrastate link as an "integral step in the interstate movement." *Id.* at 229.

{22} The *Yellow Cab* Court also considered another allegation concerning a conspiracy to control the market to transport interstate travelers to and from the travelers' homes, offices, and hotels to railroad stations in Chicago. *Id.* at 230. The Court concluded that such transportation was "too unrelated to interstate commerce" to fall within the authority of the Sherman Antitrust Act. *Id.* It reasoned that the service (1) did not cross state lines, (2) was not limited to railroad passengers, (3) did not involve a contractual or other arrangement with the railroads, and (4) did not involve "fares paid or collected as part of the railroad fares." *Id.* at 230-31.

{23} Despite Congress's broad authority to regulate activity that has an affect on commerce under the Sherman Act, *Yellow Cab*'s holding—that the intrastate link was "integral" to "the interstate movement"—implies that a narrower application of Congress's authority to regulate commerce would have been sufficient under the circumstances. *Id.* at 229; *see Am. Bldg. Maint.*, 422 U.S. at 276 (interpreting the phrase "in commerce" to be "only persons or activities within the flow of interstate commerce" (internal quotation marks and citation omitted)). Taxpayer's service, however, does not cover a step in the interstate journey of the railroads or the freight that they carry. While we agree that Taxpayer's service may affect interstate commerce provided by the railroads, it

does not provide the direct link in the stream of commerce as addressed in *Yellow Cab*.

{24} In *Brown's Crew Car*, a federal district court held that a service like the one provided by Taxpayer was "in interstate commerce" and therefore outside of the jurisdiction of a state regulatory body. 2009 WL 1240458 at *3, 13. It relied on *Yellow Cab*, reasoning that the carrier (1) operated under a contract with an interstate railroad without providing service to the public and (2) was an integral part of the railroad's interstate activity. *Brown's Crew Car*, 2009 WL 1240458 at *13. The issue in *Brown's Crew Car*, however, did not involve an interpretation of 49 U.S.C. § 14505 but rather the more general question of whether a state had regulatory authority with respect to a party's activities. In this appeal, Taxpayer limits its argument to the effect of 49 U.S.C. § 14505; it does not make any constitutional or other federalism arguments.

{25} Title 49 U.S.C. § 14505(2) preempts the Department from imposing a gross receipts tax on "the transportation of a passenger traveling in interstate commerce by motor carrier[.]" By virtue of the United States Supreme Court's interpretation of the phrase "in interstate commerce," we interpret Congress's intent in 49 U.S.C. § 14505 to address only "the flow of interstate commerce." *Am. Bldg. Maint.*, 422 U.S. at 276. Taxpayer's arguments that its service falls within 49 U.S.C. § 14505 because it affects interstate commerce is contrary to long-standing United States Supreme Court precedent. We do not foreclose, however, that a service that is "integral" to interstate commerce could be considered to be in the flow of commerce under certain circumstances.

"Passenger" Traveling "by Motor Carrier"

{26} We thus turn to the word "passenger" and the phrase "by motor carrier" as Congress has used them in 49 U.S.C. § 14505. The district court held that the crew members Taxpayer transported were not "passengers" under 49 U.S.C. § 14505. Taxpayer disagrees, contending that (1) its service falls within the preemption of Subsection 2 because the crew members, although not passengers of the railroads, are its passengers[2] and (2) although the railroads are not motor carriers, Taxpayer is a motor carrier under the statute.[3] As demonstrated by the parties' competing interpretations, ambiguity exists with respect to the meaning of both the word "passenger" and the phrase "by motor carrier" in 49 U.S.C. § 14505. We therefore look to the context in which the terms are used, the purpose of 49 U.S.C. § 14505, and its legislative history. *Thompson v. Dehne*, 2009-NMCA-120, ¶ 15, 147 N.M. 283, 220 P.3d 1132.

{27} Congress enacted 49 U.S.C. § 14505 in order to overrule a then-recent United States Supreme Court opinion, *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 177, 199 (1995), which permitted a state tax on bus tickets for interstate bus travel. *See* H.R. Rep. No. 104-311, at 120 (1995) (stating the purpose of the legislation as prohibiting "a [s]tate or political subdivision of a [s]tate from levying a tax on bus tickets for interstate travel"); H.R. Rep. No. 104-422, at 220 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 850 (stating that the legislation "reverses a recent Supreme Court decision permitting [s]tates [to levy a tax on bus tickets for interstate travel] and conforms taxation of bus tickets to that of airline tickets"); S. Rep. No. 104-176, at 48 (1995) ("This provision is intended to override a recent court decision permitting such a tax."). *Jefferson Lines* upheld an Oklahoma sales tax on the full value of bus tickets sold in Oklahoma for travel from Oklahoma to other states. 514 U.S. at 178, 200.

{28} The purpose of 49 U.S.C. § 14505, therefore, was to address taxation of interstate travel by bus passengers—passengers who had purchased tickets to travel between states. *See Tri-State Coach Lines, Inc. v. Metro. Pier & Exposition Auth.*, 732 N.E.2d 1137, 1147 (Ill. App. Ct. 2000) (finding that Congress's "exclusive focus in enacting [49 U.S.C. §] 14505 was to ensure that the tickets for interstate city-to-city bus trips, trips often passing through multiple states and having minimal contact with the state of their origin, were not taxed by the originating state in a manner disproportionate to the benefits received in that state"). It did not relate to passengers who, like the railroad crew members, were not "passengers" before and after they were transported within a single state by a motor carrier. In addition, as a preemption exclusively applying to state taxation and charges, it did not relate to persons who, like the railroad crew members, did not generate revenues for the entity traveling in interstate commerce that could be subject to state taxation.

{29} Furthermore, "passenger" is used in conjunction with, and juxtaposed to, "traveling in interstate commerce." 49 U.S.C. § 14505(2). "[W]hen interpreting an unclear or ambiguous term within a statute, we look to the neighboring words in a statute to construe the contextual meaning of a particular word in the statute." *State v. Jimenez*, 2017-NMCA-039, ¶ 33, 392 P.3d 668 (alteration, internal quotation marks, and citation omitted), *cert. denied* (No. 36,346 Apr. 6, 2017). The interstate commerce involved is that of the railroads. If the crew members were "passengers" of the railroads, *Yellow Cab* would suggest that they were traveling in interstate commerce. The crew members were not, however, "passengers" of the railroads under a *Yellow Cab* analysis, and Taxpayer does not contend that they were.

{30} For similar reasons, Taxpayer's argument that its own status as a motor carrier triggers application of 49 U.S.C. § 14505 is unavailing. Taxpayer's transportation of railroad crew members is not part of ticketed travel between states, a circumstance that places its business activity outside the scope of *Jefferson Lines* and 49 U.S.C. § 14505.

{31} Taxpayer argues that the original purpose of 49 U.S.C. § 14505 does not limit

[2]Taxpayer also contends that the Department does not interpret "passengers" differently because the Department did not separately assess gross receipts tax on Taxpayer's transport of crew members from points in New Mexico to points in other states, which action it could have taken if the crew members were not " 'passengers' . . . within the plain meaning of Section 14505." The Department asserts that Taxpayer "misunderst[ood] the fact that [the] Department has no authority to tax interstate travel." The parties have not further briefed their contentions, and we do not consider the Department's action regarding service other than the one before this Court.

[3]"Motor carrier" is defined in Part B of the ICCTA, which includes 49 U.S.C. § 14505, as "a person providing motor vehicle transportation for compensation." 49 U.S.C. § 13102(14) (2012). The statutory definition of "motor vehicle" does not include rail transportation. *See id.* at § 13102(16) ("The term 'motor vehicle' means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail[.]").

the reach of the statute as it was enacted. The purpose of the statute, however, is pertinent to the interpretation of the manner in which Congress used the language it selected. The congressional purpose of correcting the *Jefferson Lines* decision comports with the reading that Congress intended to address passengers of a motor carrier who were traveling as passengers in interstate commerce.

{32} With this understanding of Congress's intent, the railroad crew members are not "passenger[s] traveling in interstate commerce traveling by motor carrier" within the purpose of 49 U.S.C. § 14505(2). Moreover, if the crew members were not "passengers traveling in interstate commerce," it necessarily follows that Taxpayer's activity is not an integral part of the flow of commerce that Congress addressed in 49 U.S.C. § 14505.

CONCLUSION

{33} Taxpayer's transportation of railroad crew members from point to point in New Mexico was not "transportation of a passenger traveling in interstate commerce by motor carrier" under 49 U.S.C. § 14505. As a result, 49 U.S.C. § 14505 does not preempt the Department from collecting gross receipts tax assessed on Taxpayer's receipts from providing such service. We affirm the district court's ruling denying Taxpayer a refund of taxes paid.

{34} IT IS SO ORDERED.
JAMES J. WECHSLER, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
J. MILES HANISEE, Judge

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Agenda

Sign-in		7:45 – 8:15 a.m.
Introductory Comments		8:15– 8:30 a.m.
Federal and State Estate and Gift Tax Update 2018	Vickie R. Wilcox, J.D., LL.M.	8:30 – 10:00 a.m.
Break		10:00 – 10:15 a.m.
Asset Protection in Estate Planning: Irrevocable Trusts, Super Creditors, and the Courts	Patricia Tucker, J.D.	10:15 – 11:15 a.m.
Guardianships and Conservatorships in New Mexico: What Now, What Next?	Gregory W. MacKenzie, J.D.	11:15 – 12:15 p.m.
Lunch: Pizza, Drinks, and Networking in the Charity Exhibit Hall		12:15 – 1:30 p.m.
Artists, Authors, Musicians and Scientists, Oh My! Estate Planning for Creators of Intellectual Property	Jeffrey D. Myers, M.S., J.D.	1:30 – 2:30 p.m.
What Documents Do I Take to the Hospital? Overview of Basic Health Care Documents	Vickie R. Wilcox, J.D., LL.M.	2:30 – 3:00 p.m.
Ethical Concerns When Representing the Elderly or Disabled in Estate Planning	William D. Slease, J.D.	3:00 – 4:00 p.m.

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