Official Publication of the State Bar of New Mexico

Bar Bulletin

April 11, 2018 • Volume 57, No. 15

Snowy Sandias, by Valerie Fladager

Inside This Issue

CLE programming from the Center for Legal Education

Fourth Annual Symposium on Diversity and Inclusion
Diversity Issues Ripped from the Headlines, II

Friday, April 13, 2018 • 8:55 a.m.-4:15 p.m.

5.0 G | 1.0 EP

Live at the State Bar Center • Also available via Live Webcast!
Co-sponsors: Committee on Diversity in the Legal Profession, Indian Law Section, New Mexico Black Lawyers Association, New Mexico Hispanic Bar Association, New Mexico Lesbian and Gay Lawyers Association, New Mexico Women's Bar Association, Committee on Women and the Legal Profession, Young Lawyers Division

$249 Co-sponsoring group members; government and legal services attorneys; Paralegal Division members
$279 Standard and Webcast Fee

Pro Bono Representation: Managing the Legal and Ethical Issues

Friday, April 20, 2018 • 12:20-4:45 p.m.

3.0 G | 1.0 EP

Live at the State Bar Center

$179 Young Lawyers Division members; government and legal services attorneys, and Paralegal Division members Young Lawyers Division members; government and legal services attorneys, and Paralegal Division members
$209 Standard Fee

**Late fee does not apply.*

How to Practice Series

Demystifying Civil Litigation, Part I

Training in core practice skills!

Friday, April 27, 2018 • 9 a.m-4:30 p.m.

6.0 G

Live at the State Bar Center • Also available via Live Webcast!

$249 Young Lawyers Division members; government and legal services attorneys, and Paralegal Division members
$279 Standard and Webcast fee

Bankruptcy Fundamentals for the Non-Bankruptcy Attorney

Monday, April 30, 2018 • 9 a.m.-12:10 p.m.

3.0 G

Live at the State Bar Center • Also available via Live Webcast!
$129 Government and legal services attorneys; Paralegal Division members
$159 Standard and Webcast Fee

Registration and payment for the programs must be received prior to the program date.
A $20 late fee will be incurred when registering the day of the program. This fee does not apply to live webcast attendance.

Webinars

Quick and convenient one hour CLEs that can be viewed from anywhere! Webinars are available online only through your computer, iPad or mobile device with internet capabilities. Attendees will receive live CLE credit after viewing.

Guardianship Updates from the 2018 Legislature

Monday, April 30, 2018 • Noon-1 p.m.

1.0 G

Online only
$65 Standard Fee

State Bar of New Mexico
Bar Foundation
Center for Legal Education

505-797-6020 • www.nmbar.org/cle
5121 Masthead NE • PO Box 92860, Albuquerque, NM 87199

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

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April

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13
Prosecutors Section
Noon, State Bar Center

17
Real Property, Trust and Estate
Noon, teleconference

17
Solo and Small Firm
11 a.m., State Bar Center

20
Family Law Section
9 a.m., teleconference

24
Intellectual Property Law
Noon, Lewis Roca Rothgerber Christie LLP

Workshops and Legal Clinics

April

13
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

18
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

19
Common Legal Issues for Senior Citizens Workshop Presentation
10–11:15 a.m., Espanola Senior Center, Espanola, 1-800-876-6657

19
Common Legal Issues for Senior Citizens Workshop Presentation
10–11:15 a.m., City of Hobbs Senior Center, Hobbs, 1-800-876-6657

About Cover Image and Artist: Valerie Fladager has been an avid photographer, painter and potter for many years. She takes multitudes of images and selects the best for their striking design, light, color, or whimsy and transforms them into paintings or augmented photographic images. Her paintings are done in pastels, watercolor and ink, and colored pencils. Her work has been sold through several galleries and fine art and craft venues. She is a member of the National League of American Pen Women.

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/.

First Judicial District Court

Gov. Susana Martinez appoints Jason Lidyard

On March 30, Gov. Susana Martinez appointed Jason Lidyard to fill the vacant position in Division V of the First Judicial District. On April 14, a mass reassignment of all cases previously assigned to Judge Jennifer L. Attrep will be assigned to Judge Jason Lidyard pursuant to NMSC Rule 23-109, the Chief Judge Rule. Parties who have not previously exercised their right to challenge or excuse ... will have ten 10 days ... from May 2, to challenge or excuse Judge Jason Lidyard pursuant to Rule 1-088.1

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 575-461-4422.

U.S. Bankruptcy Court District of New Mexico

New Location and Phone Numbers

Effective Feb. 20, the Bankruptcy Court is at a new location: Pete V. Domenici U.S. Courthouse, 333 Lomas Boulevard NW, Suite 360, Albuquerque, NM 87102. The Bankruptcy Court customer service counter is located on the third floor of the Lomas Courthouse. Bankruptcy courtrooms and hearing rooms are located on the fifth floor of the courthouse. All Bankruptcy Court phone numbers have changed as part of this move. The new main line phone number is 505-415-7999. Note that 341 meeting locations did not change as part of the Bankruptcy Court relocation.

Professionalism Tip

With respect to my clients:

I will counsel my client that initiating or engaging in settlement discussions is consistent with zealous and effective representation.

State Bar News

Attorney Support Groups

- 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#.
- May 7, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
  May 14, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

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

ADR Committee

Reframing Presentation

Reframing, like mediation, is an art unto itself. As an art, and as one of the most valuable tools we have as mediators, reframing takes practice and ongoing refinement. Join The ADR committee at noon on April 26 at the State Bar Center in Albuquerque where Diane Grover and Kathleen Oweegon will explore the adventure of "Wrangling With Reframes". This highly interactive 1-hour learning and practice session is a great opportunity to have some fun and get some practice in this challenging and vital skill. Lunch will be provided during the presentation. R.S.V.P. to Breanna Henley at bhenley@nmbar.org. The Committee will meet from 11:30-noon in advance of the presentation.

Animal Law Section

Animal Talk: Tethering

During the 2007 Legislative Session, the New Mexico House of Representatives issued House Memorial 19 which requested that the Department of Public Safety study the public safety and humane implications of persistently tethering dogs. Join Alan Edmonds, the high-energy force behind Animal Protection of New Mexico's animal cruelty hotline at noon, April 27, at the State Bar Center for an Animal Talk covering an overview of a 2008 report that was produced by DPS to the Consumer and Public Affairs Committee as a result of House Memorial 19, current statutes and ordonnances in N.M. addressing tethering and a comparison of N.M. laws to other states, and efforts in community education on dog behavior, outreach and alternatives to tethering. R.S.V.P. to bhenley@nmbar.org

Board of Bar Commissioners

ABA House of Delegates

The Board of Bar Commissioners will make one appointment to the American Bar Association House of Delegates for a two-year term, which will expire at the conclusion of the 2020 ABA Annual Meeting. The delegate must be willing to attend meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar. However, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. Members who want to serve on the board must be a current ABA member in good standing and should send a letter of interest and brief résumé by May 4 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Judicial Standards Commission

The Board of Bar Commissioners will make one appointment to the Judicial Standards Commission for a four-year term. The responsibilities of the Judicial Standards Commission are to receive, review and act upon complaints against state judges, including supporting documentation on each case as well as other issues that may surface. Experience with receiving, viewing and preparing for meetings and

trials with substantial quantities of electronic documents is necessary. The Commission meets once every eight weeks in Albuquerque and additional hearings may be held as many as 4-6 times a year. The time commitment to serve on this Commission is significant and the workload is voluminous. Applicants should consider all potential conflicts caused by service on this Commission. Members who want to serve on the Commission should send a letter of interest and brief résumé by May 4 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Solo and Small Firm Section

Monthly Luncheon with Senetor Harris

The Solo and Small Firm Section wraps up its spring luncheon presentations at noon on April 17 at the State Bar Center. The luncheon will feature one of the state's genuine natural wonders, Senator Fred Harris, former United States Senator and UNM associate professor, on "Being Fred Harris." As the only surviving member of the 1967 Kerner Commission on racial violence, he will discuss his new book on that subject, his 60 years of public service, and whatever else his audience wishes to raise. All members of the bar, including judges, are invited to attend, enjoy a complimentary lunch and engage in vigorous discussion. R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Trial Practice Section

Social Get-Together

Join the Trial Practice Section for a get-together on from 5:30-7:30 p.m. on April 19, at The Hotel Andaluz, located at 125 Second Street NW in Albuquerque. The event will provide a forum to better get to know each other. Hor d'oeuvres, great atmosphere, good conversation and charming personalities provided. Attendees are responsible for their own beverages. R.S.V.P.s are appreciated but not a prerequisite. Contact Breanna Henley at bhenley@nmbar.org.

Young Lawyers Division

CLE on Proro Bono Representation

Join the YLD and Volunteer Attorney Program on the afternoon of April 20, at the State Bar Center for Pro Bono Representation: Managing the Legal and Ethical Issues. Registration is complimentary to those who sign up for two YLD Homeless Legal Clinics (minimum of two hours each) or to those who sign up to take on a pro-bono case through the Volunteer Attorney Program. This CLE will assist pro bono attorneys in serving a wide variety of client needs. Topics include communication style issues related to working with clients in poverty, Medicaid services, Section 8 housing issues and public benefits. This program qualifies for 3.0 G and 1.0 EP CLE credits. To view the full agenda and to register, visit www.nmbar.org.

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.

Mexican American Law Student Association at UNM Law School

23rd Annual Fighting for Justice Banquet

MALSA presents Revolucionarias de Justica at 6:30 p.m., April 14, at Hotel Albuquerque. This event will have a fundraiaser benefitting MALSA and will be honoring Denise Chavez. Get tickets, tables and sponsorship at malsanm.org.

Other Bars

New Mexico Christian Legal Aid

Training Seminar

New Mexico Christian Legal Aid invites new members to join them as they work together to secure justice for the poor and uphold the cause of the needy. They will be hosting a training seminar on Friday, April 27, from noon-5 p.m. at 4700 Lincoln Road NE Albuquerque, NM 87109. Join them for free lunch, free CLE credits, and training as they update skills on how to provide legal aid. For more information or to register, contact Jim Roach at 505-243-4419 or Jen Meisner at 505-610-8800 christianlegalaid@hotmail.com.

New Mexico Defense Lawyers Association

Save the Date - Women in the Courtroom VII CLE Seminar

The New Mexico Defense Lawyers Association proudly presents Part VII of "Women in the Courtroom," a dynamic seminar designed for New Mexico lawyers. Join us Aug. 17, at the Jewish Community Center of Greater Albuquerque for this year's full-day CLE seminar. Registration will be available online at nmdla.org in July. For more information contact nmdefense@nmdla.org.

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.

New Mexico Trial Lawyers Foundation

37th Annual Update on New Mexico Tort Law

On Friday, April 20, New Mexico Trial Lawyers Foundation will host the 37th Annual Update on New Mexico Tort Law CLE, 6.7 G. For more information contact 505-243-6003 or www.nmtla.org

The Southwest Women's Law Center

Legal Issues Affecting the Rights of Pregnant and Parenting Students in 2018

This live webinar will discuss the common obstacles that pregnant and parenting students face in accessing vital resources such as education and affordable child care. Attendees will learn about laws that can be used to help pregnant and parenting students protect and advocate for their rights. $50 course registration. CLE is open to attorneys and other professionals. Attorneys will receive 1.0 CLE credit upon completion. The CLE presented by the Southwest Women's Law Center. For more information or to R.S.V.P., please contact Elena Rubinfeld at (505)244-0502 or erubinfeld@swwomenslaw.org.

Submit announcements

for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

Law Day Call-in Program

NEEDED: **Volunteer attorneys who can answer questions about many areas of law including:**

- Family law
- Landlord/tenant disputes
- Consumer law
- Personal injury
- Collections
- General practice

Saturday, April 28 • 9 a.m. to noon

(volunteers should arrive at 8 a.m. for breakfast and orientation)

Albuquerque and Roswell

Volunteer attorneys will provide very brief legal advice to callers from around the state in the practice area of their choice. Attorneys fluent in Spanish are needed.

Earn pro bono hours!

For more information or to volunteer, visit www.nmbar.org/AskALawyer

State Bar of New Mexico
Young Lawyers Division

Legal Education

April

12 **Domestic Self-Settled Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **Diversity Issues Ripped from the Headlines, II**
5.0 G, 1.0 EP
Live 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

20 **Pro Bono Representation: Managing the Legal and Ethical Issues**
3.0 G, 1.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **37th Annual Update on New Mexico Tort Law**
6.7 G
Live Seminar, Albuquerque
New Mexico Trial Lawyers Foundation
www.nmtla.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

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

27 **Lawyer Ethics in Real Estate Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Legal Rights and Issues Affecting Pregnant and Parenting Teens in New Mexico**
1.0 G
Live Seminar, Albuquerque
Southwest Women's Law Center
swwomenslaw.org

27 **How to Practice Series: Demystifying Civil Litigation, Pt. I**
6.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Bankruptcy Fundamentals for the Non-Bankruptcy Attorney**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Guardianship Updates from the 2018 Legislature**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

May

1 **The Law of Consignments: How Selling Goods for Others Works**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

2 **Valuation of Closely Held Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **Ownership of Ideas Created on the Job**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **2018 Trust Litigation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **How Ethics Rules Apply to Lawyers Outside of Law Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Reps and Warranties in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **The Ethics of Confidentiality**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **2018 Wrongful Discharge & Retaliation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

18 **The Basics of Family Law (2017)**
5.2 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **A Little Planning Now, A Lot Less Panic Later: Practical Succession Planning for Lawyers (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Escrow Agreements in Real Estate Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Reforming the Criminal Justice System (2017)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **The Cyborgs are Coming! The Cyborgs are Coming! Ethical Concerns with the Latest Technology Disruptions (2017)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics and Digital Communications**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **33rd Annual Bankruptcy Year in Review Seminar (2018)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

30 **Basics of Cyber-Attack Liability and Protecting Clients s**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

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

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

Effective March 30, 2018

PUBLISHED OPINIONS

A-1-CA-35275	State v. R Montano	Reverse	03/29/2018

UNPUBLISHED OPINIONS

A-1-CA-35593	State v. M Taylor	Affirm	03/26/2018
A-1-CA-36323	BOA v. J Nickell	Affirm	03/26/2018
A-1-CA-36433	CYFD v. Alicia L	Affirm	03/26/2018
A-1-CA-36508	D Gardner v. K Hart	Affirm	03/26/2018
A-1-CA-36752	State v. E Reyes	Dismiss	03/26/2018
A-1-CA-36889	CYFD v. Anna C	Affirm	03/26/2018
A-1-CA-36250	CYFD v. Linda E	Affirm	03/27/2018
A-1-CA-36294	CYFD v. Sheila P	Affirm	03/27/2018
A-1-CA-36439	CYFD v. Lucy F-H	Affirm	03/27/2018
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A-1-CA-36735	CYFD v. Patricia H.	Affirm	03/29/2018
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Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
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CLERK'S CERTIFICATE OF ADDRESS AND/OR TELEPHONE CHANGES

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective April 11, 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

Opinion Number: 2018-NMSC-005

No. S-1-SC-36379 (filed January 11, 2018)

STATE OF NEW MEXICO ex rel.
RAÚL TORREZ, Second Judicial District Attorney,
Petitioner,
v.
HON. STAN WHITAKER,
Respondent,

PAUL SALAS and
MAURALON HARPER,
Real Parties in Interest.

ORIGINAL PROCEEDING

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Opinion

Charles W. Daniels, Justice

{1} One of the most significant new tools provided to the New Mexico criminal justice system as a result of the amendment to the bail provisions in Article II, Section 13 of the New Mexico Constitution, approved by the New Mexico Legislature in February 2016 and passed by New Mexico voters in the November 2016 general election, is the judicial authority to deny pretrial release—for any amount of money—if a prosecutor shows by clear and convincing evidence that no release conditions a court could impose on a felony defendant would reasonably protect the safety of any other person or the community.

{2} In this case, we have been requested to address the nature of evidentiary presentation required by this new detention authority. We agree with courts in all other federal and state bail reform jurisdictions that have considered the same issues, and we hold that the showing of dangerousness required by the new constitutional authority is not bound by formal rules of evidence but instead focuses on judicial assessment of all reliable information presented to the court in any format worthy of reasoned consideration. The probative value of the information, rather than the technical form, is the proper focus of the inquiry at a pretrial detention hearing.

{3} In most cases, credible proffers and other summaries of evidence, law enforcement and court records, or other nontestimonial information should be sufficient support for an informed decision that the state either has or has not met its constitutional burden. But we also agree with other jurisdictions that a court necessarily retains the judicial discretion to find proffered or documentary information insufficient to meet the constitutional clear and convincing evidence requirement in the context of particular cases.

I. PROCEDURAL HISTORY

{4} This case came before us on a petition for writ of superintending control filed by Second Judicial District Attorney Raúl Torrez. The petition sought to have this Court order Respondent District Judge Stan Whitaker to conduct new detention hearings in two specific cases, *State v. Salas*, D-202-LR-2017-67, and *State v. Harper*, D-202-LR-2017-68, and provide guidance on the nature of the evidence required in the pretrial detention hearings authorized by the 2016 constitutional amendment.

{5} We first review the history of the two cases that are the subject of the petition.

A. *State v. Salas*

{6} Paul Salas was arrested on March 16, 2017, and charged in a single criminal complaint with forty-seven separate armed robberies of dozens of Bernalillo County businesses in a five-month period.

{7} The complaint, prepared and signed under oath by the investigating police case agent, alleged the facts reported by the separate victims and noted that each of the robberies had been committed by a person fitting the physical description of Salas, who was dressed similarly, who brandished a firearm, and who otherwise exhibited the same modus operandi in each of the robberies; that surveillance

video available in most of the robberies confirmed that the same robber, who walked with the same characteristic gait, appeared to be responsible; that in the most recent robbery, an electronic tracking device placed in the bag of stolen cash and merchandise allowed police to immediately chase down and arrest the fleeing Salas and a codefendant and retrieve the robbery proceeds and other evidentiary items; and that after his arrest Salas waived his *Miranda* rights and confessed to each of the forty-seven charged robberies in a lengthy debriefing with the case agent who had prepared the sworn criminal complaint, providing a detailed account of each admitted robbery that was consistent with the victim reports.

{8} The day after Salas's arrest, the State filed a motion for pretrial detention. The motion contended that Salas's alleged five-month crime spree and the fact that he was a wanted fugitive from another state demonstrated "the ability to elude police and . . . an unwillingness to abide by law and cooperate [with] law enforcement." The motion stated that he "has shown a blatant disregard for the value of a human life and . . . a pattern for violence," that because of the nature of his crimes Salas presented "a serious danger to the community," and that there were no conditions "other than a no bond hold that would protect the safety of the public."

{9} No probable cause determination had been made by a court or grand jury on any of the charged offenses by the time of the March 22, 2017, detention hearing, and the district court made no probable cause determination in connection with the detention hearing.

{10} At the hearing on its detention motion, the State proffered the sworn criminal complaint in this case and a fugitive complaint on which Salas recently had been arraigned pending extradition to Arizona on a sex offense but called no live witnesses and introduced none of the underlying materials relied on by the case agent in preparing the robbery complaint.

{11} Salas offered no affirmative or rebuttal information concerning the accuracy or truthfulness of the information presented to the district court by the State and did not challenge his identity as the Paul Salas reported in the complaint to have been pursued, arrested, searched, and interrogated.

{12} Accordingly, the hearing consisted primarily of argument concerning the nature, reliability, and sufficiency of the form of documentary information offered by the State, with the defense arguing generally that the documentary evidence was insufficient to meet the State's clear and convincing evidence burden without a live witness to testify and be cross-examined about the documents' accuracy and reliability.

{13} In oral and written rulings, Respondent denied the detention motion, refusing to admit the criminal complaint on the ground that it was deemed unreliable and violative of due process in the absence of corroborating or authenticating witnesses that the defense could cross-examine. After denying detention, Respondent ordered Salas to be placed on pretrial conditions of release that included close supervision, monitoring, and a cash-only bond of $100,000, in addition to the $100,000 cash-only bond that had been set earlier on the Arizona fugitive complaint and in addition to any other applicable money bonds.

B. *State v. Harper*

{14} Mauralon Harper was charged in a sworn criminal complaint with attempted murder, aggravated battery with a deadly weapon, shooting at a vehicle resulting in great bodily harm, and tampering with evidence.

{15} The complaint alleged that Harper shot his girlfriend in the abdomen as she got into her car after arguing with Harper and ordering him out of her apartment. The investigating detective who executed the complaint reported that he joined other officers in responding to a report of a shooting at the victim's address. There they found several people attending to the bleeding victim as she lay on the ground. She was able to tell officers, "Mauralon shot me," before being transported to the hospital for emergency surgery.

{16} A neighbor who knew both Harper and the victim told police she had heard the two arguing, had heard the sound of gunshots and the victim screaming, and then saw Harper pointing a handgun toward the victim's car and the victim lying on the ground next to the car.

{17} Another witness who knew and could identify Harper stated that moments after she heard the gunshots she observed Harper running from the scene with a gun in his waistband.

{18} The investigating detective recited that he personally observed at least thirteen bullet holes in a car that was registered to the victim and parked at the scene and that the bullet holes and casing locations were consistent with the eyewitness accounts that Harper was standing in the area of the victim's apartment when he fired toward the victim's car.

{19} The District Attorney's office filed a motion to detain Harper pending trial. As in the *Salas* case, no determination of probable cause by a court or grand jury had been made either before or during the detention hearing.

{20} At the hearing, the prosecutor proffered the criminal complaint in support of the detention motion. The prosecutor also proffered court documents recording Harper's six prior convictions, including three felony convictions for bank robbery, assault on a police officer, and drug possession; documents reflecting three past domestic violence restraining orders against Harper obtained by three separate complainants; documents reflecting a pending robbery and evidence-tampering case in which Harper was currently being held without bond on a release revocation order for failure to appear; documents reflecting six past bench warrants for failure to appear; and a current district court pretrial services risk assessment that placed him in the highest risk category, calling for either intensive supervision or pretrial detention.

{21} In addition to the documentary evidence, the State proffered a video and images of text messages from the victim's phone, which the prosecutor represented to contain evidence that corroborated the State's version of the charged offenses. Although the defense argued briefly that the unreliability of the State's documentary evidence, in the absence of live testimony, left open to question whether Harper was the same Mauralon Harper referenced in the documents, the defense never offered affirmative or rebuttal evidence or even denied that he was the person who had shot at his girlfriend, instead relying on objections to the admissibility and weight of the State's submissions.

{22} Respondent denied the request for detention in oral and written rulings but then ordered Harper to be placed on multiple pretrial conditions of release that included close supervision, monitoring, and a secured bond in the amount of $100,000.

{23} In the oral bench ruling at the conclusion of the hearing, Respondent stated that he would not admit the video and text messages because the State did not provide a witness to testify to their authenticity and reliability and be available for cross-

examination. While he stated in the oral ruling that he was admitting the criminal complaint and the other documents regarding Harper's criminal history over defense objections, in the subsequent written order Respondent recited that the contents of the criminal complaint were unreliable and therefore inadmissible and stated that the admission of the complaint's hearsay contents, "without more, would deprive the Defendant a meaningful opportunity to challenge the State's evidence, which is in violation of his right to due process of law."

C. The Petition for Writ of Superintending Control

{24} After Respondent denied the State's detention motions in *Salas* and *Harper*, Petitioner Torrez sought a writ of superintending control from this Court. Respondent, Defendants Salas and Harper, whom the petition named as real parties in interest, and the Attorney General filed separate responses to the State's petition, pursuant to Rule12-504(C) NMRA ("The respondent, the real parties in interest, and the attorney general may file a response to the petition [for an extraordinary writ]."). **{25}** As framed in the petition, the controversy between the parties was a clash of absolutist positions that centered on whether the prosecution must always present live witnesses, as the petition alleged the Respondent was requiring, or whether live witnesses can never be required, as the petition seemed at times to contend. Petitioner asked this Court to order the district court to reconsider the State's motions for pretrial detention and to issue a written opinion providing guidance to inferior courts on how to interpret and apply the new pretrial detention provisions recently added to Article II, Section 13 of the New Mexico Constitution.

{26} In his response to the State's petition, Respondent took the position that due process of law may require live witness testimony to satisfy confrontation rights at pretrial detention hearings and that in these two cases he did not abuse his judicial discretion in denying the State's motions for pretrial detention.

{27} Salas and Harper argued that Respondent did not abuse his discretion to require live witnesses at a pretrial detention hearing when he found the exhibits and proffers insufficient to meet the State's burden of proof.

{28} The Attorney General urged this Court to follow federal detention hearing precedents and hold that a court may rely on proffers and documents alone without violating the due process rights of an accused but to recognize that the court retains the discretion to require one or more live witnesses when there is a question about the credibility or authenticity of nonwitness information.

{29} Following oral argument on the petition, this Court delivered an oral ruling from the bench granting the writ, providing guidelines for the evaluation of evidence in detention hearings, directing Respondent to conduct new hearings in light of those guidelines, and advising the parties that the Court would issue a full precedential opinion amplifying our oral ruling. This is that opinion.

II. DISCUSSION

{30} Article VI, Section 3 of the New Mexico Constitution provides that the New Mexico Supreme Court has the power of superintending control, a long-standing power "to control the course of ordinary litigation in inferior courts." *State v. Roy*, 1936-NMSC-048, ¶ 89, 40 N.M. 397, 60 P.2d 646. We may exercise our power of superintending control when it is "in the public interest to settle the question involved at the earliest moment." *Kerr v.Parsons*, 2016-NMSC-028, ¶ 16, 378 P.3d 1 (internal quotation marks and citation omitted). In granting a writ of superintending control, we may offer guidance to lower courts on how to properly apply the law. *See New Energy Economy, Inc. v. Vanzi*, 2012-NMSC-005, ¶ 25, 274 P.3d 53 (providing guidance to the Court of Appeals with respect to who has the right to become appellees in administrative rulemaking appeals); *Dist. Court of Second Judicial Dist. v. McKenna*, 1994-NMSC-102, ¶ 1, 118 N.M. 402, 881 P.2d 1387 (providing guidance to a district court with respect to convening a grand jury).

{31} While a writ of superintending control should not "be used as a substitute for . . . appeal," *Chappell v. Cosgrove*, 1996-NMSC-020, ¶ 6, 121 N.M. 636, 916 P.2d 836, at the time the petition was filed in this case we had not yet promulgated our July 1, 2017, rules providing expedited appeals from detention-hearing decisions. *See, e.g.*, Rule 5-405(A)(3) NMRA (providing that either party may appeal an order regarding pretrial release or detention); Rule 12-204 NMRA (providing expedited appellate procedures). Because this case presents "an issue of first impression . . . without clear answers under New Mexico law," *Chappell*, 1996-NMSC-020, ¶ 6, and because it involves new constitutional provisions with serious public safety implications, we agree that this is an appropriate case in which to exercise our superintending control authority.

{32} In order to address the proper interpretation of the new detention authority created by the November 2016 constitutional amendment and the resulting July 2017 court rules, it is important to understand the reasons for their creation and the sources and historical construction of the provisions we are called on to explicate in this case.

{33} In *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276, this Court conducted a comprehensive review of the origins and requirements of then-existing United States and New Mexico bail law. While *Brown* created no new rules of law, but simply traced the history and requirements of existing law, it took notice of the "enduring inequalities in our nation's system of bail," which has come to rely heavily on an accused person's ability to purchase a bail bond as the determining factor in releasing or detaining a person before a trial that would decide guilt or innocence. *Id.* ¶ 35. The combination of those realities resulted in a system lacking in rational justice, where clearly dangerous defendants or those who pose substantial flight risks have been able to buy their way out of jail, while large numbers of poorer, low-risk defendants have been held in jail simply for lack of money, with substantial harm done to them, their families, and the taxpayers who bear the ultimate burden of housing, feeding, guarding, medicating, and caring for them. *See id.*¶¶ 33-35.

{34} In *Brown* we traced key features of bail reforms in the United States, including the movement toward minimizing the detention of low-risk defendants simply for lack of money to buy a bond, as reflected in the provisions of the federal Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat. 214, 214-17, *repealed by* Bail Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1837, 1976-85, that "established a presumption of release by the least restrictive conditions, with an emphasis on non-monetary terms of bail." *Brown*, 2014-NMSC-038, ¶ 33 (internal quotation marks and citation omitted). In 1972, New Mexico like many other American jurisdictions tracked the provisions of those federal reforms in their own bail laws. *Id.* ¶ 37. Those preferences for nonfinancial release conditions remain essentially unchanged in current federal law and in New Mexico law, including our newest court rules. *See* 18 U.S.C. §3142(c)

(2) (2012) (requiring that in determining "[r]elease . . . conditions" for an accused person, "[t]he judicial officer may not impose a financial condition that results in . . . pretrial detention"); Rule 5-401(E)(1)(c) NMRA ("The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.").

{35} Many other jurisdictions have also followed the federal model in explicitly prohibiting pretrial detention simply for lack of money to buy a bail bond. *See* D.C. Code Sec. 23-1321(c)(3) (West 2017) (prohibiting a court from setting a "financial condition" that would "result in the preventive detention of the person"); Mass. Gen. Laws Ann. ch. 276, § 58A(2)(B)(iv) (West 2017) (providing that a "judicial officer may not impose a financial condition that results in the pretrial detention of the person"); *see also* N.J. Stat. Ann. § 2A:162-17(c)(1) (West 2017) (providing that a "court shall not impose . . . monetary bail . . . for the purpose of preventing the release of the eligible defendant").

{36} A number of states have taken other steps to decrease the justice system's reliance on commercial sureties and other monetary bail. *See, e.g.*, Ky. Rev. Stat. Ann. § 431.510 (West 2017) (abolishing by statute the commercial bail bond industry); *see also*, 725 Ill. Comp. Stat. Ann. 5/110-7(a) (West 2017) (effectively abolishing the commercial bail bond industry by requiring any money bail to be paid directly to the court rather than through a commercial surety); Or. Rev. Stat. Ann. § 135.265 (West 2017) (same); Wis. Stat. Ann. § 969.12(2) (West 2017) (same); *cf.* Colo. Rev. Stat. § 16-4-103(3)(a)-(b), 4(b) (West 2017) (instructing courts to consider risk assessment instruments and a person's financial condition when setting bond and prohibiting courts from setting bonds based solely on the level of offense).

{37} While those reforms focused on alleviating one of the worst consequences of using money to decide who will be released pretrial—jailing people for lack of money instead of for any real risk they posed—they did little to address the other primary undesirable result of the money system—releasing dangerous defendants into the community simply because they could arrange to buy their way out of jail. To address that very serious problem, new legal authority for judges to deny pretrial release based on findings of dangerousness has been created in a growing number of federal and state jurisdictions.

{38} Those community safety reforms began in the District of Columbia four years after passage of the federal Bail Reform Act of 1966.

A. District of Columbia

{39} Prior to 1970, in the vast majority of jurisdictions defendants had a constitutional or statutory right, at least on paper if not always in practice, to be released on bail prior to trial for virtually all crimes not punishable by death. *Bail: An Ancient Practice Reexamined*, 70 Yale L.J. 966, 967 (1961). As we noted in *Brown*, Article II, Section 13 of the New Mexico Constitution, like the constitutions and laws of most American states, followed a 1682 Pennsylvania model and contained an almost absolute right to bail in noncapital cases that required judges to release virtually all defendants, no matter how significant a threat they might pose to community safety after their release. *Brown*, 2014-NMSC-038, ¶¶ 26, 37.

{40} In a significant change from that history, Congress gave new risk-focused pretrial detention authority to District of Columbia judges as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473, 642-50 (1970) (D.C. Act), now codified in relevant part as D.C. Code Sections 23-1321 to -1332. *See* Thomas C. French, *Is It Punitive or Is It Regulatory? United States v. Salerno*, 20 U. Tol. L. Rev. 189, 194 (1988).

{41} Section 23-1322(b)(2)(B), D.C. Act 644-45, now codified as Section 23-1322(b)(2) (2013), permitted a court to deny pretrial release on any conditions if the court found by "clear and convincing evidence that" no conditions of release would "reasonably assure the safety of any other person or the community." Significantly for the issues we address in this opinion, Section 23-1322(c)(5), D.C. Act 645, now codified as Section 23-1322(d)(4), also provided that "pretrial detention hearings . . . need not conform to the rules pertaining to the admissibility of evidence in a court of law."

{42} The constitutionality of pretrial detention and the evidentiary requirements applicable to detention hearings in the District of Columbia were addressed thoroughly in *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981).

{43} In a significant holding for the future of pretrial detention laws, *Edwards* held that the language and history of the excessive bail prohibition in the Eighth Amendment to the United States Constitution made it clear that there has never been an absolute federal constitutional right to pretrial release like that contained in the Pennsylvania constitutional model. *Id.* at 1328.

{44} After resolving the constitutionality of pretrial detention as a general concept, *Edwards* addressed arguments relating to the construction and constitutionality of specific features of the D.C. Act, including the evidentiary procedures at detention hearings. *See Edwards*, 430 A.2d at 1334. Considering the statutory language and legislative history of the D.C. Act, *Edwards* concluded that detention hearings were not intended to be formal trials where strict rules of evidence controlled. *See Edwards*, 430 A.2d at 1334. Instead, information could be presented by hearsay: "'proffer or otherwise.'" *Id.* (quoting Section 23-1322(c)(4), D.C. Act 645). Sworn testimony was intended to be "'the exception and not the rule,'" *Edwards*, 430 A.2d at 1334 (citation omitted), although a court retained the right to "require direct testimony if dissatisfied with a proffer." *Id.*

{45} *Edwards* also held that neither the Confrontation Clause nor the Due Process Clause precludes reliance on hearsay and proffers at bail and detention hearings. *See Edwards*, 430 A.2d at 1337. In considering what process is due in a detention proceeding, *Edwards* relied on *Gerstein v. Pugh*, 420 U.S. 103 (1975), in which the United States Supreme Court held that, while a prompt judicial determination of probable cause is required to justify restraints on the liberty of a defendant pending judicial resolution of criminal charges, using hearsay and written information to make that determination did not violate a defendant's federal constitutional rights. *See Edwards*, 430 A.2d at 1335. Because the protections provided in the D.C. Act were greater than those approved in *Gerstein*, *Edwards* held that it was constitutionally permissible to "proceed by the use of proffer and hearsay" at a pretrial detention hearing, "subject to the discretion of the judge" to require more in particular cases. *Edwards*, 430 A.2d at 1336-37.

B. Federal Courts

{46} Encouraged by the experience with the D.C. Act, in 1984 Congress enacted similar detention authority for all federal courts in the Bail Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1837, 1976-85 (Federal Act). *See* 18 U.S.C. §§ 3141-3150 (2012); French, *supra* at 197.

{47} As with the D.C. Act, the Federal Act allowed federal courts to detain defendants

pretrial if clear and convincing evidence at a detention hearing demonstrated that no release conditions would "reasonably assure . . . the safety of any other person and the community." 18 U.S.C. § 3142(f), Federal Act 1979. The Federal Act also tracked the provision that the "rules concerning admissibility of evidence in criminal trials" were not applicable "to the presentation and consideration of information at the hearing." *Id.*, Federal Act 1980.

{48} The United States Supreme Court directly addressed the constitutionality of the Federal Act in *United States v. Salerno*, 481 U.S. 739 (1987). As had the District of Columbia Court of Appeals in *Edwards*, the Supreme Court held that the Eighth Amendment protected only against setting monetary conditions in an amount higher than necessary to reasonably secure a defendant's presence at court proceedings and not against denial of release to protect public safety. *Id.* at 754-55 (holding that when the Government's "only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more," but where detention is based on "a compelling interest other than prevention of flight," such as community safety, "the Eighth Amendment does not require release on bail").

{49} *Salerno* also held that the procedural protections encompassed in the Federal Act, such as the right to counsel, the right to cross-examine any witnesses who do appear at the hearing, the right to present information by proffer or otherwise, and the clear and convincing burden of proof provided "extensive safeguards . . . [that] far exceed" what is required by the due process standards articulated in *Gerstein*. *Salerno*, 481 U.S. at 751-52; *see* 18 U.S.C. § 3142(f)(2)(B).

{50} Since *Salerno*, a number of federal courts have specifically addressed whether the Federal Act permits a defendant to be detained pretrial based solely on nontestimonial information proffered by the government. For example, *United States v. Gaviria*, 828 F.2d 667, 669 (11th Cir. 1987), relied on the District of Columbia holding in *Edwards* to hold that "the government as well as the defense may proceed by proffering evidence subject to the discretion of the judicial officer presiding at the detention hearing." *Accord United States v. LaFontaine*, 210 F.3d 125, 131 (2d Cir. 2000) (stating that "proffers are permissible both in the bail determination and bail revocation contexts" but that a court "must also ensure the reliability of the evidence, by selectively insisting upon the production of the underlying evidence or evidentiary sources where their accuracy is in question" (internal quotation marks and citation omitted)); *United States v. Webb*, 238 F.3d 426 (table), 2000 WL 1721060 at 2 (6th Cir. 2000) (unpublished) ("The government may proceed in a detention hearing by proffer or hearsay."); *United States v. Smith*, 79 F.3d 1208, 1209-10 (D.C. Cir. 1996) (holding that the government may proceed by way of proffer instead of presenting live witnesses); *United States v. Winsor*, 785 F.2d 755, 756 (9th Cir. 1986) (holding that the government may present information "by proffer or hearsay" and that the "accused has no right to cross-examine adverse witnesses who have not been called to testify"); *United States v. Delker*, 757 F.2d 1390, 1396 (3d Cir. 1985) (holding that "discretion lies with the district court to accept evidence by live testimony or proffer"); *United States v. Acevedo-Ramos*, 755 F.2d 203, 206, 208 (1st Cir. 1985) (acknowledging that often the parties "simply describe to the judicial officer the nature of their evidence; they do not actually produce it," while simultaneously acknowledging a court's discretion to insist on direct testimony).

C. Massachusetts

{51} Following the federal example, in 1994 the Massachusetts Legislature enacted new procedures to permit pretrial detention of proven dangerous defendants in prosecutions for designated felony and domestic abuse cases. *See* 1994 Mass. Acts 614, 617, now codified as Mass. Gen. Laws Ann. ch. 276, § 58A(3) (West 2017) (providing that upon motion by the prosecutor and after a hearing, if a judge "finds by clear and convincing evidence that no conditions of release will reasonably assure the safety of any other person or the community" in the designated categories of prosecution, the judge "shall order the detention of the person prior to trial"). There was no constitutional impediment to this statutory reform because the Massachusetts Constitution, like the United States Constitution and unlike the Pennsylvania model, contained a protection against excessive bail but no absolute right to pretrial release. *See* Mass. Const., Declaration of Rights Art. XXVI ("No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.").

{52} The Massachusetts pretrial detention statute, like the D.C. Act and the Federal Act, was promptly subjected to a court challenge. *See Mendonza v. Commonwealth*, 673 N.E.2d 22, 35 (Mass. 1996) (upholding the constitutionality of detaining a defendant on clear and convincing proof of dangerousness). The Supreme Judicial Court in *Mendonza* also addressed a challenge to the provision of Section 58(A)(4), *see* 1994 Mass. Acts 617-18, that allows reliance on hearsay in pretrial detention hearings and provides that "[t]he rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing." *See Mendonza*, 673 N.E.2d at 31-32.

{53} Noting that the United States Supreme Court had upheld the "analogous [f]ederal procedure" against constitutional attack, the *Mendonza* Court concluded that the Massachusetts statutory guarantees of the rights of the defense to cross-examine any witnesses the prosecution does call and to offer hearsay and other information, including witnesses, were sufficient to comply with due process requirements. *Mendonza*, 673 N.E.2d at 32 (citing *Salerno*, 481 U.S. at 751-52).

{54} While *Mendonza* settled the lawfulness of considering hearsay information in a detention hearing, it did not directly address whether a detention order could be entered without any live testimony at all. That question was directly answered in *Abbott A. v. Commonwealth*, 933 N.E.2d 936 (Mass. 2010), which upheld the exclusive use of nontestimonial evidence that "bore substantial indicia of reliability . . . to warrant a finding of dangerousness." *Id.* at 946-47.

D. Ohio

{55} Ohio faced a greater challenge than the federal government and Massachusetts in authorizing pretrial detention of dangerous defendants. Since its admission to the Union, the Ohio Constitution had tracked the Pennsylvania model in guaranteeing that "all persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption is great." Ohio Const. of 1803, Art. VIII, § 12; *Smith v. Leis*, 2005-Ohio-5125, 835 N.E.2d 5, ¶¶ 18-20; *see also State ex rel. Jones v. Hendon*, 609 N.E.2d 541, 543 (Ohio 1993) (reaffirming that Section 9, Article I of the Ohio Constitution as worded at that time "guarantee[d] . . . an absolute right to bail" in noncapital cases); *Locke v. Jenkins*, 253 N.E.2d 757, 757 (Ohio 1969) (stating that "[t]he right to bail under that section is absolute, the only exception being for capital offenses. There is no discretion in the trial court in such matters.").

{56} As a result of that constitutional guarantee, Ohio had to amend its constitution before it could promulgate any pretrial detention procedures in noncapital cases. In 1997, the Ohio Legislature proposed and the voters passed a constitutional amendment to add new pretrial detention authority to Section 9, Article 1 "for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community." 1997 Ohio Laws H.J. Res. No. 5; 1997, 147 Ohio Laws Part IV, 9014, 9016; Ohio Const. art. I, § 9.

{57} Subsequent statutory enactments specified enumerated felonies for which a defendant could be detained and, as have laws in other pretrial detention hearing jurisdictions, provided that "rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing" and that the court "shall consider all available information regarding" the factors relevant to the defendant's dangerousness. Ohio Rev. Code Ann. § 2937.222(A), (C) (West 2017).

{58} Although the Ohio appellate courts have not yet squarely addressed the extent to which live witnesses could be required under their detention laws, appellate affirmances of detention decisions have included cases in which witnesses personally testified and in which they did not. *See, e.g.*, *State v. Urso*, 11th Dist. Trumbull No. T-0042, 2010-Ohio-2151, ¶¶ 4, 27, 77 (affirming a detention decision based on testimony of an investigating officer who summarized facts of the instant case and of the defendant's dangerous criminal history, primarily on the basis of hearsay documents), ¶ 70 (characterizing the evidence as not "weak," as contended by the defendant, "but rather [as] overwhelming"); *State v. Foster*, 10th Dist. Franklin No. AP-523, 2008-Ohio-3525, ¶ 8 (affirming a detention decision where the evidentiary record consisted of proffered representations and summaries by both sides and observing that the statute might "under other circumstances call for a more elaborate evidentiary hearing" but that "the facts of this case lend themselves to the approach taken").

E. New Jersey

{59} New Jersey is the most recent jurisdiction, other than New Mexico, to provide authority for courts to deny pretrial release to dangerous defendants following a hearing. Its comprehensive bail reforms "changed the landscape of the State's criminal justice system relating to pretrial release" by moving "away from heavy reliance on monetary bail," granting judges "the authority to detain defendants prior to trial if they present a serious risk of danger, flight, or obstruction," and releasing on nonmonetary conditions "[d]efendants who pose less risk." *State v. Robinson*, 160 A.3d 1, 4 (N.J. 2017).

{60} The New Jersey Constitution, like the old Pennsylvania model, guaranteed that "[a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or presumption great." *See* N.J. Const. of 1844, art. I, ¶ 10; *see also* N.J. Const. of 1947, art. I, ¶ 11.

{61} Following New Jersey's legislative abolition of capital punishment in 2007, all defendants who posted bail had a constitutional right under that provision to be released before trial. *See Robinson*, 160 A.3d at 5. The result was that judges had to release defendants "who posed a substantial risk of flight or danger to the community" while jailing "poorer defendants accused of less serious crimes, who presented minimal risk," simply because they could not afford monetary bail. *Id.*

{62} In 2013, the New Jersey Supreme Court created a broad-based committee to study the need for reforms, with representation "from all three branches of state government including the Attorney General, Public Defender, private attorneys, judges, court administrators, and representatives of the Legislature and the Governor's Office." *Robinson*, 160 A.3d at 6 (internal quotation marks and citation omitted). A key focus of the committee's recommendations the following year was to move from a resource-based, or money-based, system of release and detention to a risk-based system that relies on individualized evidence of danger or flight risk. Joint Committee on Criminal Justice, Report (March 10, 2014) at 2-4, *available at* https://www.judiciary.state.nj.us/courts/assets/criminal/finalreport3202014.pdf (last visited January 5, 2017). As the committee recognized, in order to accomplish that shift it would be necessary to amend the state constitution. *Id.* at 68.

{63} In 2014, the New Jersey Legislature passed and voters adopted an amendment to the New Jersey Constitution that was a key to the ability to move from a money-based system of pretrial release and detention to one based on evidence of risk. *Robinson*, 160 A.3d at 6. It provided that a court could deny release if it found that no "conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process." N.J. Const. art. 1, ¶ 11. In addition, the amendment provided that "[i]t shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision." *Id.*

{64} Pursuant to this new authority, new sections of the New Jersey Criminal Justice Act addressing pretrial release and detention, N.J. Stat. Ann. §§ 2A:162-15 to -26 (West 2017), and new provisions in the New Jersey Supreme Court rules regulating pretrial detention procedures, N.J. Rule 3:4A (West 2017), took effect on January 1, 2017. Like other courts before them, the New Jersey appellate courts quickly found themselves considering the permissible modes of proof in their new detention hearings.

{65} At 1:08 a.m. on the very day the new statutes and rules became effective, Amed Ingram, a convicted felon, was arrested on a number of serious firearm charges. *State v. Ingram*, 165 A.3d 797, 799-800 (N.J. 2017). The State moved for detention under the new laws, relying at the hearing on nontestimonial evidence consisting of "the complaint-warrant, the affidavit of probable cause, the PSA [risk-based public safety assessment], the PLEIR [preliminary law enforcement incident report], and defendant's criminal history." *Id.* at 800.

{66} The defendant appealed the resulting detention order, arguing that allowing the prosecutor to proceed by a nontestimonial proffer alone violated the defendant's constitutional due process rights as well as the detention statutes. *Id.* at 801. Both the intermediate appellate court and the New Jersey Supreme Court affirmed the decision of the trial court, agreeing that neither the wording of the detention statutes nor principles of constitutional due process require testimony from a live witness at every detention hearing. *Id.* at 801, 809-10. As had courts in other jurisdictions facing the issue, the New Jersey Supreme Court confirmed that "the State is not obligated to call a live witness at each detention hearing" but that "the trial court has discretion to require direct testimony if it is dissatisfied with the State's proffer." *Id.* at 809-10.

F. New Mexico

{67} New Mexico's release and detention reforms came shortly after the New Jersey reforms. After this Court issued *Brown* in 2014, we took the first step toward methodically studying improvement of our pretrial justice practices in light of the "wave of bail reform" now taking place in the United States, *Brown*, 2014-NMSC-038, ¶ 36, by creating the Court's Ad Hoc Pretrial Release Committee. *See* New Mexico Supreme Court order, February 25, 2015 (No. 15-8110). The Committee included retired Dean and Professor Emeritus Leo M. Romero of the University of New Mexico School of Law as chair and a broad-based representation of experienced state and federal judges, prosecutors, defense attorneys, the New Mexico Senate and House of Representatives judiciary committees, the Attorney General's office, detention centers, and the commercial bail industry and was tasked with making recommendations it deemed "necessary to revise the rules and policies governing pretrial release in criminal proceedings in New Mexico state courts." *Id.*

{68} The Committee, like similar bodies in other states, determined that public safety and the equal administration of justice were ill-served by our historical reliance on the ability to afford a secured bond as the determining factor in whether an accused defendant was entitled to be released pending trial, and that pretrial release decisions should instead focus on evidence-based assessments of individual risks of danger or flight.

1. The November 2016 Constitutional Amendment

{69} One of the first recommendations made by the Committee was to follow the recent Ohio and New Jersey examples and seek an amendment of the antiquated right-to-bail provisions of our state constitution to replace the money-based system of pretrial release with an evidence-of-risk-based system by giving judges new lawful authority to deny release altogether to defendants who pose unacceptable risks of public danger or flight, whether or not they can afford a bail bond.

{70} The original proposal submitted by the New Mexico Supreme Court in 2015 to the Legislature's interim Courts, Corrections and Justice Committee was based on federal and state reforms elsewhere. That proposal would have added language to the Pennsylvania-model right-to-bail provisions in Article II, Section 13 of the New Mexico Constitution to provide that bail may be denied pending trial if, after a hearing, the court finds by clear and convincing evidence that no release conditions would reasonably ensure the appearance of the person as required or protect the safety of any other person or the community and that no person otherwise eligible for pretrial release could be detained solely because of financial inability to post a money or property bond.

{71} The Court's original proposed language was amended during the course of the legislative process to restrict judicial detention authority over dangerous defendants to judges in courts of record, which currently by statute does not include courts below the district courts; to permit detention only in felony cases; to require a prosecutorial request before the court may consider pretrial detention of a dangerous defendant; to textually place the burden of proving dangerousness on the prosecution; to remove any judicial authority to deny bail outright to nondangerous defendants who pose only a flight risk; and to add an explicit right to prompt judicial consideration of a motion alleging that a defendant cannot meet a particular amount of secured bond that a court has imposed.

{72} The resulting version, passed by the Legislature in the 2016 Regular Session as Senate Joint Resolution 1 and subsequently approved by 87% of New Mexico voters casting ballots on the issue in the November 2016 general election, amended Article II, Section 13 with the following provisions:

> Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. . . .
>
> A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.

S.J.R. 1, 52nd Leg., 2nd Sess. (N.M. 2016), final version, *available at* https://www.nmlegis.gov/Sessions/16%20Regular/final/SJR01.pdf (last visited January 5, 2018); N.M. Const. art. II, § 13 (amendment effective November 8, 2016).

2. The July 2017 Procedural-Rule Amendments

{73} At the time the rulings were made in the *Salas* and *Harper* detention hearings, all the participants were learning how to apply the new detention authority provided by the constitutional amendment. This Court had not completed the process of seeking and considering input on proposals from the Committee and others for procedural rule changes to regulate compliance with the constitutional requirements. *See Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 7, 138 N.M. 398, 120 P.3d 820 (discussing state law establishing that under the New Mexico Constitution the Supreme Court has the ultimate responsibility for promulgating rules relating to judicial procedures). Both Petitioner and Respondent were necessarily working with broad constitutional concepts and without the more detailed procedural guidance that would be provided by our subsequent bail rule amendments, issued in June 2017 with an effective date of July 1, 2017. Because any future detention proceedings must comply not only with the broad requirements of the constitution but also with the new court rules, we briefly summarize those provisions here.

{74} While the constitutional amendment required few changes in Rule 5-401 NMRA (amendment effective July 1, 2017), which regulates release decisions and since its original promulgation in 1972 (*see Brown*, 2014-NMSC-038, ¶ 37) has followed federal law in requiring nonfinancial release conditions unless financial security is found necessary to assure a particular defendant's court appearance (*see State v Gutierrez*, 2006-NMCA-090, ¶ 16, 140 N.M. 157, 140 P.3d 1106), the new constitutional detention authority required promulgation of new procedural rules to guide its application.

{75} Only the district courts now have authority to enter detention orders, at least until and unless the Legislature designates any other courts as courts of record for detention hearings, and accordingly it was necessary to create a new district court pretrial detention process in our Rules of Criminal Procedure for the District Courts. *See* Rule 5-409 NMRA (effective July 1, 2017).

{76} Rule 5-409(B) provides for filing and service of motions to detain by the prosecution and of any responses by the defendant and requires notice of the detention request to the district court with detention authority, to any other courts in which the case may otherwise be pending, and to any detention centers with custody of the defendant. All release authority of any court other than the district court and of detention centers is immediately terminated pending the district court disposition of the detention motion, *see* Rule 5-409(C), (E)(1), subject to a requirement that the lower court ensure that a probable cause determination has been made in compliance with *County of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991). *See* Rule 5-409(C) & committee cmt.; Rule 6-203 NMRA; Rule 7-203 NMRA.

{77} Rule 5-409(F)-(H) provides guidance for the detention hearing itself, including expedited time limits, discovery of reasonably available evidence, presentation of evidence by both prosecution and defense, and resulting findings by the court. During the pretrial detention hearing, "[t]he defendant has the right to be present and to be represented by counsel[,] . . . to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise." Rule 5-409(F)(3).

{78} If the district court denies the state's motion for pretrial detention, it must articulate what it found to be insufficient. Rule 5-409(H) ("The court shall file written findings of the individualized facts justifying the denial of the detention motion . . . .") Alternatively, if the district court grants the state's motion and detains the defendant, it must articulate in writing the "individualized facts justifying the detention . . . ." Rule 5-409(G).

{79} If the court orders detention, Article II, Section 13 of the New Mexico Constitution as well as Rule 5-409(L), Rule 5-405(F) NMRA (amendment effective July 1, 2017), and Rule 12-204 NMRA (amendment effective July 1, 2017) provide for an expedited appeal.

{80} There is nothing in the text of the rules or their legislative history that would require live witnesses in every case or that otherwise would limit the discretion of the court in relying on information that it may find reliable and helpful. In fact, Rule 5-409(F)(5) now explicitly confirms that in detention hearings the formal rules of evidence "shall not apply to the presentation and consideration of information." This provision is consistent with our Rules of Evidence, which were in effect at the time of the detention hearings below and that have long provided that the rules "do not apply to . . . considering whether to release on bail or otherwise." Rule 11-1101(D)(3)(e) NMRA.

{81} To provide even more clarity, the published commentary to new Rule 5-409(F)(5) specifically cites precedents from other jurisdictions approving the use of sound judicial discretion in assessing the reliability and accuracy of information presented in support of detention, whether by proffer or direct proof, rather than the technical formalities of trial evidence rules. As the New Jersey Supreme Court noted in *Robinson*, 160 A.3d at 15, in addressing the similar New Jersey detention procedures, "the focus is not on guilt, and the hearing should not turn into a mini-trial."

{82} Our court rules simply do not impose any live witness limitations on the information considered at a pretrial detention hearing. We therefore address whether there are other federal or state constitutional constraints that might impose different requirements.

3. Federal Constitutional Law

{83} The federal precedents previously discussed in this opinion should put to rest any question whether the United States Constitution imposes any blanket requirement that live witnesses must testify at pretrial detention hearings.

{84} *Salerno*, 481 U.S. at 751, authoritatively disposed of general federal due process attacks on the kind of detention-for-dangerousness authority that is now part of both federal and New Mexico law: "When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat."

{85} The United States Supreme Court has never directly addressed the issue whether live witnesses are required at detention hearings, but decades of federal circuit and district court opinions, as well as state appellate decisions, have consistently answered that question in the negative, as discussed earlier in this opinion.

4. New Mexico Constitutional Law

{86} Because the United States Constitution does not mandate live testimony in pretrial detention hearings, our remaining task is to consider whether the New Mexico Constitution imposes more expansive requirements in state detention proceedings. *See State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1 ("Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined.").

{87} In language substantively indistinguishable from that of the Fourteenth Amendment to the United States Constitution, Article II, Section 18 of the New Mexico Constitution states, "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." As this Court has observed, "due process is a rather malleable principle which must be molded to the particular situation, considering both the rights of the parties and governmental interests involved." *State v. Valdez* (*In re Valdez*), 1975-NMSC-050, ¶ 13, 88 N.M. 338, 540 P.2d 818. "The amount of process due depends on the particular circumstances of each case." *State ex rel. CYFD v. Pamela R.D.G.* (*In re Pamela A.G.*), 2006-NMSC-019, ¶ 12, 139 N.M. 459, 134 P.3d 746.

{88} We have previously recognized that the Due Process Clause of the New Mexico Constitution requires that a defendant's protections at a pretrial detention hearing include "the right to counsel, notice, and an opportunity to be heard." *State v. Brown*, 2014-NMSC-038, ¶ 20 (analyzing the limited detention authority in Article II, Section 13 of the New Mexico Constitution before its 2016 amendment). Due process requires a meaningful opportunity to cross-examine testifying witnesses or otherwise challenge the evidence presented by the state at a pretrial detention hearing. *State v. Segura*, 2014-NMCA-037, ¶¶ 24-25, 321 P.3d 140.

{89} Counsel for Respondent Judge Whitaker relies on *Segura* and *State v. Guthrie*, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904, to contend that due process requires presentation of live witness testimony and a right of personal confrontation at a pretrial detention proceeding. But those cases do not establish any such bright-line requirements.

{90} In *Segura*, the defendant allegedly violated his pretrial conditions of release. 2014-NMCA-037, ¶¶ 1, 5. The district court revoked his release and ordered him into custody without providing

notice of the revocation proceeding, the opportunity to examine witnesses who actually testified at the hearing, and the opportunity to present evidence in opposition to detention. *Id.* ¶¶ 6, 24. The Court of Appeals appropriately held that the defendant's due process rights were violated. *Id.* ¶ 25. But *Segura* did not hold that the state must call live witnesses in order for a defendant to have a meaningful opportunity to challenge the state's evidence. With particular relevance to the issues before us, *Segura* simply stands for the proposition that when the state does present the direct testimony of a witness at a hearing, due process requires the opportunity to cross-examine. *Id.* ¶¶ 24-25.

{91} In *Guthrie*, we addressed what process is due to a defendant in a probation revocation hearing. 2011-NMSC-014, ¶¶ 1-2. Significantly, we held that live testimony of probation officers or other adverse witnesses "is *not* always required during probation revocation hearings" and that "[t]he trial court should focus its analysis on the relative need for confrontation to protect the truth-finding process and the substantial reliability of the evidence." *Id.* ¶¶ 12, 43. *Guthrie* specifically approved the use of "conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence" in probation revocation hearings as long as the "evidence offered has particular indica of accuracy and reliability." *Id.* ¶¶ 13, 20 (emphasis, internal quotation marks, and citations omitted). We stressed that "due process is flexible and calls for such procedural protections as the particular situation demands" and that "not all situations calling for procedural safeguards call for the same kind of procedure." *Id.* ¶ 11 (emphasis, internal quotation marks, and citation omitted).

{92} No New Mexico precedent has ever held that the New Mexico Constitution requires live witnesses in pretrial release or detention hearings even though some forms of pretrial detention, such as in "capital offenses when the proof is evident or the presumption great," have always been permitted by Article II, Section 13 of the New Mexico Constitution. From the time when this Court promulgated the New Mexico Rules of Evidence in 1973, based almost wholly on the then-proposed Federal Rules of Evidence, both the New Mexico rules and the federal rules have specifically provided that the rules of evidence do not apply in considering "whether to release on bail or otherwise." Fed. R. Evid. 1101(d)(3); Rule 11-1101(D)(3)(e); *see State v. Martinez*, 2008-NMSC-060, ¶ 25, 145 N.M. 220, 195 P.3d 1232 (observing that the New Mexico rules "were patterned after . . . the proposed Federal Rules of Evidence").

{93} While the authority of a New Mexico court to detain a defendant based on a finding of dangerousness is new, our courts have routinely made pretrial release and bail decisions on the basis of recorded materials, proffers, and other nontestimonial information with no appellate decision ever suggesting constitutional infirmity in this process. As discussed in *Brown*, 2014-NMSC-038, ¶¶ 28, 31, 35, these bail decisions have often resulted in pretrial detention for defendants who could not afford the bail amount set by the court. There is no principled reason why detaining arrestees because they are a danger to the community, rather than because they lack money to buy a bond, should require a different constitutional standard.

{94} Because the detention-for-dangerousness provisions of the New Mexico Constitution were modeled in large part on federal detention statutes, using strikingly similar language, the interpretation of our constitutional requirements can also be informed by how federal courts have analyzed the same issue. *See State v. Clements*, 1988-NMCA-094, ¶ 15, 108 N.M. 13, 765 P.2d 1195 (looking to federal law in interpreting a New Mexico rule with language similar to the federal rule); *State v. Weddle*, 1967-NMSC-028, ¶ 8, 77 N.M. 420, 423 P.2d 611 (same), *contested on other grounds*, *Caristo v. Sullivan*, 1991-NMSC-088, 112 N.M. 623, 818 P.2d 401.

{95} Our New Mexico Constitution and court rules relating to detention contain all the procedural safeguards that the United States Supreme Court found constitutionally sufficient in *Salerno*, including a detention hearing requiring a clear and convincing showing of the need for detention and affording defendants the right to counsel, to testify, to "cross-examine witnesses who appear at the hearing," and to respond to charges through live witnesses or "proffer or otherwise." *See* 481 U.S. at 751-52. And as thoroughly discussed earlier, numerous federal courts have consistently rejected the notion that due process requires live witnesses at detention hearings. The federal law is both clear and persuasive, and we recognize no need to create a different constitutional standard for due process in New Mexico detention hearings.

{96} We emphasize that pretrial detention of an accused person, prior to assessing individual guilt or innocence under the protections of constitutional due process, is not to be imposed lightly. *Salerno*, 481 U.S. at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); *Mendonza*, 673 N.E.2d at 35 (cautioning that pretrial detention must not be permitted on a "casual and untested" basis); *Robinson*, 160 A.3d at 14 ("Balanced against important concerns for public safety are the defendants' liberty interests."). A detention-hearing court must take into account both the personal rights of the accused and the broader public interest as it makes a pretrial detention decision.

5. Determining Dangerousness

{97} This Court has not been asked to reverse or affirm the particular decisions denying detention in *Salas* or *Harper* but merely to determine the appropriate modes of testimony at detention hearings and to remand for new hearings in accordance with our opinion. We will attempt to provide the requested guidance in general terms, without prejudging their application to particular cases.

{98} Like other courts addressing the issue, we caution that judges are still required to make reasoned judgments in evaluating evidentiary presentations. Making judgments about the persuasiveness of evidence is a core function of being a judge. While prosecutors may make proffers, tender documents and other exhibits, and ask the court to consider information in court records, a court may find the weight of any evidence, testimonial or nontestimonial, insufficient to meet the clear and convincing standard for detention in particular cases.

{99} The first step in a detention hearing is to assess which information in any form carries sufficient indicia of reliability to be worthy of consideration by the court. In determining whether any information presented at a detention hearing contains indicia of reliability, a court can consider, for example, whether the information is internally consistent; whether it is credibly contested; whether it originates from or is conveyed by suspect sources; and whether it is corroborated or supported by accounts of independent observers, tangible evidence, a defendant's statements or actions, other sources, or other information.

{100} The court should then consider the extent to which that information would indicate that a defendant may be likely

to pose a threat to the safety of others if released pending trial. While the goal of a pretrial detention hearing is not to impose punishment for past conduct, *Brown*, 2014-NMSC-038, ¶ 52, a defendant's past actions and statements can provide a sound basis for justifiable evidentiary inferences of likely future actions, which is the proper focus for the court and the parties under the new constitutional detention authority. *See* Rule 5-401(C)(3)(a).

{101} Both law and behavioral science recognize that in anticipating human behavior, "[o]ne of the predictive tools . . . is the consideration of one's character traits based on patterns of past conduct." *Martinez*, 2008-NMSC-060, ¶¶ 16, 23 (summarizing approaches to predicting behavior and discussing why the rules of evidence limit using evidence of bad character at trial for policy reasons, despite its undeniable "logical relevance"). Detention decisions, like release conditions, should not be based categorically on the statutory classification and punishability of the charged offense. But the particular facts and circumstances in currently charged cases, as well as a defendant's prior conduct, charged or uncharged, can be helpful in making reasoned predictions of future dangerousness. The fact that a defendant has shown a propensity for engaging in dangerous conduct in the past may be helpful in predicting whether that behavior is likely to continue in the future. That is why we stated in *Brown* that although "[n]either the Constitution nor our rules of criminal procedure permit a judge to base a pretrial release decision solely on the severity of the charged offense," a judge is required "to make an informed, individualized decision about each defendant." *Brown*, 2014-NMSC-038, ¶ 52. In order to do so a judge must consider all relevant information, including the conduct of a defendant in connection with the charged offense, in determining the kind of evidence-based, instead of charge-based, release conditions that would be reasonably necessary to assure return to court or to assure the safety of others. *See id.* ¶ 55.

{102} Finally, the court must determine whether any pretrial release conditions it could impose "will reasonably protect the safety" of others, as required by the new standard in Article II, Section 13 of the New Mexico Constitution. District Court Rule 5-401(C), (D)(13), like its counterparts in our rules for courts of limited jurisdiction, authorizes judges to impose release conditions that are "reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community." *See* Rule 6-401(C) NMRA (providing the same authorization in pretrial release considerations for the magistrate courts); Rule 7-401(C) NMRA (same for the metropolitan courts); Rule 8-401(C) NMRA (same for the municipal courts). In determining the adequacy of release conditions to protect public safety, it may be particularly helpful to consider whether a defendant has engaged in dangerous behavior while on supervised release or has refused to follow court-ordered conditions of release in the past.

{103} It is not surprising that the New Mexico Constitution, applicable court rules, and judicial precedents here and elsewhere all refer to the need for reasonableness in pretrial release and detention decisions. As we pointed out in *Brown*, "there is no way to absolutely guarantee that any defendant released on any pretrial conditions will not commit another offense. The inescapable reality is that no judge can predict the future with certainty or guarantee that a person will appear in court or refrain from committing future crimes." *Brown*, 2014-NMSC-038 ¶ 54. But to the extent that we permit judges to take into account all helpful and reliable information in making those predictions, we will reduce the margins of error.

6. Unlawful Use of Money Bail to Detain

{104} In both the *Salas* and *Harper* detention orders the district court denied pretrial detention and then conditioned release on posting $100,000 bonds. Money bonds are not light substitutes for principled pretrial detention. The lawful purpose of a money bond is not to protect public safety but only to provide additional assurance that a released defendant will return to court. *See State v. Ericksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099. A posted money bond does nothing to protect against commission of future crimes and cannot even be forfeited under New Mexico statutes "for anything other than failure to appear." *State v. Romero*, 2007-NMSC-030, ¶ 3, 141 N.M. 733, 160 P.3d 914; *see* NMSA 1978, § 31-3-2(B)(2) (1993). This inadequacy of money bonds to protect public safety is a major reason the Legislature and New Mexico voters realized that a constitutional amendment containing a more effective public safety mechanism was necessary.

{105} Although we need not speculate on the purpose for the six-figure bonds in the two cases not before us for appellate review, courts have long recognized that we "should not be ignorant as judges of what we know as [people]." *Watts v. Indiana*, 338 U.S. 49, 52, 55 (1949) (holding a coerced confession unconstitutional and observing that our serious concerns about crime cannot be a justification for ignoring "the safeguards which our civilization has evolved for an administration of criminal justice"). It is common knowledge among judges and others who have worked in our courts that in the vast majority of cases imposition of high-dollar bonds for any but the most wealthy defendants is an effort to deny defendants the opportunity to exercise their constitutional right to pretrial release.

{106} Setting a money bond that a defendant cannot afford to post is a denial of the constitutional right to be released on bail for those who are not detainable for dangerousness in the new due process procedures under the New Mexico Constitution. If a court finds that a defendant is too dangerous to release under any available conditions, the court should enter a detention order. If the court instead finds that a defendant is entitled to release under Article II, Section 13 of the New Mexico Constitution and Rule 5-409, the court must not use a money bond to impose pretrial detention. *Brown*, 2014-NMSC-038, ¶ 53 ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release. . . . If a defendant should be detained pending trial under the New Mexico Constitution, then that defendant should not be permitted any bail at all."); *see also Bandy v. United States*, 81 S. Ct. 197, 198 (1960) ("It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom."). We have explicitly recognized this constitutional principle in the text of our rules. *See* Rule 5-401(E)(1)(c) ("The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.").

{107} Other jurisdictions have recognized this constitutional principle. As the Massachusetts Supreme Judicial Court emphasized, "a judge may not consider a defendant's alleged dangerousness in setting the amount of bail, although a defendant's dangerousness may be considered as a factor in setting other conditions of release."

Brangan v. Commonwealth, 80 N.E.3d 949, 963 (2017). The court noted that if a defendant would pose a danger to the community under nonfinancial conditions of release, the court should comply with its detention authority granted by statute or constitution and court rules and by the accompanying due process requirements. *See id.* at 963-64. But if a defendant does not pose a danger to the community, the court should release the defendant under appropriate conditions. *See id.* at 964-65; *cf. Smith v. Leis*, 2005-Ohio-5125, 835 N.E.2d 5, ¶¶ 1, 66 (holding that imposition of a high-cash bond for the purpose of denying release of a defendant is unconstitutional but observing that the state could move to detain in compliance with the due process procedures in Ohio law).

{108} Following oral argument in this case, we announced our ruling from the bench, outlining the principles now embodied in this opinion, and we entered a contemporaneous written order granting the State's petition for writ of superintending control and remanding the *Salas* and *Harper* cases to the district court for action in conformity with our oral ruling and written order. *See* New Mexico Supreme Court order, April 12, 2017 (granting the petition and remanding). Those cases have not come back before us for appellate review.

{109} We now confirm our contemporaneous rulings in this case.

III. CONCLUSION

{110} We hold that neither the United States Constitution nor the New Mexico Constitution categorically requires live witness testimony at pretrial detention hearings. Under our procedural rules, judges may consider all reasonably reliable information, without regard to strictures of the formal rules of evidence, in considering whether any pretrial release conditions will reasonably protect the safety of any other person or the community.

{111} IT IS SO ORDERED.
CHARLES W. DANIELS, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
BARBARA J. VIGIL, Justice

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-006

No. S-1-SC-36363 (filed January 11, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ELEXUS GROVES,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Brett R. Loveless, District Judge

BENNETT J. BAUR,
Chief Public Defender
SCOTT WISNIEWSKI,
Assistant Public Defender
Albuquerque, New Mexico
for Appellant

HECTOR H. BALDERAS,
Attorney General
MARTHA ANNE KELLY,
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

Opinion

Charles W. Daniels, Justice

{1} Defendant Elexus Groves has been indicted on two counts of first-degree murder and other serious felony offenses. In this interlocutory appeal she challenges a district court order of pretrial detention that was based on two independent and alternative detention grounds contained in Article II, Section 13 of the New Mexico Constitution.

{2} The first ground was that Defendant was detainable under the provision that has been part of our Constitution since we became a state, providing an exception to the general right to pretrial release for defendants charged with capital offenses.

{3} The second ground was based on the new detention authority added by New Mexico voters in the November 2016 general election, allowing denial of pretrial release of a felony defendant if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

{4} We hold that the district court's detention order was lawfully based on the new constitutional authority for pretrial detention of dangerous defendants, and we affirm it on that ground. As a result, there is no need to address in this opinion the issues Defendant raises relating to the alternative ground for the district court's action based on the old capital-offense exception, a matter that we have addressed separately in *State v. Ameer*, S-1-SC-36395. *See* N.M. Sup. Ct. order (May 8, 2017).

I. FACTUAL AND PROCEDURAL BACKGROUND

{5} Shortly after 6 a.m. on Friday, January 18, 2017, a man and a woman stole a van in Albuquerque. The two attempted to flee pursuing police officers, driving recklessly at extremely high speeds through residential city streets. Defendant, shown to be the apparent driver of the stolen van by physical evidence and her postarrest statements to police, crashed it into another car at an intersection, killing a teenage girl, fatally injuring the girl's mother, and breaking the leg of the girl's three-year-old brother. As logged by the van's GPS data, a moment before the crash the van was traveling at seventy-eight miles per hour in a thirty-five-mile-per-hour residential zone, and on impact it was traveling at sixty-eight miles per hour.

{6} After the fatal crash, the offenders jumped out of the stolen van and continued their flight from the police. They ran through adjacent neighborhoods, climbing backyard fences and attempting to distract residents so they could steal another vehicle. After they succeeded in stealing another car, they escaped the pursuing officers but left behind a number of clues that resulted in Defendant's identification and her arrest two days later.

{7} Among the clues, officers found a cell phone in the back yard of one witness who had called police to report that two unknown people had jumped over his fence. Investigation of that cell phone revealed a Facebook account belonging to coparticipant Paul Garcia and a call record showing contact between Garcia and Defendant.

{8} Near the place where the second vehicle had been stolen, officers discovered a jacket containing a letter addressed to Defendant from an attorney offering to represent her in connection with her pending criminal charges.

{9} Officers obtained security video footage from a business along the offenders' escape route that recorded two persons appearing to be Defendant and Garcia crossing a parking lot. In the video, the person identified as Garcia was walking with only one shoe, which appeared to match a shoe found at the wrecked van.

{10} Following her arrest, Defendant initially appeared in metropolitan court, which set release conditions including the requirement that she post a $100,000 secured bond. The State filed a motion in district court to deny Defendant's release pending trial under the new provisions of Article II, Section 13 of the New Mexico Constitution, arguing that no conditions of release a court could impose would protect the safety of others. The case was promptly transferred to the district court, which has exclusive pretrial detention authority as a statutory court of record. *See Torrez v. Whitaker*, 2018-NMSC-___, ¶¶ 71, 75, ___ P.3d, ___ (S-1-SC-36379, Jan. 11, 2018).

{11} After a hearing at which no witnesses personally testified for either side, the district court denied the State's detention motion, continued the $100,000 secured bond, and imposed additional conditions of release. Because that order has not been appealed, we need not address it further.

{12} A grand jury then indicted Defendant on multiple charges related to the deadly January 18 chase, including two counts of first-degree felony murder, carrying potential sentences of life imprisonment. NMSA 1978, § 30-2-1(A)(2) (1994) (statutorily classifying felony murder as a "capital felony"); *see also* NMSA 1978, § 31-18-14 (2009) (providing that a person convicted of a "capital felony" shall be sentenced to life imprisonment).

{13} The day after indictment, the State filed a second detention motion, based

exclusively on the new authority in Article II, Section 13 allowing denial of pretrial release when no release conditions will reasonably protect the safety of others. To support its request, the new motion proffered details of the newly-indicted offenses and a pattern of past criminal conduct, including significantly a pending prosecution in Sandoval County. That case, based on occurrences just a few weeks earlier, also involved a stolen vehicle and a high-speed attempted escape from police by Defendant and coparticipant Paul Garcia that ended with their crashing the stolen vehicle. The motion recited that in the Sandoval County case Defendant was on pretrial release conditions that she already had violated by a failure to appear by the time she committed the offenses in this case.

{14} That postindictment detention motion first came before a temporary arraignment judge, who heard presentations of counsel and a pretrial services officer's risk-assessment-instrument-based determination that she could not "make a [release] recommendation that would reasonably ensure public safety." The arraignment judge entered an order for detention relying on the "nature and circumstances of the offense charged," Defendant's "past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings," and "the nature and seriousness of the danger to any person or the community."

{15} Defense counsel filed a motion to review that detention order, arguing that collateral estoppel principles precluded the arraignment judge from ordering detention after a previous judge had denied detention and that "no evidence was presented to [the arraignment judge] upon which she could base her ruling that pretrial detention [w]as appropriate."

{16} At the hearing on Defendant's motion to review the detention order, the district judge who was assigned to preside over postindictment proceedings conducted an evidentiary hearing at which he considered arguments and factual representations of counsel, the contents of a number of court files reflecting Defendant's criminal history, the risk assessment provided by pretrial services, and the transcript of the prior hearing at which detention was ordered. No live witness testimony was presented by either party.

{17} In addition to the factual circumstances underlying the current prosecution that were recounted in documents in the court files and described earlier in this opinion, the district court expressed concern about Defendant's conduct in the recent Sandoval County case. The court's concerns included Defendant's attempt to avoid arrest in that case by participating in a reckless high-speed chase that ended only after crashing the stolen getaway vehicle. The court also noted that the release conditions ordered in the Sandoval County case before Defendant committed similar unlawful conduct in this case included the requirement that she not violate any state laws. The court also pointed out that even before committing the crimes in this case Defendant failed to comply with her release conditions in that pending case by failing to appear for a scheduled preliminary hearing, causing issuance of a warrant for her arrest that had not been served at the time of the events in this case.

{18} At the conclusion of the hearing the district court denied Defendant's motion to review the prior detention order and ordered Defendant to be detained pending trial. One of the stated legal grounds for the detention order, a theory that had not been proposed by the State but was raised sua sponte by the district court, was that the district judge believed Defendant was charged with a "capital offense" where "'the proof is evident or the presumption great.'"

{19} As an alternative ground for detention, the court agreed with the State and concluded that Defendant's history of dangerous conduct and failure to abide by requirements of previous release orders established that "no conditions of release [would] reasonably protect the safety of any other person or the community from Defendant." The court also rejected Defendant's collateral estoppel argument, both because the interlocutory metropolitan court order of release or detention is not a final determination of an issue of pretrial detention and because the intervening grand jury indictment represented a significant change in circumstances.

{20} Defendant appealed to this Court to review the final detention order, arguing (1) that she did not have fair notice that the capital-offense theory was going to be a basis of detention and therefore did not prepare to defend against it; (2) that the evidence at the hearing was insufficient to establish that the proof was evident or the presumption great under the capital-offense theory; and (3) the evidence, which did not include live witness testimony, was insufficient to justify detention under the new detention-for-dangerousness constitutional grounds for denial of pretrial release.

{21} We scheduled oral argument and at its conclusion announced our affirmance of the detention order on the detention-for-dangerousness ground, without the need to reach other issues, and advised that we would follow up with this published opinion. *See* New Mexico Supreme Court order, April 12, 2017 (affirming the district court).

II. DISCUSSION

{22} Article VI, Section 2 of the New Mexico Constitution assigns this Court exclusive jurisdiction over appeals from final district court judgments "imposing a sentence of death or life imprisonment." This Court correspondingly has exclusive jurisdiction over interlocutory appeals, including appeals from interlocutory release and detention orders in cases like this one in which a defendant is charged with first-degree murder, an offense that currently carries a possible life sentence. *State v. Brown*, 2014-NMSC-038, ¶ 10, 338 P.3d 1276 (citing *State v. Smallwood*, 2007-NMSC-005, ¶¶ 6-11, 141 N.M. 178, 152 P.3d 821 in holding that the Supreme Court has exclusive jurisdiction over appeals of release conditions in first-degree murder prosecutions).

{23} NMSA 1978, Section 39-3-3(A)(2) (1972) permits an appeal from an "order denying relief on a petition to review conditions of release," and Article II, Section 13 of the New Mexico Constitution requires that "[a]n appeal from an order denying bail shall be given preference over all other matters."

{24} Rule 12-204(D)(2)(b) NMRA, governing procedures in appeals from bail orders, provides that a district court decision shall be set aside only if it is shown that the decision (1) "is arbitrary, capricious, or reflects an abuse of discretion," (2) "is not supported by substantial evidence," or (3) "is otherwise not in accordance with law."

{25} "An abuse of discretion occurs when the court exceeds the bounds of reason, all the circumstances before it being considered." *Brown*, 2014-NMSC-038, ¶ 43 (internal quotation marks and citation omitted). Similarly, a decision "is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *N.M. Att'y Gen. v. N.M. Pub. Reg. Comm'n*, 2013-NMSC-042, ¶ 10, 309 P.3d 89 (internal quotation

marks and citation omitted). "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *State ex rel. King v. B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 12, 329 P.3d 658 (internal quotation marks and citation omitted).

{26} With those principles in mind, we now address the merits of Defendant's appeal.

{27} The proceedings below occurred shortly after adoption of the constitutional amendment creating new authority for detention of defendants who are found to be too dangerous to be released pending trial and before promulgation of our procedural rules governing application of the broad constitutional language, in particular new Rule 5-409 NMRA, governing detention proceedings in district court.

{28} In *Torrez*, 2018-NMSC-___, we traced the history and purpose of the detention-for-dangerousness constitutional amendment and provided guidance for courts and litigants in conducting detention hearings. This is the first opinion in which we apply *Torrez*'s guidance in an appellate review of a detention ruling.

{29} As we explained in *Torrez*, a detention hearing requires a judge to make three categories of determinations in deciding whether pretrial detention should be ordered: (1) "which information in any form carries sufficient indicia of reliability to be worthy of consideration," (2) "the extent to which that information would indicate that a defendant may be likely to pose a threat to the safety of others if released pending trial," and (3) "whether any potential pretrial release conditions 'will reasonably protect the safety' of others, as required by the new constitutional standard in Article II, Section 13." *Torrez*, 2018-NMSC-___, ¶¶ 99-102. Our appellate role in determining whether substantial evidence supported the district court decision and whether the judge abused his discretion or acted arbitrarily or capriciously necessarily must also take those analyses into consideration.

{30} Looking at the first of those factors, we conclude that the district court was entitled to take into account the factually undisputed information from court and law enforcement files that has been summarized in this opinion. *See id.* ¶ 110 (holding that live witnesses may but are not required to be called at detention hearings and that judges "may consider all reasonably reliable information, without regard to strictures of the formal rules of evidence"); *see also* Rule 5-401(C) NMRA (summarizing information a court may consider in determining release conditions that might "reasonably ensure the appearance of the defendant as required and the safety of any other person and the community").

{31} There is nothing in the record to raise serious doubts about the credibility of the police officers who conducted the investigations and prepared the resulting sworn and unsworn reports or of the independent victims and other witnesses who reported their own interlocking and cross-corroborating observations of Defendant's activities to the police. In its totality the factual information about Defendant's current and previous offenses that was relied on by the district court carried strong indicia of reliability in establishing the historical facts summarized earlier in this opinion.

{32} The next required step is to consider how that information bears on an assessment of "the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release," as required by Rule 5-401(C)(4) in determining appropriate release conditions. The information in the record strongly supports the conclusion that Defendant has uncontrolled propensities to persist in the commission of unlawful and gravely dangerous conduct, as exemplified by three vehicle thefts in just a matter of a few weeks, each followed by recklessly dangerous flights from authorities on the public streets. *See* Rule 5-401(C)(3)(a) (allowing the court's assessment to take into account "the history and characteristics of the defendant, including . . . the defendant's character, physical and mental condition, . . . past conduct, . . . [and] criminal history"). The undisputed facts include that two of the vehicle thefts and high-speed flights ended in vehicle crashes, the second causing the deaths of two people and the serious injury of another, just minutes before Defendant fled again with her partner, stole a third vehicle, and engaged in yet another motorized flight from authorities.

{33} We emphasize that the relevant consideration for a court is not the category or punishability of the charged crime. *See Torrez*, 2018-NMSC-___, ¶ 101. In a detention hearing the court's focused concern is not to impose punishment for past conduct but instead to assess a defendant's likely future conduct. *See id.* (explaining that "the particular facts and circumstances in currently charged cases, as well as a defendant's prior conduct, charged or uncharged, can be helpful in making reasoned predictions of future dangerousness").

{34} In this case, Defendant's past conduct created a strong basis for reasoned inferences of her likely future conduct. Defendant had not simply committed an isolated act of theft or of reckless driving. In the record before the district court in this case, the totality of Defendant's conduct fully justifies the district court's determination that she presented an unacceptable risk of continued endangerment of the public in the same manner if released, a determination well within the bounds of reason and a proper exercise of judicial discretion. *See Brown*, 2014-NMSC-038, ¶ 13.

{35} As to the third part of the detention analysis, several facts supported the district court's determination by clear and convincing evidence that no conditions of pretrial release the court could impose under Rule 5-401 would reasonably protect the safety of any other person or the community.

{36} The clear and convincing evidence standard is a recognized term of art in our jurisprudence. It refers to "evidence that instantly tilt[s] the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *In re Locatelli*, 2007-NMSC-029, ¶ 7, 141 N.M. 755, 161 P.3d 252 (alteration in original) (internal quotation marks and citation omitted).

{37} The determination whether available release conditions would *reasonably protect* others does not require scientific accuracy any more than any other prediction of future human behavior. The key word is *reasonably*, which requires the exercise of reasoned judgment. As we noted in *Brown*, we cannot demand that human beings in judicial robes be omniscient. *See* 2014-NMSC-038, ¶ 54, (recognizing that "no judge can predict the future with certainty or guarantee that a person will appear in court or refrain from committing future crimes"). Instead, we require that judges consider available information, exercise reason, and make thoughtful judgments.

{38} In this case there were strong reasons supporting a conclusion that no available release conditions a court could impose would protect against Defendant's likely future dangerous conduct. Apart from her record of continued criminal

activity and dangerous conduct while on previous conditions of release, Defendant had demonstrated a pattern of refusal to comply with directions of the courts and of police. When Defendant committed the offenses in this case, she was on supervised release in two other cases. Defendant's conditions of prior release required, in part, that she not violate any state laws and that she appear at scheduled court proceedings, yet she refused to abide by those conditions. As the State pointed out below, even if the court were to impose conditions as extreme as GPS monitoring, she could still steal another vehicle and resist arrest by engaging in another dangerous or, as in this case, deadly escape from police.

{39} We conclude that there was substantial evidence in the record to support the district court's detention decision and that the court neither abused its discretion nor acted arbitrarily or capriciously in finding by clear and convincing evidence that no conditions of release that could be ordered for Defendant would reasonably protect the safety of others.

{40} An additional item of information that the district court took into account, although unnecessary to our finding of substantial evidence on this record, was the high-dangerousness score Defendant received on the Arnold Public Safety Assessment (PSA), a validated risk assessment that has been approved by this Court in the Second Judicial District as a pilot project. *See* Rule 5-401(C) (authorizing consideration of "any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction" in making release decisions). The PSA is a nationally recognized scientifically validated risk assessment instrument that courts in an increasing number of jurisdictions use as an aid, though never as the only factor, in making detention and release decisions. *See, e.g.*, *State v. Robinson*, 160 A.3d 1, 11 (2017) (describing New Jersey's statutorily-required use of the PSA and emphasizing that "judges consider the PSA but make the ultimate decision on release after reviewing other relevant information as well"); Arnold Foundation, *The Front End of the Criminal Justice System*, *Public Safety Assessment*, *available at* http://www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment/ (last visited January 6, 2018) (describing the purpose and operation of the PSA and naming some of the thirty-eight United States jurisdictions that have implemented it).

{41} As a result of the 2016 constitutional reform, neither our courts nor our communities are helpless to prevent release of provably dangerous offenders, as was the reality under the old money-based system. Instead, our courts are authorized now to make evidence-based pretrial release and detention decisions that better protect public safety and provide for a more fair pretrial justice system.

{42} In line with those reforms, this Court has also amended Rule 5-403 NMRA, Rule 6-403 NMRA, Rule 7-403 NMRA, and Rule 8-403 NMRA to clearly authorize all criminal courts to amend a defendant's release conditions or revoke pretrial release entirely for commission of new crimes or other violations of release orders, without waiting for a noncompliant defendant to endanger or victimize someone else.

{43} This case is a good example of the wisdom of those constitutional and court-rule changes. There is no reason in law or logic that should compel our judges to do the same things over and over and expect different results. In this case, there is no reason for a court to believe that court-ordered release conditions would do any better in controlling Defendant's repeated dangerous conduct than release conditions have done in the past. In fact, Defendant has demonstrated by her own conduct that the opposite result is likely.

{44} We agree with the United States Supreme Court that under our American system of justice "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding the federal detention-for-dangerousness statute). But in this case and on this record the district court justifiably determined that this defendant has earned a place in that carefully limited exception, not as punishment for her past acts but to protect others from her predictable future dangerousness.

III. CONCLUSION

{45} As we stated in our bench ruling following oral argument and in a contemporaneous written order, we affirm the order of the district court denying pretrial release to Defendant under the new authority in Article II, Section 13 of the New Mexico Constitution permitting courts of record to deny pretrial release by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

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

CHARLES W. DANIELS, Justice

WE CONCUR:

JUDITH K. NAKAMURA, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
BARBARA J. VIGIL, Justice

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-007
No. S-1-SC-35116 (filed January 4, 2018)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
JENNIFER MARTINEZ,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Karen L. Townsend, District Judge

HECTOR H. BALDERAS,
Attorney General
MARTHA ANNE KELLY,
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KENNETH H. STALTER,
Assistant Attorney General
STEVEN H. JOHNSTON,
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Santa Fe, New Mexico
for Petitioner

BENNETT J. BAUR,
Chief Public Defender
C. DAVID HENDERSON,
Appellate Defender
Santa Fe, New Mexico
for Respondent

Opinion

Barbara J. Vigil, Justice

{1} Our resolution of this appeal turns on the standard of review that applies to a district court's findings of fact concerning a motion to suppress evidence. Specifically, we defer to the district court's findings if supported by substantial evidence. *See State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856.

{2} Bloomfield Police Sergeant George Rascon pulled over Defendant Jennifer Martinez for failing to stop at a stop sign and, as a result, the police obtained evidence that led to Defendant's arrest and conviction for driving while intoxicated. In a motion to suppress evidence, Defendant argued that the video from the officer's on-board camera, or "dash-cam," demonstrated that Defendant made a legal stop at the intersection and that the officer lacked reasonable suspicion to pull her over. At an evidentiary hearing, the officer testified that Defendant went past the stop sign before coming to a complete stop, blocking the intersection. The district court viewed the dash-cam video and concluded that the officer had reasonable suspicion to conduct the traffic stop, even though the video demonstrated that the alleged traffic violation was not as blatant as described by the officer.

{3} The Court of Appeals reversed, reasoning that the officer was not credible and that the video evidence was too ambiguous to support a finding of reasonable suspicion. *State v. Martinez*, 2015-NMCA-051, ¶ 1, 348 P.3d 1022, *cert. granted*, 2015-NMCERT-005. We hold that the Court of Appeals misapplied the standard of review, which requires the appellate court to defer to the district court's findings of fact if supported by substantial evidence and to view the facts in the light most favorable to the prevailing party.

I. BACKGROUND

{4} Defendant was charged in magistrate court with driving while under the influence of intoxicating liquor or drugs (second offense), *see* NMSA 1978, § 66-8-102 (2008, amended 2016); consumption of an alcoholic beverage in a motor vehicle, *see* NMSA 1978, § 66-8-138(A) (2001, amended 2013); and failure to stop at a stop sign, *see* NMSA 1978, § 66-7-345(C) (2003). Defendant filed a motion to suppress evidence, arguing that the officer lacked reasonable suspicion to initiate the traffic stop. The magistrate court denied the motion to suppress. Defendant entered a conditional guilty plea to driving while under the influence of intoxicating liquor or drugs, reserving her right to appeal the suppression issue. *See State v. Celusniak*, 2004-NMCA-070, ¶ 10, 135 N.M. 728, 93 P.3d 10 (recognizing that a defendant in magistrate court "may enter a conditional plea of guilty or no contest, reserving one or more issues for appeal").

{5} Defendant appealed de novo to the district court and renewed her motion to suppress. *See* N.M. Const. art. VI, § 27 (providing for de novo appeal to district court). The State's evidence at the suppression hearing consisted of Sergeant George Rascon's testimony and the dash-cam video. The officer testified that on November 11, 2008, at about 10:00 p.m., he was patrolling a residential neighborhood in Bloomfield when he saw a vehicle approaching the four-way intersection of Sycamore and North Third at a "high rate of speed." The officer testified that when Defendant reached the intersection, she went past the stop sign before coming to a complete stop, blocking the southbound lane of traffic. The officer activated his emergency lights and pulled Defendant over for failing to stop at the stop sign.

{6} After hearing the officer's testimony and watching the dash-cam video, the district court denied Defendant's motion to suppress. The district court judge explained her ruling as follows:

> [A]fter hearing Sergeant Rascon's testimony I was certainly confused as to why [Defendant] would file a motion to suppress because he made it sound very clear why . . . he stopped and that there was reasonable suspicion. But I think it just goes to show you really need to review the video in every case. And in this case, after reviewing the video, I truly find the truth somewhere in between both positions. I certainly didn't see Sergeant Rascon's testimony that . . . she stopped in the middle of the intersection; I don't think that was the case. However, I do think she . . . seemed to be going quickly, she seemed to have slammed on her brakes, and she seems to have slammed on her brakes further into the intersection than I think is allowable, creating the reasonable suspicion for Sergeant Rascon to . . . stop [Defendant]. So therefore I will deny Defendant's motion to suppress, although I will grant that it was certainly a closer call than I thought it was going to be at first. But I still think Sergeant Rascon

did have reasonable suspicion to stop her.

{7} The Court of Appeals reversed. *Martinez*, 2015-NMCA-051. The Court of Appeals inferred from the judge's remarks that "the district court found that the officer was not credible." *Id.* ¶ 12. The Court of Appeals concluded that "the district court was left with no facts other than the video on which to conclude that the stop was supported by a reasonable suspicion." *Id.* The Court of Appeals then conducted an independent review of the dash-cam video and found that the video evidence was too ambiguous by itself to support a finding of reasonable suspicion. *Id.* ¶¶ 13-14. We granted certiorari under Article VI, Section 2 of the New Mexico Constitution and NMSA 1978, Section 34-5-14(B) (1972), to consider whether the Court of Appeals erred by failing to view the facts in the manner most favorable to the prevailing party.

II. DISCUSSION

A. Standard of Review

{8} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Ketelson*, 2011-NMSC-023, ¶ 9, 150 N.M. 137, 257 P.3d 957. "First, we look for substantial evidence to support the [district] court's factual finding, with deference to the district court's review of the testimony and other evidence presented." *State v. Yazzie*, 2016-NMSC-026, ¶ 15, 376 P.3d 858 (internal quotation marks and citation omitted). "We then review the application of the law to those facts, making a de novo determination of the constitutional reasonableness of the search or seizure." *Id.* (internal quotation marks and citation omitted).

B. The Court of Appeals Erred by Failing to Afford Proper Deference to the District Court's Findings of Fact

{9} The State argues that the Court of Appeals erred by failing to view the facts in the manner most favorable to the State, which prevailed in the district court. Defendant asks us to affirm the Court of Appeals, arguing that the objective evidence from the dash-cam demonstrates that the traffic stop was unconstitutional.

{10} Defendant relies on both the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. These constitutional provisions "provide overlapping protections against unreasonable searches and seizures," *Yazzie*, 2016-NMSC-026, ¶ 17 (internal quotation marks and citation omitted), including safeguards for "brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). A police officer can initiate an investigatory traffic stop without infringing the Fourth Amendment or Article II, Section 10 if the officer has "a reasonable suspicion that the law is being or has been broken." *Yazzie*, 2016-NMSC-026, ¶ 38.[1] "In analyzing whether an officer has reasonable suspicion, the trial court must look at the totality of the circumstances, and in doing so it may consider the officer's experience and specialized training to make inferences and deductions from the cumulative information available to the officer." *State v. Gonzales*, 2011-NMSC-012, ¶ 15, 150 N.M. 74, 257 P.3d 894. An officer obtains reasonable suspicion when the officer becomes "aware of specific articulable facts that, judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." *State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964 (internal quotation marks and citation omitted); *see also United States v. Sokolow*, 490 U.S. 1, 7 (1989) (explaining that the requisite "level of suspicion" needed to conduct an investigatory stop "is considerably less than proof of wrongdoing by a preponderance of the evidence" and "is obviously less demanding than that for probable cause").

{11} In this case, the district court concluded that the officer had reasonable suspicion to pull Defendant over for violating Section 66-7-345(C) of the Motor Vehicle Code. Section 66-7-345(C) requires a driver to stop at a stop sign as follows:

> Except when directed to proceed by a police officer or traffic-control signal, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop before entering the crosswalk on the near side of the intersection or, in the event there is no crosswalk, shall stop at a clearly marked stop line, but if none, then at the point nearest the intersecting roadway before entering the intersection.

There was neither a crosswalk nor a stop line at the intersection of Sycamore and North Third, so Section 66-7-345(C) required Defendant to stop "at the point nearest the intersecting roadway before entering the intersection." *See* NMSA 1978, § 66-1-4.9(B)(1) (1998, amended 2015) (defining "intersection" as "the area embraced within the prolongation or connection of the lateral curb lines or, if none, then the lateral boundary lines of the roadways of two highways that join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict"). At the suppression hearing, the district court heard the State's evidence and reviewed the language of Section 66-7-345(C) before finding that Defendant was "going quickly" and "slammed on her brakes further into the intersection than . . . allowable, creating the reasonable suspicion" for the officer to pull Defendant over for a traffic violation.

{12} Defendant asserts that the dash-cam video does not show a violation of Section 66-7-345(C) and argues that it is appropriate to reverse the district court's finding of reasonable suspicion on appeal based on an independent review of the video. Defendant contends that this Court is in as good a position as the district court to make findings based on the video because video is a type of documentary evidence. We agree that "[w]here the issue to be determined rests upon interpretation of documentary evidence, this Court is in as good a position as the trial court to determine the facts and draw its own conclusions." *Flemma v. Halliburton Energy Servs., Inc.*, 2013-NMSC-022, ¶ 13, 303 P.3d 814 (internal quotation marks and citation omitted). But in this case the evidence before the district court included both the officer's testimony and the dash-cam video. On appeal, we must review the totality of the circumstances and must avoid reweighing individual factors in isolation. *See Arvizu*, 534 U.S. at 274 (disapproving an appellate court's "divide-and-conquer analysis" that evaluated and rejected various factors in isolation, rather than reviewing the " 'totality of the circumstances' "). In doing so, we

[1] "Although we have interpreted Article II, Section 10 to provide broader protections against unreasonable search and seizure than the Fourth Amendment in some contexts, we have never interpreted the New Mexico Constitution to require more than a reasonable suspicion that the law is being or has been broken to conduct a temporary, investigatory traffic stop." *Yazzie*, 2016-NMSC-026, ¶ 38 (citation omitted). Defendant does not argue that a standard other than reasonable suspicion should apply to an investigatory stop under Article II, Section 10.

"defer to the district court's findings of fact if substantial evidence exists to support those findings" and "view the facts in the manner most favorable to the prevailing party." *Urioste*, 2002-NMSC-023, ¶ 6.

{13} The parties disagree about the extent to which the district court found the officer credible and relied on his testimony in finding that the traffic stop was supported by reasonable suspicion. Defendant contends that the district court rejected the officer's testimony. The Court of Appeals adopted Defendant's position. *See Martinez*, 2015-NMCA-051, ¶ 12 ("The district court could, perhaps, have stripped away the officer's exaggeration while giving credence to the officer's perception that Defendant came to rest in the intersection. But it did not. Instead, the district court found that the officer was not credible."). The State, on the other hand, asserts that the district court found aspects of the officer's testimony credible even though he misremembered or exaggerated exactly how far Defendant protruded into the intersection before coming to a complete stop. The State argues that the Court of Appeals misconstrued the district court's credibility findings and contravened the standard of review by independently reweighing the evidence on appeal. We agree with the State.

{14} When acting as the fact-finder at a suppression hearing, the district court must evaluate the credibility of witnesses and determine the weight to which the evidence is entitled. *See State v. Gonzales*, 1997-NMSC-050, ¶ 18, 124 N.M. 171, 947 P.2d 128 ("Determining credibility and weighing evidence are tasks entrusted to the trial court sitting as fact-finder."). The district court may exercise "discretion to credit portions of a witness' testimony even though it finds other portions dubious." *United States v. Whalen*, 82 F.3d 528, 532 (1st Cir. 1996); *see also Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) ("Anyone who has ever tried a case or presided as a judge at a trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness's entire testimony, few trials would get all the way to judgment."). On appeal, we defer to the district court's evaluation of witness credibility. *See Urioste*, 2002-NMSC-023, ¶ 6 ("As a reviewing court we do not sit as a trier of fact; the district court is in the best position to resolve questions of fact and to evaluate the credibility of witnesses."). An appellate court is "unable to view the witness's demeanor or . . . manner of speech, and therefore [is] not in a position to evaluate many of the aspects of witness credibility that the trier of fact may evaluate." *State v. Evans*, 2009-NMSC-027, ¶ 37, 146 N.M. 319, 210 P.3d 216. If the district court does not make explicit credibility findings, "we will indulge in all reasonable presumptions in support of the district court's ruling." *See Jason L.*, 2000-NMSC-018, ¶ 11 (internal quotation marks and citation omitted).

{15} In this case, the district court did not make an explicit finding regarding the officer's credibility but did find that "the truth [fell] somewhere in between [the officer's and Defendant's] positions." The district court further found that the officer "did have reasonable suspicion to stop" Defendant for a traffic violation. "Factfinding frequently involves selecting which inferences to draw." *Jason L.*, 2000-NMSC-018, ¶ 10 (internal quotation marks and citation omitted). An appellate court must indulge in "[a]ll reasonable inferences in support of the district court's decision" and disregard "all inferences or evidence to the contrary." *Id.* (alteration omitted) (internal quotation marks and citation omitted). "The fact that another district court could have drawn different inferences on the same facts does not mean this district court's findings were not supported by substantial evidence." *Id.* Applying the appropriate standard of review, we presume that the district court credited the officer's perception that Defendant violated Section 66-7-345(C), even though the dash-cam video showed that the violation was not as blatant as the officer described.

{16} Defendant relies on cases from other jurisdictions to argue that the officer's testimony should not weigh into our reasonable suspicion calculus because the dash-cam video contradicted the officer's testimony. *See, e.g.*, *State v. Canty*, 736 S.E.2d 532, 536-37 (N.C. Ct. App. 2012) (finding no reasonable suspicion, in part because a video disproved an officer's assertion that the defendant's vehicle crossed the fog line); *Carmouche v. State*, 10 S.W.3d 323, 331-32 (Tex. Crim. App. 2000) (declining to defer to the district court's findings, in part because a video presented "indisputable visual evidence contradicting essential portions" of an officer's testimony). Defendant asserts that when an officer's testimony is materially different from objective evidence, the objective evidence should control a court's factual understanding of what took place. *See Ortega v. Koury*, 1951-NMSC-011, ¶ 8, 55 N.M. 142, 227 P.2d 941 ("Physical facts and conditions may point so unerringly to the truth as to leave no room for a contrary conclusion based on reason or common sense, and under such circumstances the physical facts are not affected by sworn testimony which in mere words conflicts with them."); *see also Crownover v. Nat'l Farmers Union Prop. & Cas. Co.*, 1983-NMSC-099, ¶ 8, 100 N.M. 568, 673 P.2d 1301 ("A decision resting on evidence which is inherently improbable is not based on substantial evidence.").

{17} The cases Defendant cites are distinguishable from this case. Here, the facts were not indisputably established, and the dash-cam video did not squarely contradict the officer's testimony. Due to poor lighting and the angle of the dash-cam, the video does not show whether Defendant violated Section 66-7-345(C) by failing to stop "at the point nearest the intersecting roadway before entering the intersection." As noted by the Court of Appeals, "[b]ecause of the angle on which the video is taken, it is impossible to determine whether Defendant's vehicle is just barely in the intersection (a violation) or just barely behind the intersection (no violation) when it came to a stop." *Martinez*, 2015-NMCA-051, ¶ 14. Defendant acknowledges that the dash-cam video provides a distorted view of the intersection, making it difficult to ascertain the position of Defendant's car relative to the curb when she came to a stop. If there is "conflicting evidence, we defer to the district court's factual findings, so long as those findings are supported by evidence in the record." *Evans*, 2009-NMSC-027, ¶ 37.

{18} We hold that the record, viewed in the light most favorable to the district court's ruling, includes sufficient evidence to support the district court's finding that the officer had an objectively reasonable basis to stop Defendant for violating Section 66-7-345(C). The officer testified that Defendant's car approached the intersection at a "high rate of speed" and went past the stop sign before coming to a stop in the intersection, blocking the southbound lane of traffic. Although the dash-cam video does not show that Defendant blocked the intersection and is ambiguous concerning whether Defendant violated Section 66-7-345(C), the video confirms the officer's testimony that Defendant was moving quickly when she braked and that her vehicle went past the stop sign before

stopping. The district court resolved the parties' factual dispute in favor of the State, finding that Defendant drove too far into the intersection before slamming on her brakes and coming to a stop. We conclude that the Court of Appeals erred by reweighing the evidence on appeal and failing to view the facts in the manner most favorable to the prevailing party.

III. CONCLUSION

{19} Having considered the totality of the circumstances and given appropriate deference to the district court's factual findings, we affirm the district court's determination that the officer had reasonable suspicion to stop Defendant. We reverse the Court of Appeals and remand for further proceedings consistent with this opinion.

{20} IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice

Certiorari Denied, December 20, 2017, No. S-1-SC-36767

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-015

No. A-1-CA-34773 (filed October 25, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
PHILLIP SIMMONS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Benjamin Chavez, District Judge

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for Appellee

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for Appellant

OPINION

Jonathan B. Sutin, Judge

{1} Defendant Phillip Simmons was convicted by a jury of two counts of criminal sexual penetration in the second degree (in the commission of a felony) (CSP II-felony) in violation of NMSA 1978, Section 30-9-11(E)(5) (2009), one count of criminal sexual penetration in the second degree (by force or coercion, child 13-18) (CSP II-force/coercion) in violation of Section 30-9-11(E)(1), one count of kidnapping in the first degree in violation of NMSA 1978, Section 30-4-1 (2003), one count of distribution of a controlled substance to a minor in the second degree in violation of NMSA 1978, Section 30-31-21 (1987), and one count of contributing to the delinquency of a minor in violation of NMSA 1978, Section 30-6-3 (1990).[1]

{2} On appeal, Defendant argues that (1) the district court failed to instruct the jury on a required element for the CSP II-felony convictions; (2) there was insufficient evidence to support the jury's guilty verdicts; and (3) this Court must vacate the kidnapping, distribution of a controlled substance to a minor, or contributing to the delinquency of a minor convictions, or else reduce the CSP II-felony convictions to CSP IV because allowing all convictions to stand would violate double jeopardy. We affirm in part and remand in order to vacate Defendant's CSP II-felony convictions.

BACKGROUND

{3} On an evening in July 2010, Victim, a fifteen-year-old boy, went to a concert with his family. After the concert, Victim planned on attending a party with his family and got a ride with his cousin and his cousin's friend. While in the car, Victim got into an argument with his cousin, at which point his cousin's friend kicked Victim out of the car in downtown Albuquerque near the Alvarado Transportation Center (ATC). Victim, wanting to get home, tried to get a ride home from ATC but was initially unsuccessful. After some time, Defendant pulled up to Victim and offered Victim a ride home. Defendant told Victim he needed to do something first and drove to a salon. After going to the salon, Defendant drove Victim to Defendant's apartment.

{4} Once at the apartment, Defendant told Victim he had "to get something real quick," and they entered the apartment. Victim testified that he felt "a little bit forced" to enter the apartment and believed he was threatened. Once inside, Defendant offered Victim a beer, as well as "[c]rack, weed, [and] coke." Victim, feeling pressured, accepted a beer and cocaine, which made him feel "woozy." At that point, Defendant began touching Victim and sucked Victim's penis. Victim testified that he was "worried about getting home" and that the encounter "made [him] feel . . . gross" and "[a]shamed of [himself]." Thereafter, Defendant sucked Victim's penis again, and they smoked more cocaine. Victim asked to go home, but Defendant told him that Defendant would take Victim home "in the morning[.]" Victim protested, telling Defendant that he had to go see his probation officer because Victim was on probation. Defendant then asked for anal sex, and Victim complied because he was afraid that if he did not, he would be anally penetrated. Victim testified that Defendant was larger than him, and he was scared.

{5} Defendant eventually took Victim home around 7:00 a.m. When Defendant dropped Victim off, Defendant provided his name and phone number to Victim, told Victim to call him, and made promises of money and access to his car. When Victim arrived home he cried, took multiple showers, and told his mother, aunt, and grandmother what had happened. Victim was examined by a sexual assault nurse examiner (SANE), who testified that Victim disclosed that he felt coerced to have anal sex with Defendant and reported being "woken up with his genitals being sucked on[.]"

{6} Victim identified Defendant as the perpetrator in a photo array, gave the police a fairly accurate description of Defendant's apartment, and identified Defendant as the perpetrator at trial. A forensic examiner testified at trial that she identified saliva that contained Defendant's DNA on the inside of Victim's boxer shorts.

{7} The jury found Defendant guilty of two counts of CSP II-felony, one count of CSP II-force/coercion, one count of kidnapping, one count of distribution of a controlled substance to a minor, and one count of contributing to the delinquency

[1]We note that although the jury clearly found Defendant guilty of two counts of CSP II-felony and one count of CSP II-force/coercion and the district court recognized those verdicts, the judgment erroneously states that Defendant was convicted of three counts of CSP II-force/coercion.

of a minor. For the CSP II-felony counts, the jury was instructed that the State must prove that Defendant caused Victim to engage in fellatio and anal intercourse during the commission of kidnapping or distribution of a controlled substance to a minor or contributing to the delinquency of a minor. However, the jury was not asked to identify which felony it relied upon in reaching its verdicts on the CSP II-felony counts. Defendant was ultimately sentenced to twenty-seven years in prison, with nine years of the sentence suspended, for a total sentence of eighteen years. This appeal followed.

DISCUSSION

I. Jury Instructions—CSP II-felony

{8} Defendant argues that the district court failed to instruct the jury that in order to find Defendant guilty of the CSP II-felony counts, it had to find that there was a causal link between the felony committed and the CSP. Defendant admits that trial counsel did not request that an instruction be given on the causal link between the CSP II-felony charges and the associated felonies.

{9} When a party fails to object to a tendered jury instruction, we review the issue for fundamental error. *See State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. Fundamental error "only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." *State v. Baca*, 1997-NMSC-045, ¶ 41, 124 N.M. 55, 946 P.2d 1066, *overruled on other grounds by State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783.

{10} In support of his position that fundamental error occurred, Defendant highlights *State v. Stevens*, 2014-NMSC-011, 323 P.3d 901, arguing when charging CSP II-felony, the associated felony "must be a felony that is committed against the victim of, and that assists in the accomplishment of, sexual penetration perpetrated by force or coercion or against a victim who, by age or other statutory factor, gave no lawful consent." *Id.* ¶ 39. According to Defendant, the State never argued and the jury never found a "nexus" between the associated felony, i.e., distribution of a controlled substance to a minor, kidnapping, and/or contributing to the delinquency of a minor, on the one hand, and the two counts of CSP II-felony, on the other hand. Defendant argues that the jury should have been asked to consider the causal link between the associated felony and the CSP when rendering its verdict on CSP II-felony, and because the jury never was instructed to find that the felony assisted in the accomplishment of the CSP, there was fundamental error.

{11} In *Stevens*, our Supreme Court considered the adequacy of a given CSP II-felony jury instruction and whether the inadequacies in the instruction constituted fundamental error. *Id.* ¶¶ 1-3. The defendant in *Stevens* was charged with two counts of CSP-II felony, with the associated felony being distribution of a controlled substance to a minor, after the defendant provided her minor daughter with methamphetamine and told her daughter to perform oral sex on the defendant's boyfriend on two occasions. *Id.* ¶¶ 4-6. The defendant argued that her "convictions for CSP II-felony resulted from fundamental error because the jury was not instructed that the [prosecution] had to prove that the sexual activity occurring during the commission of a felony was otherwise criminal[.]" *Id.* ¶ 12 (internal quotation marks omitted). The at-issue instruction required, in relevant part, that the prosecution prove (1) "[t]he defendant caused [her] daughter to engage in fellatio on [the defendant's] boyfriend[,]" and (2) "[t]he defendant committed the act during the commission of distribution of a controlled substance to a minor[.]" *Id.* ¶ 13 (internal quotation marks omitted). Our Supreme Court ultimately held that "when a CSP II charge is based on the commission of a felony, it must be a felony that is committed against the victim of, and that assists in the accomplishment of, sexual penetration perpetrated by force or coercion or against a victim who, by age or other statutory factor, gave no lawful consent." *Id.* ¶ 39. The *Stevens* Court concluded, however, that although the jury instruction was deficient, the error was unpreserved and "did not rise to the level of fundamental error." *Id.* ¶¶ 42-43, 46. The Court noted that in convicting the defendant, the jury necessarily determined that the defendant caused her boyfriend to sexually penetrate her daughter during the commission of a felony. *Id.* ¶ 43. Additionally, the Court looked to testimony from the defendant's daughter that she acquiesced to the defendant's request after she was injected with methamphetamine. *Id.* ¶ 45. Thus, the Court did "not consider guilt to be so doubtful that a conviction would shock the judicial conscience" and affirmed the defendant's convictions. *Id.* ¶¶ 45, 58.

{12} In this case, as in *Stevens*, there is no fundamental error. Here, the jury instructions on CSP-II felony stated, in relevant part, that the State must prove: (1) Defendant caused Victim to engage in fellatio and anal intercourse, and (2) Defendant committed the acts during the commission of kidnapping or distribution of a controlled substance to a minor or contributing to the delinquency of a minor. These instructions are similar to the instruction in *Stevens* in that they did not instruct the jury to find that the associated felony must be "committed against the victim of[] and . . . assist[] in the accomplishment of" the CSP. *Id.* ¶ 39. But, also as in *Stevens*, this deficiency does not rise to the level of fundamental error. *See id.* ¶¶ 42-43, 46. Here, a reasonable juror would not be confused by the instruction, and the connection between the associated felonies and the acts of CSP is so readily apparent that the CSP II-felony convictions do not shock the judicial conscience. In this case, the associated felonies, i.e., kidnapping, distribution of a controlled substance to a minor, and contributing to the delinquency of a minor, were all committed against Victim, as evidenced by the guilty verdicts for those felonies. Additionally, there can be no doubt that Defendant was assisted in carrying out the CSPs against Victim by the commission of the associated felonies.

II. Sufficiency of the Evidence

{13} Defendant argues that there was insufficient evidence to support his convictions for kidnapping, distribution of a controlled substance to a minor, CSP II, and contributing to the delinquency of a minor. "In reviewing the sufficiency of the evidence, [the appellate courts] must view the evidence 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." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (alteration, emphasis, internal quotation marks, and citation omitted). Further, "[c]ontrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts[,]" *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829, and we defer to the fact-finder "when it weighs the credibility of witnesses and resolves conflicts in witness testimony."

State v. Salas, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482.

A. Distribution of a Controlled Substance to a Minor, CSP II, and Contributing to the Delinquency of a Minor

{14} Defendant's argument regarding the distribution of a controlled substance to a minor conviction is that, although Victim testified he was offered various drugs, a drug test was not performed, and thus the evidence is insufficient. His argument against the three CSP II convictions is that Victim's testimony was "almost nonsensical." And Defendant's argument against contributing to the delinquency of a minor is that there was no evidence that Defendant gave Victim alcohol or controlled substances. We reject all of these arguments because they request that this Court usurp the role of the jury as fact-finder and supplant the jury's view of the evidence with our own.

{15} At trial, Victim testified that Defendant provided him with drugs and alcohol and that there were three sexual encounters. Victim identified Defendant as the perpetrator at trial, and a forensic examiner testified at trial that she identified saliva that contained Defendant's DNA on the inside of Victim's boxer shorts. *See id.* Simply because the evidence presented at trial could have been bolstered by a drug test or clearer testimony does not mean that there was insufficient evidence to convict Defendant of his crimes. *See Rojo*, 1999-NMSC-001, ¶ 19. Given the testimony, we hold there was sufficient evidence to uphold Defendant's convictions for distribution of a controlled substance to a minor, CSP II, and contributing to the delinquency of a minor.

B. Kidnapping

{16} Defendant argues that there was insufficient evidence of kidnapping because the Victim willingly entered Defendant's car and that, after driving to the salon and Defendant's apartment, "a savvy boy like [Victim] would have begun to suspect that the ride home was not going to happen any time soon." Defendant argues that there was no kidnapping by deception because Victim went voluntarily into Defendant's apartment, and Victim never testified that he was physically restrained by Defendant. Defendant argues that it is unclear at what point the physical association between him and Victim was no longer voluntary, and thus it was unreasonable for the jury to convict Defendant of kidnapping.

{17} We are unpersuaded. To support a conviction for kidnapping, the jury instruction required proof, in relevant part, that Defendant "took or restrained or confined or transported [Victim] by force or intimidation or deception[, and] intended to hold [Victim] against [Victim's] will to inflict death, physical injury or a sexual offense on [Victim.]" *See* § 30-4-1(A)(4) ("Kidnapping is the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent . . . to inflict death, physical injury or a sexual offense on the victim."). **{18}** Kidnapping by deception "can occur when an association [between a victim and a defendant] begins voluntarily but the defendant's actual purpose is other than the reason the victim voluntarily associated with the defendant." *State v. Jacobs*, 2000-NMSC-026, ¶ 24, 129 N.M. 448, 10 P.3d 127; *see State v. Laguna*, 1999-NMCA-152, ¶¶ 2, 12, 17, 128 N.M. 345, 992 P.2d 896 (describing kidnapping by deception where the victim was offered a ride and the defendant "conceal[ed his] intent of exploring sexual involvement with [the victim]").

{19} Here, Victim testified that he was led to believe that Defendant was going to give him a ride home, even though Defendant made two stops. Once at the apartment, Victim testified that he felt "a little bit forced" to enter the apartment and believed he was threatened. The jury could have reasonably found that Victim's association with Defendant was based on a deception when Defendant (1) lied by offering Victim a ride home with another intent in mind, (2) lied to Victim when he said he would drive Victim home after stopping at the salon, or (3) lied to Victim when he said he would drive Victim home after stopping at the apartment "to get something real quick[.]" Additionally, as noted by the State, the jury could have reasonably found that Defendant used intimidation as part of the kidnapping as evidenced by the physical disparities between Defendant and Victim, Victim's testimony that Defendant told him to go into the apartment, and Victim's testimony that he felt forced.

{20} We are also unpersuaded by Defendant's argument that "a savvy boy like [Victim] would have begun to suspect that the ride home was not going to happen any time soon." As with his sufficiency of the evidence arguments regarding his other convictions, Defendant is essentially asking this Court to re-weigh the evidence and make alternative determinations about Victim's credibility and what Victim should have believed. As we have stated, we defer to the fact-finder regarding such issues. *See Salas*, 1999-NMCA-099, ¶ 13. And we do "not re-weigh the evidence to determine if there was another hypothesis that would support innocence[.]" *State v. Garcia*, 2005-NMSC-017, ¶ 12, 138 N.M. 1, 116 P.3d 72.

III. Double Jeopardy

{21} Defendant argues on appeal that, with respect to each of the two CSP II-felony convictions, this Court on double jeopardy grounds must vacate either the kidnapping, distribution of a controlled substance to a minor, or contributing to the delinquency of a minor convictions. Defendant compares CSP II-felony to felony murder, arguing that CSP II-felony is a compound crime that requires a finding of CSP and the associated felony and that the associated felony is thus subsumed within the CSP II-felony. *See State v. Frazier*, 2007-NMSC-032, ¶ 1, 142 N.M. 120, 164 P.3d 1 (holding under double jeopardy principles that "the predicate felony is always subsumed into a felony murder conviction, and no defendant can be convicted of both"); *State v. Tsethlikai*, 1989-NMCA-107, ¶ 8, 109 N.M. 371, 785 P.2d 282 (noting that CSP II-felony is a compound crime). Defendant argues in his brief in chief that kidnapping "is the most likely crime to be violative of double jeopardy" and thus suggests that the kidnapping conviction is "subsumed into the CSP II[-felony] convictions" and must be vacated. However, in his reply brief, Defendant appears to change his position, suggesting that "the proper remedy in this case would be to reduce the CSP II to a CSP IV[2] because it is impossible to know upon which alternative [associated felony] the jury relied." And Defendant requests that "this Court vacate the CSP II and enter the lesser included offense [of CSP IV] that is not based upon a finding that violates double jeopardy."

{22} In its answer brief, the State agrees that a conviction must be vacated. But the State argues that the conviction for contributing to the delinquency of a minor, the lesser of the three predicate felonies, should be vacated because, per *Frazier*, "if the facts support multiple charges of a

[2]CSP IV requires that a defendant be guilty of sexual penetration of a child thirteen to sixteen by a person who is at least eighteen years old and at least four years older than the victim, and in this case, the jury was instructed as to CSP IV as a lesser included offense of CSP II-felony. Section 30-9-11(G)(1).

particular felony which can be sustained under a unit[]of[]prosecution analysis, then the [prosecution] is free to use one of those charges as the predicate felony and obtain separate convictions for the other charges." 2007-NMSC-032, ¶ 27. Additionally, the State notes that our Supreme Court has held that if a double jeopardy violation is found, the appellate courts "must vacate the conviction for the lesser offense." *State v. Gonzales*, 2007-NMSC-059, ¶ 10, 143 N.M. 25, 172 P.3d 162.

{23} Because Defendant's argument that his CSP II-felony convictions should be vacated and remanded for sentencing as CSP IV convictions was argued for the first time in his reply brief, we need not and do not address that argument. *See Guest v. Berardinelli*, 2008-NMCA-144, ¶ 36, 145 N.M. 186, 195 P.3d 353 ("[W]e do not consider arguments raised in a reply brief for the first time."); *State v. Druktenis*, 2004-NMCA-032, ¶ 122, 135 N.M. 223, 86 P.3d 1050 ("We will not consider issues raised for the first time in an appellant's reply brief."). But even if Defendant had earlier proposed his solution of lowering his CSP II-felony convictions to CSP IV convictions, we would not be inclined to adopt his proposed solution because he failed to develop the argument and cited no authority in support of that maneuver. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 ("[A]ppellate courts will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists[.]"); *State v. Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (noting that we will "not review unclear or undeveloped arguments [that] require us to guess at what [a party's] arguments might be"); *see also State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254 (reminding counsel that the appellate courts "are not required to do their research" and stating that "conclusory statement[s] will not suffice and [are] in violation of our [R]ules of [A]ppellate [P]rocedure").

{24} Although it is unclear which associated felony was relied upon by the jury in reaching its guilty verdicts for the two CSP II-felony counts, we focus on Defendant's argument that the kidnapping and CSP II-felony convictions violate double jeopardy. Defendant asks this Court to consider vacating the distribution of a controlled substance conviction or contributing to the delinquency of a minor conviction only if we disagree that the CSP II-felony and kidnapping convictions violate double jeopardy. Because, as explained later in this opinion, we hold that convicting Defendant for both kidnapping and CSP II-felony would violate double jeopardy and because we instruct the district court to vacate the CSP II-felony convictions, we need not and do not address Defendant's alternative arguments that his convictions for distribution and/or contributing to the delinquency would violate double jeopardy if coupled with the CSP II-felony convictions.

{25} Double jeopardy challenges involve constitutional questions of law that we review de novo. *SeeState v. Melendrez*, 2014-NMCA-062, ¶ 5, 326 P.3d 1126. The prohibition against double jeopardy "functions in part to protect a criminal defendant against multiple punishments for the same offense." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747 (internal quotation marks and citation omitted). Double jeopardy multiple-punishment cases are divided into two classifications: (1) multiple convictions under a single statute are "unit of prosecution" cases; and (2) multiple convictions under separate statutes resulting from the same conduct are "double description" cases. *Id*. Because we are dealing with multiple convictions under separate statutes, this is a double description case. For double description cases, we apply the two-part test set forth in *Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223: (1) whether the conduct is unitary; and (2) if so, whether the Legislature intended to punish the offenses separately. *State v. Silvas*, 2015-NMSC-006, ¶ 9, 343 P.3d 616.

A. Unitary Conduct

{26} In analyzing a double description multiple-punishment claim, we first determine whether the underlying conduct for the offenses is unitary. *See Swafford*, 1991-NMSC-043, ¶ 25. "Conduct is not unitary if sufficient indicia of distinctness separate the transaction into several acts." *State v. Montoya*, 2011-NMCA-074, ¶ 31, 150 N.M. 415, 259 P.3d 820 (internal quotation marks and citation omitted). In specifically analyzing whether the conduct underlying kidnapping and CSP II-felony convictions is unitary, this Court has held that "unitary conduct occurs when the [prosecution] bases its theory of [kidnapping] on the same force used to commit CSP II[-felony] even though there were alternative ways to charge the crime." *Id*. ¶ 37. Stated another way, "because some force or restraint is involved in every sexual penetration without consent, [kidnapping] cannot be charged out of every CSP without a showing of force or restraint separate from the CSP." *Id*. ¶ 38.

{27} In the present case, the jury could have found that Defendant's kidnapping of Victim was complete when he deceived Victim into entering his car by offering Victim a ride home. The jury could also have found that the kidnapping was accomplished when Victim, feeling forced and intimidated, entered Defendant's apartment and remained while the ensuing acts of CSP occurred. When the conduct underlying two convictions could be unitary under the facts, but we are unsure if the jury relied on that unitary conduct for both convictions, we nevertheless assume for the purposes of our double jeopardy analysis that the conduct was unitary because one of the options/alternatives/scenarios is legally inadequate. *See id*. ¶ 39 (acknowledging the principle that "we must reverse a conviction if one of the alternative bases for the conviction provided in the jury instructions is legally inadequate because it violates a defendant's constitutional right to be free from double jeopardy" and concluding that the conduct in the kidnapping and CSP was unitary for the purposes of double jeopardy because this Court was unable to determine from the record when the kidnapping was accomplished (internal quotation marks and citation omitted)); *see also State v. Foster*, 1999-NMSC-007, ¶ 27, 126 N.M. 646, 974 P.2d 140 ("[T]he Double Jeopardy Clause . . . require[s] a conviction under a general verdict to be reversed if one of the alternative bases for conviction provided in the jury instructions is legally inadequate because it violates a defendant's constitutional right to be free from double jeopardy[.]" (internal quotation marks omitted)), *abrogation on other grounds recognized by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683.

{28} As we stated in Section (I), *supra*, we have no doubt that Defendant was assisted in carrying out the acts of CSP by the commission of the associated felonies. And if the jury could have found that the kidnapping was accomplished during the CSPs, which is possible given the testimony, the conduct would be unitary because the force used for the kidnapping would be the same force used for the CSPs. We therefore conclude, for the purposes of our double jeopardy analysis, that the conduct was unitary.

B. Legislative Intent

{29} Where unitary conduct forms the basis for multiple convictions, we next "inquire whether [the d]efendant has been punished twice for the same offense, and if so, whether the Legislature intended that result." *Silvas*, 2015-NMSC-006, ¶ 11. "In analyzing legislative intent, [the appellate courts] first look to the language of the statute itself." *Swick*, 2012-NMSC-018, ¶ 11. In the absence of an express statement of legislative intent, we apply the rule of statutory construction from *Blockburger v. United States*, 284 U.S. 299, 304 (1932), to ensure that "each provision requires proof of a fact the other does not." *Swafford*, 1991-NMSC-043, ¶ 10 (internal quotation marks omitted). "If that test establishes that one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both." *Id.* ¶ 30. When punishment cannot be had for both, "[t]he general rule requires that the lesser offense be vacated . . . [and] . . . the degree of felony . . . is an appropriate measure of legislative intent regarding which of two offenses is a greater offense." *Swick*, 2012-NMSC-018, ¶ 31 (third omission in original) (internal quotation marks and citation omitted). "If one statute requires proof of a fact that the other does not, then the Legislature is presumed to have intended a separate punishment for each statute without offending principles of double jeopardy. That presumption, however, is not conclusive and it may be overcome by other indicia of legislative intent." *Silvas*, 2015-NMSC-006, ¶¶ 12-13 (internal quotation marks and citations omitted).

{30} "When applying *Blockburger* to statutes that are vague and unspecific or written with many alternatives, we look to the charging documents and jury instructions to identify the specific criminal causes of action for which the defendant was convicted." *State v. Ramirez*, 2016-NMCA-072, ¶ 18, 387 P.3d 266, *cert. denied*, 2016-NMCERT-___ (No. S-1-SC-35949, July 20, 2016). The jury instructions in the present case for the CSP II-felonies required the jury to find that Defendant caused Victim to engage in fellatio and anal intercourse during the commission of kidnapping or distribution of a controlled substance to a minor or contributing to the delinquency of a minor. The jury instruction for the separate crime of kidnapping required the jury to find that Defendant took, restrained, or transported Victim by force, intimidation, or deception with the intent to hold Victim against his will to inflict a sexual offense on him.

{31} In comparing the two offenses of CSP II-felony and kidnapping as charged, we look to *Montoya*, 2011-NMCA-074, ¶ 42, as instructive. In *Montoya*, this Court considered whether the defendant's right to be free from double jeopardy was violated when he was convicted of both CSP II-felony and the associated felony of either aggravated burglary or kidnapping. *Id.* ¶ 28. After holding that the conduct underlying the CSP II-felony conviction and the aggravated burglary conviction was not unitary, but that the conduct underlying the CSP II-felony conviction and kidnapping conviction could be unitary, this Court turned to legislative intent. *Id.* ¶¶ 34, 39-40. In evaluating legislative intent, we looked to the jury instructions provided for the CSP II-felony count and the kidnapping count and determined that the CSP II-felony instruction "required the jury to find that [the d]efendant caused [the v]ictim to engage in sexual intercourse during the commission of [kidnapping] or aggravated burglary." *Id.* ¶ 41. Per the jury instructions, this Court concluded that CSP II-felony required proof of all of the elements of kidnapping, and thus the kidnapping conviction was subsumed within the CSP II-felony conviction. *Id.* ¶ 42.

{32} Here, similar to *Montoya*, our analysis of the jury instructions for the CSP II-felony and kidnapping charges supports a conclusion that kidnapping is subsumed within the CSP II-felony convictions. *See id.* We therefore remand to the district court with instructions to vacate Defendant's conviction for the lesser offense, *see id.* ¶ 43, which means "vacat[ing] the conviction carrying the shorter sentence." *State v. Montoya*, 2013-NMSC-020, ¶ 55, 306 P.3d 426. Under the facts of this case, because Defendant's conviction for kidnapping was a first degree felony conviction and his convictions for CSP II-felony were second degree felony convictions, the CSP II-felony convictions are the lesser offenses. We, therefore, instruct the district court to vacate the CSP II-felony convictions, leaving the kidnapping conviction.[3] *See Montoya v. Driggers*, 2014-NMSC-009, ¶ 9, 320 P.3d 987 (noting that the district court complied with this Court's mandate to vacate the lesser conviction of CSP II-felony because, between CSP II-felony and kidnapping (first degree), CSP II-felony was the lesser conviction); *Swick*, 2012-NMSC-018, ¶ 31 ("The general rule requires that the lesser offense be vacated . . . [and] . . . the degree of felony is an appropriate measure of legislative intent regarding which of two offenses is a greater offense." (third omission in original) (alteration, internal quotation marks, and citation omitted)).

CONCLUSION

{33} For the reasons set forth in this opinion, we remand to the district court with instructions to vacate Defendant's CSP II-felony convictions. We affirm the district court's judgment in all other respects.

{34} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

STEPHEN G. FRENCH, Judge

[3]We acknowledge that stating the kidnapping is subsumed, while holding that kidnapping was the greater offense as compared to CSP II-felony, seems irregular. "Subsume" means to "include or place something within something larger or more comprehensive[.]" *Merriam-Webster's Collegiate Dictionary* 490 (11th ed. 2005). Yet here we are also holding that the subsumed offense is the greater offense. As noted by our Supreme Court in Montoya, 2013-NMSC-020, ¶ 56, "as a matter of policy, it would be unacceptable for us to hold that where a person's criminal conduct would have violated either of two statutes, a defendant can escape liability for the one carrying the greater punishment by committing the crime in such a manner as to also violate the statute carrying the lesser penalty."

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BLEUS & ASSOCIATES, LLC is presently seeking to fill two (2) Associate Attorney Positions for its Uptown Albuquerque Office. (1) Senior Associate with 8+ years of experience and (1) Junior Associate sought. PRACTICE WILL INCLUDE ALL ASPECTS OF CIVIL LITIGATION WITH AN EMPHASIS ON PERSONAL INJURY; INSURANCE BAD FAITH; AND OTHER TORT MATTERS. Candidates should possess Litigation/Personal Injury experience and have a great desire to zealously advocate for Plaintiffs. Trial experience preferred. Salary D.O.E. Please submit Resume's to paralegal2.bleuslaw@gmail.com. All inquiries to remain confidential.

NM Gaming Control Board Office of General Counsel, Staff Attorney

The New Mexico Gaming Control Board (NMGCB) is currently seeking to fill a Staff Attorney vacancy in the Office of General Counsel. The Staff Attorney is responsible for providing administrative prosecutorial services to the NMGCB. This position will provide legal advice to the NMGCB and staff members on various matters including contract issues, personnel issues, licensure issues and regulatory matters. The position will communicate and partner with other divisions of the agency to aid overall regulation and compliance. This position will interpret, summarize, and analyze the Bingo & Raffle Act and the Gaming Control Act to help prepare administrative complaints that will be presented to a Hearing Officer, Court and the Board. The ideal candidate has experience in: Drafting, evaluating, and reviewing pleadings, opinions, and correspondence; Researching and responding to complex legal issues; Interpreting laws, rulings, and gaming compacts; Conducting negotiations and settlements; Reviewing contracts; Legal representation in state and federal courts and administrative tribunals and Preparing cases for administrative law hearings. Statutory Requirements: Licensed as an attorney by the Supreme Court of New Mexico or qualified to apply for limited practice license. This position is a Pay Band 75, Attorney II (http://www.spo.state.nm.us/classification-descriptions.aspx). The applicant must possess a Juris Doctorate Degree from an accredited school of law and three (3) years of experience in the practice of law. For a detailed job description, requirements and application/resume procedure please refer to: http://www.spo.state.nm.us/State_Employment.aspx or contact Donovan Lieurance, Acting ED at 505-417-1079. Deadline for submission is: April 27, 2018.

Entry-Level Attorney Position

We have an entry-level attorney position available in Las Vegas, New Mexico. Excellent opportunity to gain valuable experience in the courtroom and with a great team of attorneys. Requirements include J.D. and current license to practice law in New Mexico. Please forward your letter of interest and Resumé to Richard D. Flores, District Attorney, c/o Mary Lou Umbarger, District Office Manager, P.O. Box 2025, Las Vegas, New Mexico 87701; or via e-mail: mumbarger@da.state.nm.us Salary will be based on experience, and in compliance with the District Attorney's Personnel and Compensation Plan.

Senior Trial Attorney & Assistant Trial Attorney
1st Judicial District Attorney

The First Judicial District Attorney's Office has an opening available for a Senior Trial Attorney prosecuting drug trafficking and distribution cases pursuant to the High Intensity Drug Trafficking Area (HIDTA) federal grant. The HIDTA attorney is responsible for managing the HIDTA grant including maintaining case statistics, and preparing quarterly and annual reports. Target salary is $59,802 plus benefits. This is a Term position based upon availability of funding. The office also has an opening for an entry level Assistant Trial Attorney to handle DUI and/or Domestic Violence cases. Salary is based on experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to: "DA Employment," PO Box 2041, Santa Fe, NM 87504, or via e-mail to 1stDA@da.state.nm.us.

Assistant Santa Fe County Attorney

Now hiring an Assistant Santa Fe County Attorney - Preferred applicants will have a commitment to public service and a strong background in local government representation, including familiarity with at least some of the following topics: public records inspection and retention; conduct of meetings subject to Open Meetings Act; representation of public bodies; administrative adjudications, appeals, and rulemakings; negotiation and preparation of contracts; real estate transactions; government procurement; zoning, planning, subdivisions, and local land use regulation; public housing; public utilities, roads and other public infrastructure; law enforcement and detention; local taxes and finances; civil litigation and appeals. The forgoing list is not exhaustive list but is intend to convey the nature of a diverse and dynamic practice. Successful applicants must have strong analytic, research, communication and interpersonal skills. Our office is collaborative and fast paced. The salary range is from $27.0817 to $40.6221 per hour. Individuals interested in joining our team must apply through Santa Fe County's website, at http://www.santafecountynm.gov/job_opportunities.

Administrative Assistant

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

Administrative Assistant

Moses, Dunn, Farmer & Tuthill, P.C., a well-established Albuquerque law firm, has an immediate opening for a full-time administrative assistant with at least one year of experience in an administrative or accounting role. Candidates must have knowledge of basic bookkeeping principles, strong computer skills and the ability to prioritize and perform multiple tasks. Experience with TABS3 and QuickBooks desirable. The Firm offers a competitive compensation and benefits package and opportunity for advancement. Please send your letter of interest, resume and salary requirements to Jerri G. Kinney, P.O. Box 27047, Albuquerque, NM 87125.

Legal Assistant

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

Temporary Full-Time Legal Secretary

Small Albuquerque office of a national Indian law firm seeks experienced legal secretary for 3 months beginning in June. Hourly wage DOE. Please send cover letter and resume to: Sonosky, Chambers, Sachse, Mielke & Brownell, LLP, 500 Marquette Ave. NW, Suite 660, Albuquerque, NM 87102, or sjones@abqsonosky.com

Immediate for Experienced Santa Fe Legal Secretary

The Frith Firm needs a bright, conscientious, hardworking, meticulous and (5+ years) legal secretary. You will have very substantial client contact. You must have excellent writing, communication and organizational skills. Our work is computer intensive, informal, non-smoking and a fun place to work. We are all on the same team, and we want another 'team player'. Excellent salary + monthly bonus, paid holidays + sick and personal leave, and other benefits based upon 1 year tenure. All responses are strictly confidential. Please send your Resume with a cover letter to thefrithfirm@gmail.com.

Director of First Impressions/ Receptionist/Legal Assistant

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

Paralegal

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

Positions Wanted

Legal Asst/Paralegal Seeks Immediate FT Employment

Desire to work in Personal Injury area of law. Strong Work Ethic. Integrity. Albq./ RR area only. Over 5 yrs exp. E-file in State & Fed Courts. Calendaring skills. Med Rec. Rqsts & Organization. Please contact 'legalassistantforhire2017@gmail.com ' for resume/references.

Office Space

Shared Office Space Available – Highly Desirable Uptown Location

Beautifully furnished and spacious office suite includes your choice of 2 available large window offices and 2-3 available interior offices. Rent includes; access to 2 spacious and beautiful conference rooms, phones, fax service, internet, copy machine, janitorial service, large waiting area, kitchenette and garage parking. Class A space. Rent ranges $1,000 to $2,000 per month dependent space selections. Contact Nina at 505-889-8240 for more details.

500 Tijeras NW

Three beautiful furnished, and spacious downtown offices available with reserved on-site tenant and client parking. Walking distance to court-houses. Two conference rooms, security, kitchen, gated patios and a receptionist to greet and take calls. Please email esteffany500tijerasllc@gmail.com or call 505-842-1905.

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BAR BULLETIN
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All advertising must be submitted via e-mail by 4 p.m. Wednesday, two weeks prior to publication (*Bulletin* publishes every Wednesday). Advertising will be accepted for publication in the *Bar Bulletin* in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.**

For more advertising information, contact: Marcia C. Ulibarri at 505-797-6058 or email mulibarri@nmbar.org

Office Space—Santa Fe
Two downtown units at 200 West De Vargas Street (located next to First Judicial Court Building). The property has its own private parking lot. Units have brick floors, kiva fireplaces, vigas and plenty of natural light. Contact Ryan Romero @ (505) 660-3274.

UNM area/Nob Hill Professional Office Building
1930's remodeled vintage office in high traffic area one block off Central. Large, spacious rooms with lots of historic Nob Hill character including hardwood floors, floor to ceiling windows and built-in storage cabinets. 1,200 sf with two private offices, large open staff area, reception room, 500 sf partial basement, full kitchen and ¾ bath. Updated electrical, HVAC, security doors and alarm system. Tree-shaded yard in front and private 6-space parking lot in back. Ideal for professional practice: law, accounting, health care. See Craigslist ad for photos. $1,400/month with one year lease. Contact Beth Mason, bethmason56@gmail.com, 505-379-3220

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

620 Roma N.W.
The building is located a few blocks from Federal, State and Metropolitan courts. Monthly rent of $550.00 includes utilities (except phones), fax, copiers, internet access, front desk receptionist, and janitorial service. You'll have access to the law library, four conference rooms, a waiting area, off street parking. Several office spaces are available. Call 243-3751 for an appointment.

Individual Office Space for Rent in Santa Fe
Gas/electric/water included. Large reception area. Coffee/tea/water service provided. Access to copier. File room available at no extra cost. No smoking. Beautiful grounds. $500.00/month unfurnished or $550.00/month furnished. Contact Kathy Howington (505) 916-5558.

Downtown Mid Century Office for Lease
Office condo at 509 Roma NW with reserved off street parking. Walk to all courthouses and downtown services. 4 Private offices with a conference room, kitchenette and reception. Phone, copy machine, and updated furniture included if desired. $2900/mo. Email carrie.sizelove@svn.com or call 505-203-9890. Also available for purchase.

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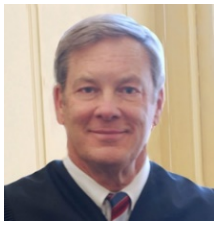

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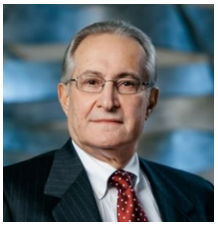

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- Oil, Gas, Energy & Water
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- Attorney Fee / Malpractice
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- Real Estate
- Securities
- Unfair Competition
- Water Law

About FedArb

For the past decade, FedArb has created a nationwide roster of former federal district court and state court judges, which is augmented by a select cadre of distinguished professors, lawyers and experts. Our administrative team focus is being responsive to the needs of the parties and enforcing agreed upon deadlines. FedArb also offers moot court exercises and leadership for corporate investigations. Its panelists have expertise in 27 different areas.

FedArb's case managers may be reached at **650-328-9500 or info@FedArb.com.**

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Attorney Bert Parnall
welcomes
Nicholas J. Trost
to the growing Parnall Law team.

Cynthia Braun

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