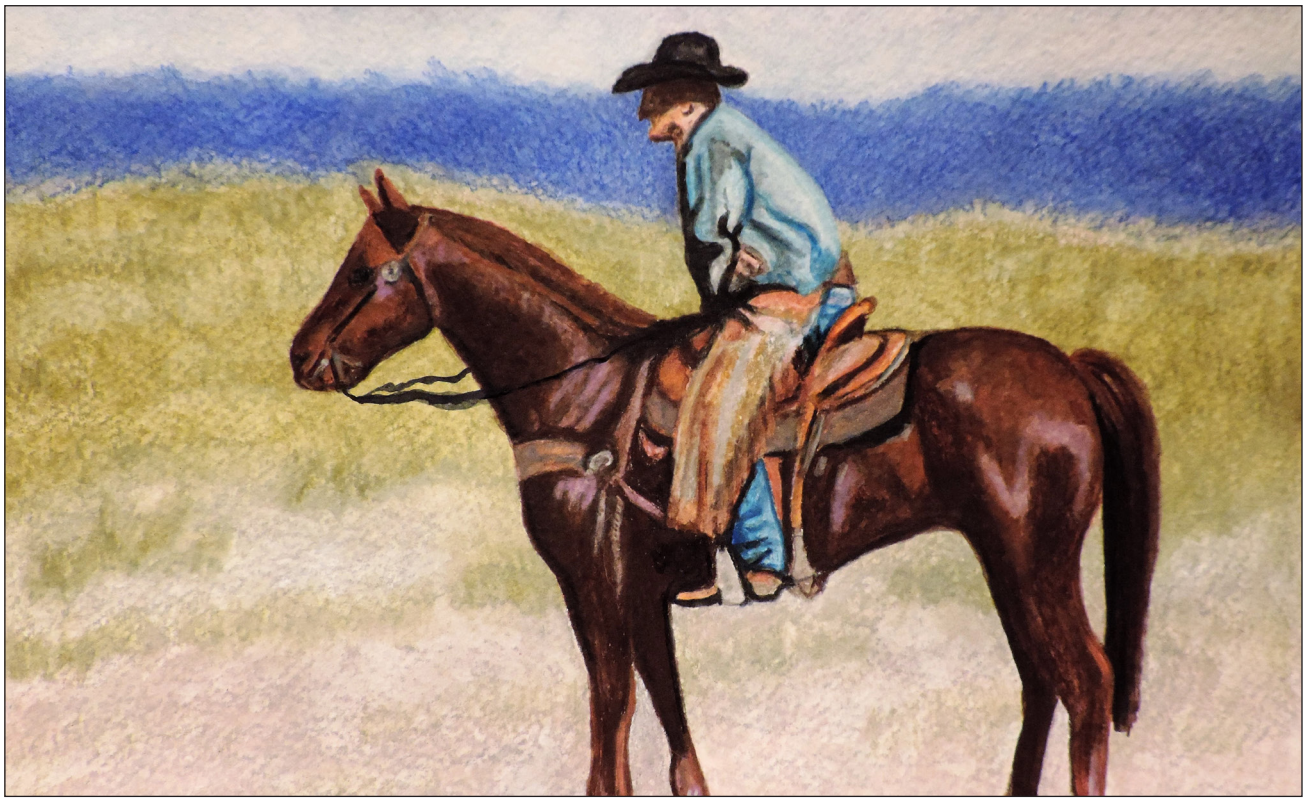
Official Publication of the State Bar of New Mexico

Bar Bulletin

May 2, 2018 • Volume 57, No. 18



New Mexico Cowboy, by Joan McMahon (see page 3)

www.joansart.com

Inside This Issue

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About Cover Image and Artist: Joan McMahon seeks to capture the joy she experiences in sharing her life with an extended family of animal members. Her watercolors radiate the inner light of her subject animals. McMahon decided that her artwork should "pay it forward" for the animals that inspire it. With the sales of her art McMahon donates to animal rescue and welfare organizations. More of her work can be viewed at www.joansart.com.

Notices

Court News

New Mexico Supreme Court Judicial Standards Commission

Seeking Commentary on Proposed Amended Rules

The Commission has completed a comprehensive review and revision of its procedural rules. Commentary on the proposed amendments is requested from the bench, bar and public. The deadline for public commentary has been extended to May 18. To be fully considered by the Commission, comments must be received by that date and may be sent either by email to rules@nmjsc.org or by mail to Judicial Standards Commission, PO Box 27248, Albuquerque, NM 87125-7248. To download a copy of the proposed amended rules, visit nmjsc.org/recent-news/.

First Judicial District Court

Gov. Susana Martinez Appoints Judge 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

Second Judicial District Court

Notice of Exhibit Destruction

Pursuant to 1.21.2.617 FRRDS (Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy criminal exhibits associated with the following criminal case numbers filed with the Court. Cases on appeal are excluded.

CR-1988-45096; CR-1989-00034; CR-1989-00238; CR-1989-00264; CR-1989-00920; CR-1991-00634; CR-1991-01605; CR-1991-01818; CR-1991-02015; CR-1991-02346; CR-1991-02350; CR-1992-00478; CR-1992-00791; CR-1992-01491; CR-1992-01565; CR-1992-01157; CR-1992-01175; CR-1992-01643; CR-1992-01752; CR-1993-00401; CR-1993-00760; CR-1993-01271; CR-1993-02236; CR-1993-02269; CR-1993-02390; CR-1994-00099; CR-1994-00622; CR-1994-01161; CR-1994-01187; CR-1994-03093; CR-1995-00017; CR-1995-00498; CR-1995-00840; CR-1995-01138; CR-1995-01796; CR-1995-02615; CR-1995-03720; CR-1996-00074; CR-1996-01197; CR-1996-01455; CR-1996-03599; CR-1996-03600; CR-1997-00865; CR-1997-01077; CR-1997-01234; CR-1997-01357; CR-1997-01413; CR-1997-02497; CR-1997-02755; CR-1997-03912; CR-1998-01087; CR-1998-01385; CR-1998-02541; CR-1998-03601; CR-1998-03687; CR-1998-03688; CR-1998-03729; CR-1999-00313; CR-1999-01451; CR-1999-03824; CR-2000-00050; CR-2000-00675; CR-2000-00713; CR-2000-00976; CR-2000-01061; CR-2000-02360; CR-2000-02361; CR-2000-03357; CR-2000-03770; CR-2000-03771; CR-2000-03772; CR-2000-03773; CR-2000-04899; CR-2001-00727; CR-2001-02141; CR-2001-02212; CR-2001-02433; CR-2001-02549; CR-2002-00529; CR-2002-01049; CR-2002-01505; CR-2002-02668; CR-2002-03247; CR-2002-03691; CR-2003-00314; CR-2003-01216; CR-2003-02167; CR-2004-00112; CR-2004-04836; LR-2005-00006; CR-2005-04915; CR-2005-04916; CR-2006-02355; CR-2006-03370; CR-2006-04515; CR-2006-04975; CR-2006-05242; CR-2007-05057; CR-2007-05393; CR-2008-01851; CR-2008-05940; CR-2008-06296

Counsel for parties are advised that exhibits may be retrieved beginning May 6-July 6, Should you have questions regarding cases with exhibits, please call to verify exhibit information with the Special Services Division, at 505-841-6717, from 8 a.m.-4:30p.m., Monday-Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Professionalism Tip

With respect to my clients:

I will be courteous to and considerate of my client at all times.

New Mexico Workers' Compensation Administration

Request for Comments

The Director of the Workers' Compensation Administration (WCA), Darin A. Childers, is considering the reappointment of Judge Anthony "Tony" Couture to a five-year term pursuant to NMSA 1978, Section 52-5-2 (2004). Judge Couture's term expires on August 26. Anyone wishing to submit written comments concerning Judge Couture's performance may do so until 5 p.m. on May 31. All written comments submitted per this notice shall remain confidential. Comments may be addressed to WCA Director Darin A. Childers, PO Box 27198, Albuquerque, New Mexico 87125-7198, or emailed in care of Sabrina Bludworth, Sabrina.Bluworth@state.nm.us.

State Bar News

Attorney Support Groups

- 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#.
- May 21, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

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

Appellate Practice Section

Luncheon with Judge Gallegos

Join the Appellate Practice Section for a brown bag lunch at noon, May 18, at the State Bar Center with guest Judge Daniel Gallegos of the New Mexico Court of Appeals. The lunch is informal and is intended to create an opportunity for appellate practitioners to learn more about the work of the Court. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. to Carmela Starace at cstarace@icloud.com.

Board of Bar Commissioners

Risk Management Advisory Board

The president of the State Bar of New Mexico is required to appoint one attorney to the Risk Management Advisory Board for a four-year term. The appointee is requested to attend the Risk Management Advisory Board meetings. A summary of the duties of the advisory board, pursuant to §15-7-5 NMSA 1978, are to review: specifications for all insurance policies to be purchased by the risk management division; professional service and consulting contracts or agreements to be entered into by the division; insurance companies and agents to submit proposals when insurance is to be purchased by negotiation; rules and regulations to be promulgated by the division; certificates of coverage to be issued by the division; and investments made by the division. Members who want to serve on the board should send a letter of interest and brief résumé by June 1 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Rocky Mountain Mineral Law Foundation Board

The president of the State Bar is required to appoint one attorney to the Rocky Mountain Mineral Law Foundation Board for a three-year term. The appointee is expected to attend the Annual Trustees Meeting and the Annual Institute, make annual reports to the appropriate officers of their respective organizations, actively assist the Foundation on its programs and publications and promote the programs, publications and objectives of the Foundation. Members who want to serve on the board should send a letter of interest and brief résumé by July 2 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

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.

Notice of Closure

Due to a planned UNM data center outage, the UNM Law Library will be closed to the public Saturday, May 26-28. For more information on Law Library services and hours, please visit our website, lawlibrary.unm.edu or call 505-277-6236.

UNM Law Scholarship Classic presented by U.S. Eagle

Join the UNMSOL and other members of the law school community at 8 a.m., June 8, at the UNM Championship Golf Course to play a part in sustaining over $50,000 in life-changing scholarships for law students. Don't delay! The tournament sells out every year. Register at https://goto.unm.edu/golf.

Utton Center

2018 UNM Water Conference

2018 UNM Water Confernce presents "New Mexico Water: What Our Next Leaders Need to Know" on Thursday , May 17, at 7:30 a.m.-4:30 p.m. This event is being hosted by the Utton Center and the UNM Center for Water & The Environment. Registration will include lunch and parking. Late registration (after April 29): General $50, full time students $20. See program and register online at: http://cwe.unm.edu/outreach-and-education/2018-water-conference.html. This program has been approved by the CLE for 5.5 G CLE credits. For more information, contact Yolanda at 505-277-3222.

Other Bars

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.

In the Supreme Court of the State of New Mexico

Law Day Recognition

Law Day 2018

Law Day began 60 years ago, with a proclamation from President Eisenhower. That first proclamation eloquently set forth the reasons why we, as a free people, celebrate our heritage of liberty under law.

President Eisenhower noted that it was "fitting that the people of this nation should remember with pride and vigilantly guard the great heritage of liberty, justice, and equality under law that our forefathers bequeathed to us." Further, he said that it is "our moral and civic obligation as free [people] and as Americans to preserve and strengthen that great heritage."

In celebrating Law Day this year, let us dedicate ourselves to the great values protected and preserved in our Constitution.

And, at the same time, let us recognize that democracy is not static, that we must always work to improve and perfect it. Let us seek to draw ever closer to the ideal hand carved into the woodwork above the bench of the Supreme Court of New Mexico: "Dedicated to the Administration of Equal Justice Under Law."

Let us resolve that Law Day be an opportunity for all of us, in government and the private sector, to examine our efforts to make equal justice a reality, and to work together to reach that goal.

For more than 100 years, America's charitable institutions and foundations, its lawyers and its courts, and countless others have worked to bring equal justice to as many people as possible.

Law Day 2018 is an opportune time to recognize the work of those who try to make courts accessible and justice equal:

Legal services organizations who provide legal services to those unable to afford them;

Pro Bono Publico programs under which private lawyers accept worthy cases at no fee;

Lawyer referral programs that help people find appropriate legal services;

Court programs designed to inform the public about laws and legal procedures, provide interpreters for those who need them, and generally make courts accessible.

We salute these efforts, but let us offer greater support to those who work daily to provide legal services to those who most need them. Let us dedicate ourselves to improving our courts and our justice system, so that we will truly have "justice for all."

NOW, THEREFORE, I, Judith K. Nakamura, Chief Justice of the Supreme Court of New Mexico, do hereby recognize Tuesday, May 1, 2018, as Law Day, and I urge the legal professionals of New Mexico to recognize and participate in the observance of this the designated day.

DONE in Santa Fe, New Mexico, this 23rd day of April, 2018.

Judith K. Nakamura, Chief Justice

Report by Disciplinary Counsel
Disciplinary Quarterly Report

Reporting Period: January 1, 2018 – March 31, 2018

Final Decisions

Final Decisions of the NM Supreme Court 3

Matter of Eric Morrow, Esq., Disciplinary No. 03-2017-755. The New Mexico Supreme Court issued an Order on January 2, 2018 suspending Respondent from the practice of law for one (1) year for failure to communicate, general incompetence, general neglect, and a conflict of interest resulting in actions adverse to the client's interest. The Court deferred the suspension upon the following conditions: Respondent will be under supervision by a licensed New Mexico attorney throughout the probation period, must complete 3 hours of continuing legal education in estate planning matters and 3 hours in domestic relation matters, and pay costs to the Disciplinary Board.

Matter of Yvonne K. Quintana, Esq., Disciplinary No. 07-2017-762. The New Mexico Supreme Court issued an Order on January 25, 2018 accepting a conditional agreement and suspending Respondent from the practice of law for one (1) year for failing to protect the interests of a client. The Court deferred the suspension upon the following conditions: Respondent must: (a) serve a two (2) year supervised probationary period; (b) take two (2) law management CLEs; and (c) pay costs to the Disciplinary Board.

Matter of Bryan J. Hess, Disciplinary No. 07-2017-765. The New Mexico Supreme Court issued an Order on February 16, 2018 indefinitely suspending Respondent from the practice of law for a period of no less than two (2) years for failure to communicate, due diligence, and failure to cooperate with the Disciplinary Board. Respondent was also ordered to reimburse client protection fund on any claims and pay costs to the Disciplinary Board.

Summary Suspensions

Total number of attorneys summarily suspended.....0

Administrative Suspensions

Total number of attorneys administratively suspended.....0

Disability Inactive Status

Total number of attorneys placed on disability inactive status.....0

Charges Filed

Total number of attorneys that had charges filed against them 6

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to represent a client diligently; failing to communicate with a client; making false statements of fact to a tribunal; knowingly offering false evidence; falsifying evidence; knowingly making false statements of material fact in a disciplinary proceeding; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to represent a client diligently; charging an unreasonable fee; failing to communicate to the client in writing the basis or rate of the fee; filing to hold unearned client funds in a separate trust account; failing to expedite litigation; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to represent a client diligently; failing to communicate with a client; failing to expedite litigation; failing to comply with a court order; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to act with reasonableness and competence in representing a client; filing a claim the lawyer knew to be without merit; failing to make reasonable efforts to expedite litigation consistent with the interests of the client; knowingly disobeying an obligation under the rules of the tribunal; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to ascertain and abide by the client's objective regarding representation; failing to act with reasonable diligence and promptness in representing a client; failing to reasonably communicate with a client; knowingly making a false statement of material fact in connection with a disciplinary matter; engaging in conduct involving dishonesty, fraud, deceit and misrepresentation; and engaging in conduct prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to represent the client diligently; failing to expedite litigation; knowingly making false statements of material facts in a disciplinary proceeding; committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer; engaging in conduct involving fraud in attempting to obtain a witness' false testimony; and engaging in conduct that is prejudicial to the administration of justice.

Petition for Injunctive Relief Filed

Petitions for injunctive relief filed…….0

Petitions for Reciprocal Discipline Filed

Petitions for reciprocal discipline filed 0

Reinstatement from Probation

Petitions for reinstatement filed 0

Formal Reprimands

Total number of attorneys formally reprimanded 1

Matter of Shannon G. Pettus, Esq. (Disciplinary No. 07-2017-766) a Formal Reprimand was issued at the Disciplinary Board meeting of March 16, 2018, for the violation of Rule 16-101, failing to provide competent representation to a client; Rule 16-103, failing to represent a client diligently; Rule 16-302, failing to expedite litigation; and Rule 16-804(D), engaging in conduct prejudicial to the administration of justice. The Formal Reprimand was published in the State Bar Bulletin issued March 28, 2018.

Informal Admonitions

Total number of attorneys admonished 3

An attorney was informally admonished for failing to ensure an orderly termination of representation and conduct prejudicial to the administration of justice in violation of Rules 16-116(D) and 16-804(D) of the Rules of Professional Conduct.

An attorney was informally admonished for failing to hold the clients' property separate from their own property in violation of

Rule 16-115 of the Rules of Professional Conduct.

An attorney was informally admonished for failing to provide competent representation to a client, failing to represent a client diligently, failing to keep the client reasonably informed about the status of the matter, promptly comply with reasonable requests for information, and failing to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, and knowingly fail to respond to a lawful demand for information from the disciplinary authority in violation of Rules 16-101, 16-103, 16-104(A)(3), 16-104(A)(4) and 16-801 (B) of the Rules of Professional Conduct.

Letters of Caution

Total number of attorneys cautioned ...13

Attorneys were cautioned for the following conduct: (1) general misrepresentation to client; (2) contact with officials; (3) failure to communicate (two letter of caution issued); (4) bank overdraft (2 letters of caution issued); (5) overreaching excessive fees; (6) comments regarding facts; (7) failure to protect interest of client; (8) general misrepresentation to court (two letters of caution issued); (9) commercial transaction; and (10) harassment.

Complaints Received

Allegations	**No. of Complaints**
Trust Account Violations	4
Conflict of Interest	6
Neglect and/or Incompetence	76
Misrepresentation or Fraud	25
Relationship with Client or Court	25
Fees	8
Improper Communications	8
Criminal Activity	0
Personal Behavior	6
Other	14
Total number of complaints received	172

In the Supreme Court of the State of New Mexico

Juror Appreciation Week Recognition

May 1 - 7, 2018

WHEREAS, the right to a trial by jury is one of the core values of American citizenship;

WHEREAS, the obligation and privilege to serve as a juror are as fundamental to our democracy as the right to vote;

WHEREAS, our courts depend upon citizens to serve as jurors;

WHEREAS, service by citizens as jurors is indispensable to the judicial system;

WHEREAS, all citizens are encouraged to respond when summoned for jury service;

WHEREAS, a continuing and imperative goal for the courts, the bar, and the broader community is to ensure that jury selection and jury service are fair, effective, and not unduly burdensome on anyone; and

WHEREAS, one of the most significant actions a court system can take is to show appreciation for the jury system and for the tens of thousands of citizens who annually give their time and talents to serve on juries.

BE IT RESOLVED that the New Mexico State Courts are committed to the following goals:

- educating the public about jury duty and the importance of jury service;
- applauding the efforts of jurors who fulfill their civic duty;
- ensuring that the responsibility of jury service is shared fairly by supporting employees who are called upon to serve as jurors;
- ensuring that the responsibility of jury service is shared fairly among all citizens and that a fair cross section of the community is called for jury service including this State's non-English speaking population;
- ensuring that all jurors are treated with respect and that their service is not unduly burdensome;
- providing jurors with tools that will assist their decision making; and
- continuing to improve the jury system by encouraging productive dialogue between jurors and court officials.

NOW, THEREFORE, I, Judith K. Nakamura, Chief Justice of the Supreme Court of New Mexico, do hereby recognize the week of May 1 - May 7, 2017, as Juror Appreciation Week in New Mexico and encourage all state courts in New Mexico to support the celebration of this week.

DONE in Santa Fe, New Mexico, this 23rd day of April, 2018.

Judith K. Nakamura, Chief Justice

Legal Education

May

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

22 **Introduction to New Mexico's Uniform Directed Trust Act**
1.0 G
Webcast/Live Seminar, Albuquerque
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)**
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Center for Legal Education of NMSBF
www.nmbar.org

24 **Complying with the Disciplinary Board Rule 17-204**
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Center for Legal Education of NMSBF
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30 **Basics of Cyber-Attack Liability and Protecting Clients**
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Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Professionalism for the Ethical Lawyer**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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1 **Choice of Entity for Service Businesses**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **2018 Ethics in Litigation Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2018 Ethics in Litigation Update, Part 2**
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Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

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13 **Closely Held Company Merger & Acquisitions, Part 2**
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15 **Practice Management Skills for Success**
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Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethics and Email**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Director and Officer Liability**
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Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Holding Business Interests in Trusts**
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Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Complying with the Disciplinary Board Rule 17-204**
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Webcast/Live Seminar, Albuquerque
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www.nmbar.org

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22 **Effective Communications with Clients, Colleagues and Staff**
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Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Classes of Stock: Structuring Voting and Non-voting Trusts**
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Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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27 **Roadmap/Basics of Real Estate Finance, Part 2**
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Center for Legal Education of NMSBF
www.nmbar.org

28 **Social Media as Investigative Research and Evidence**
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29 **Complying with the Disciplinary Board Rule 17-204**
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29 **The Ethics of Social Media Research**
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A-1-CA-36851	Tahiti Three LLC v. E Sandoval	Dismiss	04/17/2018
A-1-CA-35495	BAC Home Loans v. M Cruz	Reverse/Remand	04/18/2018
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From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-013
No. S-1-SC-35477 (filed February 8, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
NOE TORRES,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
Drew D. Tatum, District Judge

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Opinion

Charles W. Daniels, Justice

{1} Defendant Noe Torres appeals his convictions of multiple offenses arising from a shooting into a home that missed the intended victim but resulted in the killing of a young boy. Among other questions he raises are several issues regarding the scope of constitutional double jeopardy protections against multiple punishments for the same offense. With regard to those double jeopardy issues, we hold that:

(1) Conviction and punishment for both attempted murder of an intended victim and a resulting murder of a different but unintended victim when the two crimes causing harm to the separate victims arise from the same act does not violate the double jeopardy clause;

(2) The double jeopardy clause does protect against multiple punishments for causing death or great bodily harm to a victim by shooting at a dwelling and for first-degree murder of the same victim when the same shooting caused the great bodily harm and the resulting death; and

(3) The double jeopardy clause also protects against multiple conspiracy convictions for entering into a single criminal conspiracy with objectives to commit more than one criminal offense.

{2} We reject Defendant's other claims relating to alleged trial errors.

I. BACKGROUND

{3} In the early hours of September 15, 2005, nine shots were fired through a bedroom window of an apartment in Clovis, killing ten-year-old Carlos Perez. Carlos had been sleeping in the bedroom he shared with his older brother, the intended victim, seventeen-year-old Ruben Perez.

{4} That night there were two distinct groups of actors involved in the shooting: one group in a Suburban and the other in a Camry. The two groups converged at the apartment complex where the shooting took place. The Suburban group included Orlando Salas, Demetrio Salas, David Griego, and Melissa Sanchez. The Camry group included Defendant, Edward Salas, Krystal Anson, and Ashley Garcia.

{5} The day before the shooting, an altercation between Orlando Salas and Ruben Perez took place at their high school. Later that night, in the early hours of September 15, Orlando and his older brother Demetrio picked up two friends, Melissa Sanchez and David Griego, in the Salas's blue and white Suburban. They pulled into an alleyway near the Gatewood Apartments where Ruben lived. Orlando and Demetrio said they wanted to get that "sewer rat," referring to Ruben.

{6} Demetrio then drove to the house of a friend, Eric Gutierrez, that was near the Gatewood Apartments and dropped off Melissa and Orlando. Demetrio said he and David were "going to go do a mission" and left. About five minutes later Demetrio and David returned to Eric's house. Demetrio was described as "on an adrenaline rush" and holding a gun. Demetrio said, "We just went and blasted nine rounds into that sewer rat's house, pow, pow, pow, pow." Demetrio told Melissa not to touch him because he had gunpowder residue on him. Eric turned on his police scanner, and they heard that a child had been shot and that police were looking for a blue and white Suburban. Eric heard someone say, "Oh we got the wrong . . . guy."

{7} On September 14, 2005, Defendant was with Krystal Anson, Ashley Garcia, and Edward Salas, the older brother of Demetrio and Orlando. Later, in the early hours of September 15, Defendant, Krystal, Ashley, and Edward drove to the Gatewood Apartments in Krystal's white Camry. They parked the Camry on the street near the apartments. Defendant and Edward got out and ordered Krystal and Ashley to stay in the car.

{8} The Salas Suburban was parked down the street from the Camry. Two people got out of the Suburban and met Defendant and Edward at the apartment complex. Defendant, Edward, and the two from the Suburban shook hands and then disappeared from the sight of the Camry occupants.

{9} Krystal and Ashley got out of the Camry and walked to a nearby park. The girls were talking and smoking cigarettes at the park when they heard gunshots and ran back to the Camry. Defendant and Edward were also running to the Camry. When Defendant got to the car he was described as excited and smelling like "burned matches." Defendant got into the driver's seat of the Camry, Edward got into the front passenger seat, the girls got into the back seat, and they "took off." When Edward received a phone call, Defendant turned up the radio volume. Krystal heard Edward say to Defendant, "We didn't get him. We got the little boy," and then heard Defendant reply, "Are you sure it was the little boy?"

{10} The next day, Defendant went to the house of a girl he was dating. They packed bags and hurriedly left for Mexico. Two days after the murder, police obtained an arrest warrant for Defendant. Defendant was arrested more than six years later in Chihuahua, Mexico, and after another six months was brought back to New Mexico for trial.

{11} At Defendant's March 2015 trial, a crime scene expert testified that a shooter fired nine rounds into the bedroom win-

dow of the Perez residence and estimated that the shooter's position was two to three feet from the window. Additionally, a ballistics expert testified that the smell of gunpowder is similar to the smell of burned matches.

{12} The jury found Defendant guilty of shooting at a dwelling resulting in death or great bodily harm to Carlos, first-degree murder of Carlos, attempted first-degree murder of Ruben, conspiracy to commit first-degree murder, conspiracy to shoot at a dwelling, transportation of a firearm by a felon, and intimidation of a witness. At sentencing, the district court found Defendant to be a habitual offender and increased his sentence by three years. Defendant was sentenced to a total penitentiary term of life imprisonment plus thirty-one and one-half years.

{13} Defendant appealed his convictions to this Court. *See* N.M. Const. art VI, § 2 ("Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court."). He challenges his convictions on four grounds: (1) several of the convictions violated constitutional protections against double jeopardy, (2) the convictions were not supported by sufficient evidence, (3) the district court erred in not allowing him to cross-examine a witness regarding a prior bad act, and (4) his constitutional rights were violated when the district court did not allow him to attend sidebar conferences with his counsel and because he was shackled to the table during trial. Defendant also contends that a time-barred prior felony was unlawfully used to impose a habitual offender sentence enhancement.

II. DISCUSSION

A. Double Jeopardy Challenges

{14} We first address Defendant's arguments that the following combinations of convictions constitute impermissible double jeopardy: (1) first-degree murder of Carlos and shooting at a dwelling resulting in death or great bodily harm to Carlos, (2) first-degree murder of Carlos and attempted first-degree murder of Ruben, and (3) conspiracy to commit first-degree murder and conspiracy to commit shooting at a dwelling.

{15} The double jeopardy protections of the United States Constitution and the New Mexico Constitution guarantee that a state may not compel a person to be "twice put in jeopardy" for the same criminal offense. U.S. Const. amend. V; *see* N.M. Const. art. II, § 15; *Benton v. Maryland*, 395 U.S. 784, 787, 793-94 (1969) (holding that the Fourteenth Amendment secures to defendants in state prosecutions the protections of the Double Jeopardy Clause of the Fifth Amendment, overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)). Double jeopardy may result from (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." *State v. Gallegos*, 2011-NMSC-027, ¶ 30, 149 N.M. 704, 254 P.3d 655 (internal quotation marks and citation omitted) (explaining that both the state and federal constitutions provide these three levels of protection).

{16} As to the third of those categories, there are two ways in which double jeopardy protections can be violated by multiple punishments. *State v. Bernal*, 2006-NMSC-050, ¶ 7, 140 N.M. 644, 146 P.3d 289. One is where a defendant suffers multiple punishments under the same statute for the same conduct, which presents a unit-of-prosecution issue. *Id.* The other is where a defendant is convicted under different statutes but the same criminal conduct is the basis underlying the multiple charges. *Id.* ¶¶ 7, 10. This latter category, termed a double-description violation, *id.*, is relevant to the issues we address in this case.

{17} A double jeopardy challenge presents a question of constitutional law, which we review de novo. *Gallegos*, 2011-NMSC-027, ¶ 51.

1. The Double Jeopardy Clause Prohibits Multiple Punishments for Both Causing Death or Great Bodily Harm by Shooting into a Dwelling and First-Degree Murder for the Same Death

{18} In reviewing a double-description double jeopardy challenge, where a defendant's conduct violates more than one statute, we must first determine whether the defendant's conduct was unitary, requiring an analysis of whether or not a defendant's acts are separated by sufficient "indicia of distinctness." *State v. DeGraff*, 2006-NMSC-011, ¶¶ 26-27, 139 N.M. 211, 131 P.3d 61. If the conduct is not unitary, then there is no double jeopardy violation. *State v. Silvas*, 2015-NMSC-006, ¶ 9, 343 P.3d 616. If the conduct is unitary, we must determine whether the Legislature intended multiple punishments for the unitary action. *Id.*

{19} When determining whether a defendant's conduct is unitary "we have looked for an identifiable point at which one of the charged crimes had been completed and the other not yet committed. We have also looked for an event that intervened between the initial use of force and the acts that caused death." *DeGraff*, 2006-NMSC-011, ¶ 27 (citations omitted).

{20} The State concedes that Defendant's conduct was unitary with respect to the crimes of first-degree murder and shooting at a dwelling. Defendant's convictions arose from only one act, shooting through the Perez window. There was no identifiable point in time or intervening event between the completion of the shooting and the act causing the killing; they were one and the same. *See State v. Montoya*, 2013-NMSC-020, ¶ 30, 306 P.3d 426 ("[The d]efendant's act of shooting the driver of the [vehicle] was the common factual basis for both the shooting into the motor vehicle and the voluntary manslaughter convictions, and his culpable conduct was therefore 'unitary.'" (citation omitted)); *State v. Gutierrez*, 2011-NMSC-024, ¶¶ 2, 54, 150 N.M. 232, 258 P.3d 1024 (holding that the defendant's conduct underlying the convictions of both armed robbery and unlawful taking of a motor vehicle was unitary because both convictions were based on the conduct of stealing a car).

{21} When unitary conduct is the basis for multiple convictions, we must attempt to determine whether "the Legislature[] inten[ded] to punish the crimes separately." *State v. Swick*, 2012-NMSC-018, ¶ 11, 279 P.3d 747. "In analyzing legislative intent, we first look to the language of the statute itself." *Id.* If the Legislature clearly authorized multiple punishments the analysis is over, and there is no double jeopardy violation. *Gutierrez*, 2011-NMSC-024, ¶ 50. If the statutory language does not explicitly allow for multiple punishments, we apply canons of construction to determine legislative intent. *Swafford v. State*, 1991-NMSC-043, ¶¶ 12-13, 112 N.M. 3, 810 P.2d 1223 (discussing various canons of construction to determine legislative intent in a double jeopardy analysis, looking to the language, structure, and legislative history of the statutes and the social evils sought to be addressed by the statutes). If "the legislative intent remains ambiguous, the rule of lenity requires us to presume that the Legislature did not intend multiple punishments for the same conduct." *Swick*, 2012-NMSC-018, ¶ 13.

{22} The statute criminalizing shooting at a dwelling and causing great bodily harm provides, in pertinent part, "Whoever commits shooting at a dwelling or occupied building that results in great bodily harm to another person is guilty

of a second degree felony." NMSA 1978, § 30-3-8(A) (1993); *see State v. Varela*, 1999-NMSC-045, ¶ 14, 128 N.M. 454, 993 P.2d 1280 (recognizing that the statutory element of great bodily harm could be established by proof of a death resulting from shooting into a dwelling). The murder statute provides, in pertinent part, "Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . by any kind of willful, deliberate and premeditated killing." NMSA 1978, § 30-2-1(A)(1) (1994).

{23} Because the statutes at issue in this case do not explicitly address allowance for multiple punishments when the conduct is unitary, we must apply canons of construction to try to ascertain the Legislature's intent.

{24} One of the canons of construction is what has been referred to in our jurisprudence as a modified *Blockburger* test, which originated with *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (announcing a simple test to determine whether there are single or multiple offenses: whether each criminal statute "requires proof of a fact which the other does not"). *See Montoya*, 2013-NMSC-020, ¶ 31 (observing that "[a]lthough the *Blockburger* test has the virtue of simplicity, it has been justly criticized as a mechanical test that compares statutory elements and is only sometimes related to substantive sameness" (internal quotation marks and citation omitted)). A literal application of the original *Blockburger* test would result in a determination that the multiple convictions in this case did not constitute double jeopardy because causing great bodily harm or death by shooting at a dwelling does not require the killing of a human being while the murder statute does not require shooting at a dwelling. But we have long rejected such a mechanical application. *See, e.g.*, *State v. Santillanes*, 2001-NMSC-018, ¶¶ 5, 24, 38, 130 N.M. 464, 27 P.3d 456 (recognizing that one death could result in only one homicide conviction under New Mexico law and holding that a defendant could not be punished separately for vehicular homicide and child abuse resulting in death, despite the fact that a mechanical application of the original *Blockburger* elements test would permit double punishment).

{25} In New Mexico, we now apply a modified *Blockburger* test to not only the defining statutes in the abstract but also to the State's theory of the particular case, because our law does not permit an application of *Blockburger* that is "so mechanical that it is enough for two statutes to have different elements." *Swick*, 2012-NMSC-018, ¶ 21 (explaining and applying the modified *Blockburger* test).

{26} In *Montoya* we held that convictions for causing great bodily harm to a person by shooting at a motor vehicle and the resulting homicide of the same person constituted double jeopardy when both convictions were based on the unitary conduct of shooting at a person in a motor vehicle. *See* 2013-NMSC-020, ¶ 54. While *Montoya* specifically addressed the shooting at a motor vehicle provision rather than the shooting at a dwelling provision at issue in the present case, these analogous subsections of the same statute, § 30-3-8, create similar offenses that address the same evil. Like the crime of shooting at a motor vehicle, the crime of shooting at a dwelling was enacted to protect against death and personal injury. *See Montoya*, 2013-NMSC-020, ¶¶ 44-45, 52. As we have recognized, the Legislature also enacted the murder statute to deter intentional infliction of serious personal injury. *See Swick*, 2012-NMSC-018, ¶ 29 ("[T]he attempted murder statute concerns itself with the intent to harm fatally.").

{27} This case is conceptually indistinguishable from *Montoya*. Because the crime of causing great bodily harm or death by shooting at a dwelling and the crime of murder are directed at punishing the same social evil, causing death or bodily harm to a person, we conclude for the reasons we set out in *Montoya* that the Legislature did not intend to subject Defendant to multiple punishments for the killing of a single victim. *See Montoya*, 2013-NMSC-020, ¶ 54; *see also Swick*, 2012-NMSC-018, ¶ 29 (holding that because both the attempted murder and the aggravated battery statutes "address the social evil of harmful attacks on a person's physical safety and integrity," convictions of both violate double jeopardy). We therefore hold that imposition of multiple punishments for the single death of Carlos Perez would constitute double jeopardy.

{28} When double jeopardy protections require one of two otherwise valid convictions to be vacated, we vacate the conviction carrying the shorter sentence. *See Montoya*, 2013-NMSC-020, ¶¶ 55-56 (avoiding violation of double jeopardy protections by vacating the conviction carrying the shorter sentence); *Swick*, 2012-NMSC-018, ¶ 31 (same). Because first-degree murder carries a life sentence, *see* NMSA 1978, § 31-18-14 (2009), and shooting at a dwelling with resulting death or great bodily harm carries a sentence of fifteen years imprisonment, *see* NMSA 1978, § 31-18-15(A)(4) (2007, amended 2016), we vacate Defendant's conviction for shooting at a dwelling.

2. Defendant's First-Degree-Murder and Attempted-First-Degree-Murder Convictions Related to Different Victims Did Not Constitute Double Jeopardy

{29} Defendant was convicted for murdering Carlos Perez and for attempting to murder Ruben Perez. He argues that these convictions of murder and attempted murder constitute double jeopardy because the conviction for murdering Carlos was based on "transferred intent." Defendant essentially contends that any intent applies to the conviction for murdering Carlos and cannot be used again to convict him for attempting to murder Ruben. We agree with the State that there is no double jeopardy violation because the number of murder convictions is dependent on the number of victims: Carlos was a victim of murder, and Ruben was a victim of attempted murder.

{30} "The doctrine of transferred intent is a legal fiction that is used to hold a defendant criminally liable to the full extent of his or her criminal culpability . . . where a defendant, while intending to kill one person, accidentally kills an innocent bystander or another unintended victim." *State v. Fekete*, 1995-NMSC-049, ¶ 21, 120 N.M. 290, 901 P.2d 708 (citation omitted). "Contrary to what its name implies, the transferred intent doctrine does not refer to any actual intent that is capable of being used up." *People v. Bland*, 48 P.3d 1107, 1113 (Cal. 2002) (internal quotation marks and citation omitted). The New Mexico murder statute incorporates the doctrine of transferred intent by not requiring proof of intent to kill a specific person. *See* § 30-2-1(A); *Fekete*, 1995-NMSC-049, ¶ 23.

{31} In *State v. Gillette*, the Court of Appeals upheld three counts of attempted first-degree murder, two counts based on a theory of transferred intent and one count for the attempt on the intended victim. *See* 1985-NMCA-037, ¶¶ 38, 47-48, 102 N.M. 695, 699 P.2d 626. In "a bizarre and tangled scenario," the defendant attempted to kill the intended victim by anonymously leaving a poisoned soft drink for the victim at her workplace. *Id.* ¶¶ 2, 8. The intended victim and her two friends drank part of

the poisoned drink. *Id.* ¶ 8. None of the three victims suffered any injury. *Id.* ¶ 46. The Court of Appeals held that a victim need not be injured for a defendant to be guilty of attempted murder and, because the defendant intended to kill the victim, that the "defendant's felonious intent to kill is transferred to others who foreseeably may also ingest the poison." *Id.* ¶¶ 45, 47.

{32} *Gillette* is instructive. If one of the friends in *Gillette* had died, the defendant could have been convicted on one count of first-degree murder, predicated on transferred intent, and two counts of attempted murder for the victims who survived. Based on the reasoning in *Gillette*, a defendant can be convicted of attempted murder for the attempt to kill the intended victim and convicted of murder of additional victims who were actually killed, based on a theory of transferred intent.

{33} In reviewing a unit-of-prosecution double jeopardy challenge, where an accused is convicted of multiple violations of a single statute, "the only basis for dismissal is proof that a suspect is charged with more counts of the same statutory crime than is statutorily authorized." *Bernal*, 2006-NMSC-050, ¶ 13. "The unit-of-prosecution analysis is done in two steps. First, we review the statutory language for guidance on the unit of prosecution. If the statutory language spells out the unit of prosecution, then we follow the language, and the unit-of-prosecution inquiry is complete." *Id.* ¶ 14 (citation omitted). If the statute is not clear, we must "determine whether a defendant's acts are separated by sufficient 'indicia of distinctness' to justify multiple punishments under the same statute." *Id.* (citation omitted).

{34} Here we need not get past the first step in the unit-of-prosecution analysis because the murder statute is clear regarding the unit of prosecution. *See* § 30-2-1(A) ("Murder in the first degree is the killing of one human being by another . . . ."). The unit of prosecution under our murder statute depends on the number of victims, where one murder results in one murder charge and two murders result in two murder charges. *See id.* Because the unit of prosecution in the murder statute is clearly dependent on the number of victims, it follows that the Legislature intended the unit of prosecution for attempted murder to also depend on the number of victims targeted in the attempt. *See Bernal*, 2006-NMSC-050, ¶¶ 19, 31, 37 (looking to the robbery statute to determine the unit of prosecution for attempted robbery); *State v. Vega*, No. 33,363, dec. ¶ 60 (N.M. Sup. Ct. Jan. 9, 2014) (nonprecedential) (holding that the unit of prosecution for attempted first-degree murder is the same as that for murder). Because there were two victims in this case, the two convictions under Section 30-2-1(A)(1) for the crimes committed against each victim do not constitute multiple punishments for the same offense in violation of double jeopardy protections. Accordingly, we affirm Defendant's convictions of the attempted murder of Ruben Perez and the murder of Carlos Perez.

3. Multiple Convictions of Conspiracy to Commit First-Degree Murder and Conspiracy to Shoot at a Dwelling Based on a Single Conspiratorial Agreement Constitute Double Jeopardy

{35} Defendant was convicted of conspiracy to commit first-degree murder and conspiracy to shoot at a dwelling in an attempt to commit the murder. The district court merged these two conspiracy convictions by imposing one sentence for the two. Defendant argues that his multiple conspiracy convictions constitute double jeopardy because the State failed to prove two separate conspiracies and contends that the district court's merging of the sentences did not cure the double jeopardy violation. Defendant is correct.

{36} In *Gallegos*, 2011-NMSC-027, ¶¶ 1, 34, we addressed the problem of splitting a conspiratorial agreement into multiple charges of conspiracy based simply on the number of crimes contemplated in the conspiracy. We observed that "[w]here there is one agreement to commit two or more criminal acts, the perpetrators are guilty of a single conspiracy" and accordingly that "the number of agreements to break the law determines the number of criminal conspiracies subject to prosecution." *Id.* ¶ 34 (internal quotation marks and citation omitted).

{37} To avoid imposing multiple punishments for what in reality is often one criminal conspiratorial agreement with multiple objectives, we held in *Gallegos* that "[t]he Legislature established . . . a rebuttable presumption that multiple crimes are the object of only one, overarching, conspiratorial agreement subject to one, severe punishment set at the highest crime conspired to be committed." *Id.* ¶ 55. "[T]he state has an opportunity to overcome the Legislature's presumption of singularity, but doing so requires the state to carry a heavy burden." *Id.*

{38} In *Gallegos*, the defendant was convicted of three conspiracy charges: conspiracy to commit first-degree murder, conspiracy to commit aggravated arson, and conspiracy to commit kidnaping. *Id.* ¶ 27. All the conspiracy convictions arose from attempts by the defendant and several others to kill the victim. *Id.* ¶¶ 8-14, 57. The evidence that the crimes were committed in a relatively short period of time, were continuous, and were undisturbed by an intervening event strongly supported the conclusion that the defendant and his coconspirators formed only one overarching agreement rather than three separate agreements. *Id.* ¶ 60. Accordingly, we held that the state had established only a single conspiracy to kill. *Id.* ¶ 64.

{39} In the present case, the State presented no evidence to rebut the presumption that the agreement to murder Ruben Perez and the agreement to shoot at a dwelling to accomplish that goal were the objects contemplated by one conspiratorial crime. Accordingly, the State has conceded on appeal that Defendant should be convicted of one conspiracy, rather than two. We agree that the evidence supports the conclusion that there was only one conspiracy, the conspiracy to murder Ruben Perez by shooting into his bedroom.

{40} New Mexico law is also clear that a double jeopardy violation is not cured by merging multiple convictions for concurrent sentencing. *See id.* ¶ 64 ("[D]ouble jeopardy problems are not cured by the trial court imposing concurrent sentences for the multiple convictions . . . ." (internal quotation marks and citation omitted)). "[T]he appropriate remedy is to vacate [the d]efendant's redundant convictions with punishment imposed on the single remaining conspiracy at the level of the highest crime conspired to be committed." *Id.* (internal quotation marks and citation omitted). Accordingly, we vacate Defendant's conviction of conspiracy to shoot at a dwelling.

B. Sufficiency of the Evidence Challenges

{41} Defendant contends that his convictions are not supported by sufficient evidence. We address sufficiency of the evidence for the convictions that we have not already determined should be vacated on double jeopardy grounds.

{42} In reviewing for sufficiency of the evidence, we must determine "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable

doubt with respect to every element essential to a conviction." *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rinker v. State Corp. Comm'n*, 1973-NMSC-021, ¶ 5, 84 N.M. 626, 506 P.2d 783. "[W]e 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.

1. Sufficient Evidence Supports Defendant's Convictions of Attempted First-Degree Murder of Ruben Perez and First-Degree Murder of Carlos Perez

{43} We address Defendant's contention that there is insufficient evidence to prove he had the requisite mens rea for first-degree murder and attempted first-degree murder, either as a principal or as an accessory. The requisite mens rea for each of these crimes is deliberate intent to murder. *See* § 30-2-1(A)(1); NMSA 1978, § 30-28-1 (1963); UJI 14-201 NMRA; UJI 14-2801 NMRA. "A deliberate intention may be inferred from all of the facts and circumstances of the killing. The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action." UJI 14-201.

{44} "In New Mexico, [a] person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission . . . although he d[oes] not directly commit the crime . . . ." *State v. Carrasco*, 1997-NMSC-047, ¶ 6, 124 N.M. 64, 946 P.2d 1075 (internal quotation marks and citation omitted). A person who is an accessory to a crime is equally culpable and subject to the same punishment as the principal actor. *Id.* "The evidence of aiding and abetting may be as broad and varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs, or by any means sufficient to incite, encourage or instigate commission of the offense." *State v. Ochoa*, 1937-NMSC-051, ¶ 31, 41 N.M. 589, 72 P.2d 609. A defendant's "mere presence without some outward manifestation of approval is insufficient" to uphold a conviction on a theory of accessory liability. *State v. Salazar*, 1967-NMSC-187, ¶ 4, 78 N.M. 329, 431 P.2d 62. In addition to aiding and abetting, to be convicted of the crime the accessory must "share the criminal intent of the principal . . . ." *State v. Marquez*, 2010-NMCA-064, ¶¶ 9, 13, 148 N.M. 511, 238 P.3d 880 (stating that the requisite mens rea for homicide or great bodily injury by vehicle is conscious wrongdoing and that in order to prove accessory liability for this crime, "it would be necessary for the [s]tate to demonstrate that [a d]efendant encouraged and shared the intent of conscious wrongdoing with [the principal actor]").

{45} Defendant argues that his case is controlled by *State v. Vigil*, where we held that the defendant's first-degree murder conviction was not supported by substantial evidence. *See* 2010-NMSC-003, ¶¶ 1, 4, 147 N.M. 537, 226 P.3d 636. In *Vigil*, the jury found the defendant guilty of first-degree murder on a theory of accessory liability. *Id.* ¶ 1. The victim owed the defendant's cousin money, which precipitated an altercation between the defendant and the victim. *Id.* ¶ 6. Later that day, the victim and the defendant showed up in separate vehicles at the residence of the defendant's girlfriend. *Id.* ¶¶ 7-9. The defendant, angered that the victim was at his girlfriend's residence, got out of his vehicle in a rage and punched the victim twice through the open window of the victim's car. *Id.* ¶ 10. The victim shot the defendant and sped off. *Id.* ¶¶ 10-11. The defendant fell to the ground and remained there until he was taken to the hospital. *Id.* ¶ 10. As the victim was driving away, the defendant's cousin and two others appeared at the scene and fired shots into the victim's retreating vehicle, killing the victim. *Id.* ¶ 11. We held that there was insufficient evidence to uphold the defendant's conviction of first-degree murder under a theory of accessory liability. *Id.* ¶¶ 22-23. The defendant was incapacitated at the time the principal actor formed the requisite intent, and the defendant had not participated in planning the killing and did not help or encourage the principal in any way. *Id.* ¶¶ 19-21.

{46} In this case the record contains sufficient evidence to support a jury finding that Defendant had the deliberate intent to kill Ruben and that he helped in the planning of the crime. Defendant spent the day before the murder with Edward, who had a motive to kill Ruben. *See State v. Motes*, 1994-NMSC-115, ¶¶ 12, 14-15, 118 N.M. 727, 885 P.2d 648 (considering motive in assessing whether the defendant had the deliberate intent to kill). Defendant secured for himself and Edward a ride in the Camry to the apartment complex where Ruben lived where the two got out of the Camry, shook hands with those in the Suburban group in front of the apartment building, and disappeared from sight with the other two shortly before gunshots were heard. From this, a jury could reasonably infer that Defendant aided and abetted in the plan to kill Ruben.

{47} There also was sufficient evidence that Defendant actively participated in the actual attempt to kill Ruben. The lethal weapon was fired two to three feet from Ruben's bedroom window, and after the shots were fired Defendant returned to the Camry in an excited state, smelling like burned matches. From this evidence the jury could draw a reasoned inference that Defendant had been involved in the shooting, had been outside the bedroom window in very close physical proximity to the murder weapon, and had shared the deliberate intent to murder Ruben. *See State v. Griffin*, 1993-NMSC-071, ¶ 25, 116 N.M. 689, 866 P.2d 1156 (holding that evidence of the defendant shooting the victim at close range supported the jury's finding that the defendant had the deliberate intent to murder the victim); *see also State v. Treadway*, 2006-NMSC-008, ¶ 10, 139 N.M. 167, 130 P.3d 746 (same).

{48} Once in the Camry, Edward said to Defendant after receiving a phone call, "We didn't get him. We got the little boy." Defendant replied, "Are you sure it was the little boy?" The exchange between Edward and Defendant provides further support for the jury's finding that Defendant shared the deliberate intent to murder Ruben.

{49} Because there was sufficient evidence to support the jury's finding that Defendant had the requisite deliberate intent to kill required for his convictions of first-degree murder and attempted first-degree murder, we affirm those convictions.

2. Sufficient Evidence Supports Defendant's Conviction of Conspiracy to Commit First-Degree Murder

{50} Defendant also challenges the sufficiency of the evidence to support his conviction of conspiracy to commit first-degree murder. "Conspiracy consists of knowingly combining with another for the purpose of committing a felony." NMSA 1978, § 30-28-2 (1979). "An overt act is not required and the crime of conspiracy is complete when the felonious agreement is

reached." *State v. Lopez*, 2007-NMSC-049, ¶ 21, 142 N.M. 613, 168 P.3d 743 (internal quotation marks and citation omitted). "The jury may therefore infer the existence of an agreement based on the defendant's conduct and surrounding circumstances . . . ." *Gallegos*, 2011-NMSC-027, ¶ 45. "Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties. A formal agreement need not be proved; a mutually implied understanding is sufficient to establish the conspiracy." *State v. Dressel*, 1973-NMCA-113, ¶ 4, 85 N.M. 450, 513 P.2d 187 (citation omitted).

{51} There is sufficient evidence to support the jury's finding that Defendant conspired with others to commit murder. In this case, the evidence that supports Defendant's conviction of first-degree murder also supports the jury's finding that Defendant was part of a conspiracy to commit first-degree murder. Defendant was with Edward the day before the shooting, he secured a ride to the Gatewood Apartments for himself and Edward, they arrived at the apartment complex at the same time as the Suburban group, he shook hands with the persons from the Suburban group before shots were heard, he went to the shooting scene before the shots were fired, he ran back from the scene smelling like "burned matches" immediately after the shots were fired, and when Edward informed Defendant that they shot the wrong person, Defendant asked Edward if he was sure. From this evidence a reasonable, or reasoning, jury could find that Defendant was part of an agreement with one or more others to murder Ruben. *See State v. Flores*, 2010-NMSC-002, ¶¶ 2-3, 22, 147 N.M. 542, 226 P.3d 641.

3. Sufficient Evidence Supports Defendant's Conviction of Unlawful Transportation of a Firearm

{52} Defendant argues that there is insufficient evidence that he was in unlawful possession of a firearm in violation of NMSA 1978, Section 30-7-16 (2001). Defendant concedes that he was a felon at the time of the charged offenses but contends that there is insufficient evidence to prove he received or possessed a firearm.

{53} Defendant overlooks the fact that the statute also prohibits a felon from transporting a firearm. *See* § 30-7-16(A) ("It is unlawful for a felon to receive, *transport* or possess any firearm or destructive device in this state." (emphasis added)). Transportation of a firearm is a general intent crime and does not require proof of the felon's intent to violate the law for conviction. *State v. Dunsmore*, 1995-NMCA-012, ¶¶ 4, 6-7, 119 N.M. 431, 891 P.2d 572. A felon's knowing act of transporting a firearm is enough to violate the law. *Id.* ¶ 7.

{54} There is sufficient evidence that Defendant knowingly transported a firearm. Although Defendant's trial version of the day of the offenses varies greatly from the other witnesses' versions, he acknowledged in his trial testimony that on September 14, 2005, he was driving Edward around town and was aware that Edward had brought a gun into the car. Because of Defendant's admission alone, there is sufficient evidence for a jury to find that Defendant transported a firearm. *See Dunsmore*, 1995-NMCA-012, ¶ 8 (upholding a conviction for a felon unlawfully transporting a firearm when the defendant transported a person he knew to be in possession of a gun). Accordingly, we affirm Defendant's conviction for transporting a firearm.

C. The District Court's Disallowing Impeachment of a Witness Regarding a Prior Bad Act Is Not Grounds for Reversal

{55} Defendant argues that the trial court erred when it denied Defendant the opportunity to cross-examine a State's witness, Keith Farkas, regarding a prior bad act that was probative of the witness's character for truthfulness. The State contends that the district court did not commit error, and even assuming error, any error under the circumstances was harmless.

{56} Farkas had been a detective with the Clovis Police Department and conducted the crime scene investigation on the Camry and the Suburban. In 2006, Farkas was accused of stealing a work computer. Criminal charges were brought and later dropped, but because of the criminal charges he was dismissed from the Clovis Police Department. Defendant wanted to cross-examine Farkas regarding this alleged theft and argued that the evidence was admissible because it went to Farkas' credibility and trustworthiness. The State argued that the impeachment should be precluded for its lack of substantial probative value under the discretion afforded a trial court by Rule 11-403 NMRA, which provides, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." The district court excluded the evidence.

{57} Under Rule 11-608(B)(1) NMRA "A party may . . . inquire into particular instances of a witness's conduct on cross-examination . . . providing the conduct is probative of truthfulness or untruthfulness." *State v. Casillas*, 2009-NMCA-034, ¶ 43, 145 N.M. 783, 205 P.3d 830. "Questions concerning embezzlement, burglary, auto theft and larceny involve dishonesty, [a]re probative as to truthfulness and [a]re proper [for] cross-examination under Evidence Rule 608(b)." *State v. Wyman*, 1981-NMCA-087, ¶ 10, 96 N.M. 558, 632 P.2d 1196.

{58} While Rule 11-608 specifically allows the court to permit cross-examination on prior specific acts relating to a witness's character for truthfulness, the language in the rule is permissive, not mandatory. *See* Rule 11-608(B)(1) ("[T]he court *may*, on cross-examination, allow [specific instances of a witness's character for truthfulness] to be inquired into . . . ." (emphasis added)). Because the language in the rule is permissive, the district court did not abuse its discretion when it did not allow Defendant to cross-examine the witness regarding the specific prior dishonest act. *See Segura v. K-Mart Corp.*, 2003-NMCA-013, ¶ 28, 133 N.M. 192, 62 P.3d 283 (observing that under Rule 11-608, "even though such evidence may be relevant, its admissibility is left to the sound discretion of the trial court").

{59} On this record, there is no showing the district court abused the judicial discretion provided by either Rule 11-608 or 11-403. Farkas's credibility was not probative of any important issue in the case. Farkas testified only that the evidence collected from the vehicles, consisting of fingerprints, hair, and gunshot residue, produced no conclusive results as to the vehicles' occupants. His testimony provided very little, if any, incriminating evidence against Defendant. Defendant would not have gained anything by impeaching Farkas's character for truthfulness.

{60} Because the district court did not abuse its discretion and because Defendant was not prejudiced in any material respect by the district court's exclusion

of the minimally relevant impeachment evidence, the district court's ruling does not warrant reversal.

D. Shackling Defendant During Trial Was Not Fundamental Error

{61} We address Defendant's contention that he was denied a fair trial because he was "chained to the table" throughout his trial without a hearing to determine whether shackling was appropriate. Defendant neither objected to the shackling in the district court nor requested a hearing to consider whether shackling was justified.

{62} Because Defendant did not preserve this issue for appeal, we review for fundamental error. *State v. Johnson*, 2010-NMSC-016, ¶ 25, 148 N.M. 50, 229 P.3d 523 (holding that because the defendant did not object to the use of leg irons during trial, this Court reviewed the issue for fundamental error). Fundamental error "goes to the foundation or basis of a defendant's rights or . . . take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive" and "only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." *Cunningham*, 2000-NMSC-009, ¶ 13 (internal quotation marks and citations omitted).

{63} In *Johnson* we recognized that "'the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial[,]' including security concerns." *Johnson*, 2010-NMSC-016, ¶ 26 (alteration in original) (quoting *Deck v. Missouri*, 544 U.S. 622, 635 (2005)). But we pointed out that "where a defendant is restrained in a manner not visible to the jury, prejudice is not presumed." *Johnson*, 2010-NMSC-016, ¶ 28.

{64} In this case, there is nothing in the record that reflects that the shackles could be seen by the jury. There were only three instances when defense counsel even mentioned Defendant's shackles to the judge, and in none of those instances did defense counsel indicate that the shackles could be seen by the jury. First, defense counsel noted during a whispered sidebar conference that Defendant was shackled and could not attend. Second, after the jury was released for lunch, defense counsel asked if Defendant could be unshackled during the lunch break so he could make notes pertaining to afternoon witnesses. The judge denied this request, noting that Defendant's shackles did not prevent him from making notes. Third, defense counsel requested Defendant's shackles be removed before the jury was brought in one morning because Defendant would be the first to testify that day, and the judge granted this request. This last instance indicates that the district court actually took steps to ensure that the jury did not see Defendant in shackles, minimizing any risk of prejudice. As we concluded in analogous circumstances in *Johnson*, where there was no showing the jury had seen the defendant's shackles, we conclude that "the district court did not commit fundamental error by keeping [the d]efendant in shackles for the duration of the trial." *Id.* ¶ 29.

{65} Because there was no fundamental error in shackling Defendant in a manner not visible to the jury, we have no need to address the question whether Defendant's history of flight to avoid prosecution or any other particular considerations would have supported the court's exercise of discretion in ordering leg restraints during trial.

E. Defendant Was Not Denied a Fair Trial by the Court's Refusal to Permit Him to Join His Counsel at Sidebar Conferences

{66} Defendant argues that his shackling made it impossible for him to attend sidebar conferences during trial and suggests that this violated his constitutional right to counsel by preventing him from communicating with his lawyer. Defendant cites two United States Supreme Court cases in support of this argument, neither of which addresses the sidebar issue: *Gideon v. Wainright*, 372 U.S. 335, 339-40 (1963) (interpreting the Sixth Amendment to mean that "counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived."), and *Illinois v. Allen*, 397 U.S. 337, 344 (1970) (emphasizing that courts should refrain from binding and gagging defendants unless absolutely necessary to honor "one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel"). The district court held that because Defendant was represented by counsel and his counsel attended the sidebar conferences, Defendant did not have a right to join his counsel for the sidebars. We agree.

{67} Defendant was represented by his attorney at all sidebar conferences. *See United States v. McCoy*, 8 F.3d 495, 496-97 (7th Cir. 1993) (holding that the defendant's interests were adequately protected by his counsel's presence at the conference and that the defendant's "absence from the conferences did not detract from his defense or in any other way affect the fundamental fairness of his trial"). Defendant alleges no specific time when the shackles prevented him from communicating with counsel.

{68} No New Mexico or United States Supreme Court precedent establishes a defendant's right to join his counsel at a sidebar conference during trial. The United States Supreme Court has held that a defendant has a right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" and when the defendant's presence "is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder v. Massachusetts*, 291 U.S. 97, 105-08 (1934), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964); *see also Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) ("[A]n accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings."). While "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure," *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987), it is the defendant's burden to show the critical nature of his absence, *see id.* at 747.

{69} The only sidebar conference when defense counsel actually objected to Defendant's absence was called to address defense counsel's objection on foundational grounds to admission of a gun offered as an evidentiary exhibit. The judge deferred a ruling on the objection at the sidebar conference, the State then provided the necessary foundation in open court, and Defendant stipulated to the gun's admission after conferring with his attorney. Defendant has articulated no reason why his absence from this sidebar conference or any other adversely affected his ability to communicate with his counsel or to defend himself.

{70} We conclude that Defendant has failed to establish that his inability to join his counsel at routine sidebar conferences adversely affected his right to a fair trial or any other constitutional rights.

F. The District Court Erred in Enhancing Defendant's Sentence Pursuant to the Habitual Offender Statute When More Than Ten Years Had Elapsed Between Defendant's Discharge on the Earlier Offense and the Date of Actual Conviction of the Current Offense

{71} Defendant argues that his sentence should not have been enhanced pursuant to the habitual offender statute because more than ten years had elapsed between Defendant's discharge from probation for his prior felony conviction and the date of conviction in the current case. The State concedes that the district court erred in application of the habitual offender statute, NMSA 1978, § 31-18-17(A) (2003).

{72} The habitual offender statute defines "prior felony conviction" as "a conviction, when less than ten years have passed prior to the *instant felony conviction* since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later . . . ." Section 31-18-17(D)(1) (emphasis added). The habitual offender statute textually calculates felon status based on the date of the current felony conviction, not the date of the criminal offense. While questions may be raised about the policy considerations in allowing delays in conviction to change the sentence for a criminal offense, particularly in cases like this where Defendant has reduced his sentence through his time as a fugitive from justice, those are issues for the Legislature to consider. Because "[i]t is the particular domain of the legislature, as the voice of the people, to make public policy," changes in the scope of statutes is a subject for "legislative therapy, not judicial surgery." *State ex rel. N.M. Judicial Standards Comm'n v. Espinosa*, 2003-NMSC-017, ¶ 36, 134 N.M. 59, 73 P.3d 197 (Serna, J., specially concurring) (internal quotation marks and citations omitted).

{73} Looking at the relevant dates in this case, Defendant's probation for his prior felony expired on September 25, 2004, by a court's order of unsatisfactory discharge. The date of the conviction in this case was March 13, 2015. Because Defendant completed his probation for the prior felony conviction more than ten years before the date of conviction in the current case, we agree with the State's concession that the district court erred in using the prior felony conviction as a predicate felony to enhance Defendant's sentence. Accordingly, we vacate the three-year sentence enhancement.

III. CONCLUSION

{74} We affirm Defendant's convictions of first-degree murder, attempted first-degree murder, and conspiracy to commit first-degree murder. We reverse his convictions for shooting at a dwelling and conspiring to shoot at a dwelling, and we vacate the habitual offender enhancement of his sentence. We remand this case to the district court for entry of an amended judgment and sentence in accordance with this opinion.

{75} 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

Certiorari Granted, January 4, 2018, No. S-1-SC-36770

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-017

No. A-1-CA-35126 (filed October 30, 2017)

CABLE ONE, INC., a Delaware corporation,
Plaintiff-Appellee,
v.
NEW MEXICO TAXATION AND REVENUE DEPARTMENT, a governmental agency of the State of New Mexico, and DEMESIA PADILLA, in her official capacity as the Secretary of the New Mexico Taxation and Revenue Department,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Francis J. Mathew, District Judge

JUSTIN R. SAWYER
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Opinion

J. Miles Hanisee, Judge

{1} We have before us a matter of first impression—whether a company whose tangible property located in New Mexico is used to provide cable television programming, internet, and interconnected Voice over Internet Protocol (VoIP) to customers comes within the definition of "communications system," thereby subjecting it to reclassification and valuation by the New Mexico Taxation and Revenue Department (the Department). We hold Cable One's tangible property falls squarely within the Property Tax Code's (the Code), NMSA 1978, §§ 7-35-1 to -38-93 (1973, as amended through 2016), definition of "communications system" pursuant to Section 7-36-30(B)(1) and that the Department properly reclassified it and subjected it to valuation also pursuant to Section 7-36-30. The district court having concluded otherwise, we reverse.

BACKGROUND

{2} Cable One operates two cable systems in New Mexico: one in Sandoval County (the Rio Rancho system) and one in Chavez County (the Roswell system). Each system is capable of providing Cable One's customers with cable television service (i.e., video programming), internet access, and interconnected VoIP. When Cable One began its operations in New Mexico in the early 1980s, its primary purpose was to provide cable television service. Between 2002 and 2011, Cable One repurposed a number of its channels in both the Rio Rancho and Roswell systems in order to provide high-speed data (internet) and interconnected VoIP services. Cable One's tangible property within New Mexico includes a "headend" for each of the two systems it operates. According to Cable One, a " 'headend' . . . serves as a collection system for signals over the cable television system" and "also houses equipment that enables Cable One to provide internet access service and interconnected VoIP service to customers over the same cable television system." Cable One's system uses optical means to transmit and receive information.

{3} In 2008, the Department "became aware that many cable companies were transitioning from one-way to two-way communication services." Historically, cable television companies were considered to provide "one-way" service, meaning that their systems were designed to transmit but not receive information and were thus not considered "communications systems" for purposes of central assessment. [1]Telephone companies, by contrast, provide two-way service because their systems are capable of both transmitting and receiving information. In response to the "ever[-]evolving technological advancements [in] the cable television, broadband internet, VoIP, and

[1]"Central assessment" generally refers to assessment by a state taxation authority rather than local assessors and denotes the use of a special method of valuation intended to address the challenge of uniformly valuing certain types of businesses and property. *See Comcast Corp. v. Dep't of Rev.*, 337 P.3d 768, 772-73 (Or. 2014) (en banc) (explaining that central assessment "had its origins in unit valuation, an assessment method that . . . was devised to address the difficult task of valuing a business . . . when the property of the business is located in more than one taxing district[,]" and "developed to remedy the perceived problems with unit valuations performed by local assessors"); *see also* § 7-36-2(B), (C) (reserving to the Department the authority to assess the property of particular types of business); § 7-36-15(B) (prescribing a standard valuation method for all property "[u]nless a method or methods of valuation are authorized in Sections 7-36-20 through 7-36-33"); §§ 7-36-22 to -25, and -27 to -33 (providing a special and different valuation method for each type of property subject to central assessment under Section 7-36-2(B), (C)).

traditional telephone industr[ies,]" the Department began centrally assessing "all cable companies operating in the state which provided two-way communications services that [Sections] 7-36-2 and 7-36-30 . . . governed." Specifically, the Department now centrally assesses "all cable television companies which provide broadband internet and VoIP services."

{4} Upon being notified that the Department reclassified Cable One's property as a "communications system," Cable One began paying its taxes under protest. Cable One filed a complaint in January 2014 seeking a partial refund of its 2013 taxes paid and a declaratory judgment that its property is not part of a communications system. In response to the district court's question at the motion for summary judgment hearing regarding why its internet access and VoIP services did not qualify under Section 7-36-30(B)'s definition of "communications system," Cable One conceded that those services "would fit within [Section 7-36-30(B)(1)'s] definition" but argued that the court could not look at Subsection (B)(1) "in a vacuum." Cable One argued that "canons of statutory construction are clear . . . that [courts are] to look at a statute in its whole and give effect to every provision of it." Cable One contended that the Department's reliance on Subsection (B)(1)'s definition of "communications system" to guide its determination failed to consider the Code's overall scheme of central assessment and whether the Legislature intended for property such as Cable One's to come within that scheme. As evidence that the Legislature did *not* intend for its property to be centrally assessed, Cable One relied on (1) distinctions between it and other centrally-assessed industries, such as whether they are regulated by the Public Regulations Commission and cross county lines; (2) the definition of "plant" property contained in Section 7-36-30(B)(4), of which Cable One contended it had none, meaning it had no relevant property to be centrally assessed; (3) the failure of House Bill 617 (H.B. 617) during the 2008 legislative session, which would have amended the definition of "communications system;" and (4) the Department's own long-standing construction that cable companies are not subject to central assessment, which Cable One argues should be controlling.

{5} The Department responded that when Cable One repurposed parts of its existing system between 2002 and 2011 in order to be able to both transmit and receive information, it—like such similarly capable telecommunications companies—became subject to central assessment under Sections 7-36-2 and 7-36-30 because its property then plainly qualified under the statutory definition of "communications system." The Department noted that the definition employs and the statute in general refers to the broader term "communications system" rather than the narrower term "*tele*communications system" that Cable One urged the district court to conclude the Legislature intended. The Department also challenged Cable One's interpretation of the definition of "plant" as violative of rules of statutory construction and its reliance on H.B. 617 "to infer legislative intent" as "groundless."

{6} The district court granted in part Cable One's motion for summary judgment, concluding that Cable One's property "is not part of a 'communication[s] system' under the . . . Code." In its order, the district court never addressed whether Cable One's property met Section 7-36-30(B)(1)'s definition of "communications system." Instead, it primarily relied on the administrative gloss doctrine—i.e., that "[a]n administrative interpretation of even ambiguous language might bind an agency over a period of time to a particular construction" as the district court described it—and its view of the failure of H.B. 617 as "persuasive evidence that [the Legislature] intended to preserve the then current assessment practices concerning cable television property" to conclude that Cable One's property "is not part of a 'communication[s] system' under the . . . Code."

{7} The district court denied Cable One's summary judgment motion with respect to its claim for a refund of its 2013 taxes based upon its need to conduct an evidentiary hearing to ascertain the refund amount to which Cable One may be entitled. While the January 2014 action was still pending, Cable One filed a second complaint in January 2015 seeking the same relief as to its 2014 taxes. After the cases were consolidated, Cable One moved for summary judgment on its refund claims for tax years 2013 and 2014. The parties stipulated to the refund amounts for those two years and agreed that there was no need for an evidentiary hearing. In its final judgment, the district court ordered the Department to refund Cable One $54,387.40 of its 2013 taxes and $53,986.84 of its 2014 taxes, amounts that represent the "difference between the property taxes Cable One paid under central assessment . . . and what it would have paid under local assessment." The Department timely appealed.

DISCUSSION

{8} The singular question before us is whether the Department properly reclassified Cable One's property as a "communications system?" The Department argues that when Cable One repurposed its equipment to expand its services to include both internet access and VoIP, it "transformed its[] business from a cable company into a communications system" as defined in Section 7-36-30(B)(1), thus bringing Cable One under the Department's authority. Cable One argues that the Legislature intended the term "communications system" to apply only to "traditional, regulated telecommunications companies," which Cable One is not, meaning the Department had no authority to reclassify Cable One's property and value it under Section 7-36-30. We agree with the Department.

Standard of Review

{9} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv.,* Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. The parties agree that there are no material facts in dispute and that the issue presented on appeal is purely legal. *See Fed. Express Corp. v. Abeyta*, 2004-NMCA-011, ¶ 2, 135 N.M. 37, 84 P.3d 85. We likewise review de novo the district court's conclusion that Cable One's property is not part of a communications system because that conclusion rests upon the district court's interpretation of the Code, which is also a question of law. *See Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61 ("The meaning of language used in a statute is a question of law that we review de novo.").

I. The Legislature Intended for Cable One's Property to Be Classified as "Communications System" and Subject to Central Assessment by the Department

A. Applicable Rules of Statutory Construction

{10} In construing a statute, our "primary goal is to ascertain and give effect to the intent of the Legislature." *Starko, Inc. v. N.M. Human Servs. Dep't*, 2014-NMSC-033, ¶ 18, 333 P.3d 947 (internal quotation marks and citation omitted). "In discerning the Legislature's intent, we are aided by classic canons of statutory construction,

and we look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135 (alteration, internal quotation marks, and citation omitted). We also examine "the context in which [the statute] was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-046, ¶ 11, 142 N.M. 235, 164 P.3d 934. In instances where the Legislature has specially defined a term in a statute, courts are required to follow and apply the Legislature's definition "unless the definition is arbitrary, creates obvious incongruities in the statute, defeats a major purpose of the legislation[,] or is so discordant to common usage as to generate confusion." *Wilschinsky v. Medina*, 1989-NMSC-047, ¶ 26, 108 N.M. 511, 775 P.2d 713 (internal quotation marks and citation omitted). We accord such weight to statutory definitions because courts "presume [that statutory definitions] accurately reflect legislative intent." 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:7 at 310 (7th ed. 2014). "Unless it would lead to an unreasonable result, we regard a statute's definition of a term as the Legislature's intended meaning." *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 15, 376 P.3d 836; *Sw. Land Inv., Inc. v. Hubbart*, 1993-NMSC-072, ¶ 6, 116 N.M. 742, 867 P.2d 412 (explaining in a case involving interpretation of the term "owner" as contained in the Code, that courts "must follow the [L]egislature's intent as evidenced by a legislative definition unless that definition results in an unreasonable classification").

B. Cable One Comes Within the Statutory Definition of "Communications System"

{11} As used in the Code, "communications system" means "a system for the transmission and reception of information by the use of electronic, magnetic or optical means or any combination thereof and which system or any portion thereof is available for use by another person for consideration." Section 7-36-30(B)(1). As the Department points out, the Legislature's definition evinces its intent that any property that—(1) is used for the transmission and reception of information; (2) employs electronic, magnetic, or optical means, or any combination thereof, to accomplish the transmittal and reception of information; and (3) that it be available for use by another person for consideration is considered part of a "communications system." *Id.* The undisputed facts in the record establish that Cable One's property qualifies under the plain language of Section 7-36-30(A) and (B)(1) for classification as part of a "communications system." Cable One, in fact, conceded at the motion for summary judgment hearing that its property in New Mexico meets the definition of "communications system."

{12} Cable One argues, however, that the fact that the Department "begin[s] and end[s its] argument with the definition of 'communications system' " in Section 7-36-30(B)(1) constitutes "selective parsing of the statutory scheme." According to Cable One, another statutory provision—specifically Section 7-36-30(B)(4)—"give[s] rise to [an] ambiguity" regarding whether the Legislature intended for Cable One's property to be considered part of a "communications system." Thus, Cable One argues that we must turn to other interpretive aids in order to determine whether the statutory definition of "communications system" applies to Cable One's property. What Cable One disregards, however, is that "techniques in aid of construction of a statute are used to resolve an ambiguity, not to create one." *Tafoya v. N.M. State Police Bd.*, 1970-NMSC-106, ¶ 13, 81 N.M. 710, 472 P.2d 973. Moreover, in instances such as this where the Legislature has specially defined a term, the Department's focus on Section 7-36-30(B)(1)'s definition is appropriate because "our analysis is bound by the statutory language" and we are not at liberty to "go beyond the plain language" of the definition. *Morris*, 2016-NMSC-027, ¶ 16. That is particularly so where, as here, the party challenging the application of the definition has failed to allege—much less establish—that the definition either leads to an unreasonable result, is arbitrary, is incongruous with the rest of the statute, defeats the legislative purpose of the statute, or generates confusion because it is so discordant to common usage. *See id.* ¶ 15; *Wilschinsky*, 1989-NMSC-047, ¶ 26.

{13} Thus, because Cable One has failed to challenge the statutory definition itself under the applicable standard, no further construction is required. However, to the extent Cable One's asserted ambiguity argument could be construed as contending that the definition of "communications system" is incongruous with the rest of Section 7-36-30 or other provisions of the Code, we explain why that argument also fails.

C. Section 7-36-30(B)(1)'s Definition of "Communications System" Is Not "Incongruous" With Section 7-36 30(B)(4)'s Definition of "Plant"

{14} "Plant" is defined as "all tangible property located in this state and used or useful for the provision of communication service as reflected by the uniform system of accounting in use by the taxpayer, but does not include construction work in progress or materials and supplies[.]" Section 7-36-30(B)(4). According to Cable One, "[n]one of Cable One's property in . . . New Mexico meets [Section 7-36-30(B)(4)'s] definition [of 'plant'], as Cable One has never maintained and is not required to maintain its books and records in accordance with any uniform system of accounting." Cable One contends that the phrase "uniform system of accounting" refers specifically and only to the Federal Communications Commission's Uniform System of Accounts (USOA)—"a historical financial accounting system" that is intended "for use by telephone companies," 47 C.F.R. § 32.1 (2016); 47 U.S.C. § 220(a)(2) (2012)—despite the facial differences between the terms. Thus, reasons Cable One, because it does not and is not required to use the USOA, it does not have property that qualifies as a "plant" as contemplated by Section 7-36-30(B)(4), and because it does not have property that qualifies as a "plant," it cannot be considered to have property that is part of a "communications system" as defined in Section 7-36-30(B)(1). Cable One's strained reading of Section 7-36-30—particularly its decontexualization of the term "plant" and the inordinate weight it places on the term "uniform system of accounting" as used within the definition of "plant"—is an extreme deviation from not only the approach taken throughout the Code with respect to the relationship between property classification and valuation, but also well-established rules of statutory construction.

{15} Our Legislature enacted a property tax code that distinguishes between different classes of property and establishes special methods of valuation tied to a property's classification. *See generally* §§ 7-36-1 to -33. While "classification" and "valuation" are related concepts, they are distinct. *See*, *e.g.*, § 7-36-2(E) (providing that the Department "may delegate authority to the county assessor for the valuation *and* classification of property" (emphasis added)).

{16} The purpose of property classification is "to shift the burden of taxes from property, as such, to productivity, . . . its utility, its general setting in the economic organization of society, so that every[]one will be called upon to contribute according to his ability to bear the burdens[.]" *Hilger v. Moore*, 182 P. 477, 483 (Mont. 1919). Thus, classification of property inherently focuses on categorizing property based on its use. *See*, *e.g.*, N.M. Const. art. VIII, § 3 (exempting from taxation certain classes of property, including "all church property not *used* for commercial purposes, all property *used* for educational or charitable purposes, [and] all cemeteries *not used* or held for private or corporate profit" (emphases added)); § 7-36-2.1(A) (providing that "[p]roperty subject to valuation for property taxation purposes shall be classified as either residential property or nonresidential property"); § 7-36-20 (providing a special method of valuation for "land *used* primarily for agricultural purposes"); § 7-36-23(A) (providing a special method of valuation for "all mineral property and property *used* in connection with mineral property").

{17} Valuation, by contrast, focuses on the process by which the government—after taking into consideration the purpose for which particular property is used—ascertains the property's value in order to levy a uniform tax thereon. *See* N.M. Const. art. VIII, § 1(A) (providing that "taxes levied upon tangible property shall be in proportion to the value thereof," and "[d]ifferent methods may be provided by law to determine value of different kinds of property"); *First Nat'l Bank v. Bernalillo Cty. Valuation Protest Bd.*, 1977-NMCA-005, ¶ 29, 90 N.M. 110, 560 P.2d 174 (explaining that those tasked with assessing or valuing property must "exercise an honest judgment" and that an " 'honest judgment' is not one that favors the state or the taxpayer" but "should be a fair, reasonable, just and truthful judgment of valuation of property"); *see also Gerner v. State Tax Comm'n*, 1963-NMSC-022, ¶ 9, 71 N.M. 385, 378 P.2d 619 (explaining that "to have uniformity and equality in a form of tax, the valuations must be established by some standard"); *Black's Law Dictionary* 1784 (10th ed. 2014) (defining "assessed valuation" as "[t]he value that a taxing authority gives to property and to which the tax rate is applied"). In order to determine the proper valuation method to use to assess the value of property, the property must first be classified. *See Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, ¶¶ 2, 3, 14, 136 N.M. 630, 103 P.3d 554 (describing the issue presented as whether certain property "should be classified and valued as agricultural land" rather than "recreational" land because "[t]he question whether property is entitled to the special valuation method in Section 7-36-20 [for land used primarily for agricultural purposes] is a question of classification" (internal quotation marks omitted)). It is a property's classification that dictates the applicable valuation method or methods, not whether a particular valuation method can be applied that determines whether property should be classified a certain way. *See Rodarte*, 2004-NMSC-035, ¶¶ 2, 3, 14.

{18} Cable One's interpretation turns this analysis on its head, making a property's classification as a "communications system" dependent not on the purpose for which the property is used but instead on whether a particular valuation method may apply depending on whether the property's owner uses a specific accounting method. Critically, Cable One's analysis ignores that the term "plant" appears in neither the definition of "communications system" nor in Section 7-36-30(A), which establishes the applicable scope of Section 7-36-30. *See* § 7-36-30(A) ("All property that is part of a communications system and is subject to valuation for property taxation purposes shall be valued in accordance with the provisions of this section."). That is to say, the Legislature did not make a property's *classification* as a "communications system" contingent on whether a taxpayer's property includes a "plant" and most certainly did not make classification dependent on whether the taxpayer employs the USOA. Rather, "plant" appears only in Section 7-36-30(B)(4), wherein it is defined as set forth previously, and Section 7-36-30(D), which prescribes one of two *valuation* methods that a taxpayer whose property is classified as "communications system" may elect to have the Department apply. *See* § 7-36-30(C) (providing that "[e]ach taxpayer having property subject to valuation under this section shall elect to have that property valued by the [D]epartment in accordance with either Subsection D or Subsection F of this section"); § 7-36-30(D) (providing a valuation method that focuses on the value of the taxpayer's "plant," "construction work in progress," and "materials and supplies"). Importantly, the term "plant" also does not appear in Subsection F, the other of the two possible valuation methods a taxpayer may elect and, notably, the one that Cable One did not choose. *See* § 7-36-30(F) (providing an alternative valuation method that uses "one or more or a combination of the following methods of valuation and applying the unit rule or appraisal to the property: (1) capitalization of earnings[,] (2) market value of stock and debt[,] or (3) cost less depreciation and obsolescence").

{19} While we are mindful that "where several sections of a statute are involved, they must be read together so that all parts are given effect[,]" *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599, that rule of statutory construction does not apply here because neither Section 7-36-30(B)(4) nor Section 7-36-30(D)—both relating to valuation—is "involved" in resolving the pertinent issue Cable One raises here: whether the Department properly reclassified its property as "communications system." They relate only to the manner in which the Department ascertains the taxable value of property already classified as a "communications system" based on whether it meets Section 7-36-30(B)(1)'s statutory definition. Additionally, to adopt Cable One's construction of the statute would effectively require that we read into Section 7-36-30(A) and (B)(1) language that is not there. Specifically, we would need to rewrite Subsection A to say "[a]ll property that is part of a communications system [and includes a plant] . . . shall be valued in accordance with the provisions of this section" and Subsection (B)(1) to say " 'communications system' means a system [that includes a plant and is used] for the transmission and reception of information[.]" We are not at liberty to do so. *See Albuquerque Commons P'ship v. City Council of City of Albuquerque*, 2011-NMSC-002, ¶ 7, 149 N.M. 308, 248 P.3d 856 (explaining that courts "may only add words to a statute where it is necessary to make the statute conform to the [L]egislature's clear intent, or to prevent the statute from being absurd" (internal quotation marks and citation omitted)). Thus, following applicable rules of statutory construction and properly placing in context the term "plant," we conclude there exists no "obvious incongruit[y]" between the definitions of "communications system" and "plant." *Wilschinsky*, 1989-NMSC-047, ¶ 26. We briefly examine legislative history to illustrate that there is neither incongruity—obvious or not—within the statute nor ambiguity as to the Legislature's intent regarding whether Cable One's property may be classified as a "communications system."

D. Legislative History Evinces the Legislature's Intent to Expand the Department's Central Assessment Authority Beyond "Traditional, Regulated Telecommunications Companies"

{20} Legislative history—particularly the Legislature's 1985 amendment of Sections 7-36-2 and 7-36-30—further reinforces our conclusion that the Legislature did not intend to restrict the Department's central assessment authority to only "traditional, regulated telecommunications companies" as Cable One contends. *See N.M. Real Estate Comm'n v. Barger*, 2012-NMCA-081, ¶ 18, 284 P.3d 1112 (explaining that "[t]here is New Mexico precedent for looking to later amendments of statutes [to] aid in interpreting ambiguous or unclear statutory language"); *In re Gabriel M.*, 2002-NMCA-047, ¶ 15, 132 N.M. 124, 45 P.3d 64 (explaining that courts may compare an earlier version of a statute with a current version "to help determine legislative intent"). Prior to 1985, the Department's central assessment authority extended to property "used in the conduct of the following businesses:"

(1) railroad;
(2) *telegraph, telephone or microwave transmission*;
(3) pipeline;
(4) public utility; and
(5) airline.

NMSA 1953, § 72-29-2 (1975) (emphasis added) (Vol. 10 Repl., Part 2, 1975 Pocket Supp.). Accordingly, a special valuation method existed for "property that is part of a *telephone or telegraph* communications system." NMSA 1953, § 72-29-19 (1975) (emphasis added) (Vol. 10 Repl., Part 2, 1975 Pocket Supp.). Importantly, in the pre-1985 version of what is now Section 7-36-30, there was provided only one special method of valuation for property classified as "part of a telephone or telegraph communications system": the one that considers "[p]lant," "[c]onstruction work in progress[,]" and "materials and supplies" property in determining value, i.e., present-day Section 7-36-30(D). *See* § 72-29-19(A), (C)-(E).

{21} In 1985, however, the Legislature amended the Code in three critical ways. First, it specifically removed references to "telephone or telegraph," replacing the prior classification with a new one: "communications system." *See* 1985 N.M. Laws, ch. 109, §§ 2(B), 6. Second, it enacted the definition of "communications system" previously discussed and subjected to central assessment all property used as part of a "communications system as that term is defined in Section 7-36-30[.]" 1985 N.M. Laws, ch. 109, § 2(B). Importantly, the new classification and definition retained no reference to "telephone" or "telegraph" systems to qualify the term "communications system." *See id.* Third, it provided an "alternative to valuation" under the pre-existing method that allowed the taxpayer to elect to have its property valued "using one or more or a combination of" three methods: "(1) capitalization of earnings; (2) market value of stock and debt; or (3) cost less depreciation and obsolescence[,]" 1985 N.M. Laws, ch. 109, § 6(G), (H),[2] i.e., the option provided by present-day Section 7-36-30(F) that contains no reference to "plant" property. We note that our Legislature was not the only one to so amend its property tax code in response to technological innovations in information transmission that occurred in the latter part of the twentieth century. *See Cable One, Inc. v. Ariz. Dep't of Revenue*, 304 P.3d 1098, 1103-04 (Ariz. Ct. App. 2013) (explaining that the Arizona legislature enacted its "telecommunications company definition" in 1985 at a time when "the telecommunications industry was undergoing profound changes concerning local and long-distance telephone services and who could provide those service[s]"); *see also Comcast Corp.*, 337 P.3d at 774-75, 787-89 (explaining that until 1973, Oregon centrally assessed only " 'telegraph communication' and 'telephone communication' " businesses but that in 1973 the Oregon legislature "replaced the references to telegraph and telephone communication with the more general term 'communication' " and describing the three major "evolutionary period[s] for cable television" between 1950 and the mid-1990s). Notably, our own Supreme Court, also in 1985, expressed an "aware[ness] that the telecommunications field is rapidly developing" when it held that cable companies providing the then-new service of "digital high speed data transmission" on an intrastate basis were subject to regulation by the State Corporation Commission. *In re Generic Investigation into Cable Television Servs. in State of N.M.*, 1985-NMSC-087, ¶¶ 3, 4, 27, 103 N.M. 345, 707 P.2d 1155.

{22} This history also reveals the Legislature's intent to broaden the understanding of what types of communications-related property would be subject to central assessment and Section 7-36-30's special valuation methods. It also reveals an awareness by the Legislature that after so broadening the scope of Section 7-36-30, it became necessary to provide another method of valuation—one that does not approach valuation by considering the tangible property cost of a "plant." Thus, it is true that prior to 1985, only property that was part of a traditional telephone or telegraph system fell under the Department's authority. Section 72-29-2. However, after 1985, *any* property that is part of a "system for the transmission and reception of information by the use of electronic, magnetic or optical means or any combination thereof and which system or any portion thereof and is available for use by another person for consideration" is subject to classification as "communications system." Sections 7-36-2(B)(2), -30(B)(1). Perhaps most significantly, that a company arguably does not possess any property meeting Section 7-36-30(B)(4)'s definition of "plant" for valuation purposes in no way disqualifies it from having its property classified as "communications system."

{23} Cable One fails to offer any explanation that would reconcile the Legislature's 1985 amendment of Sections 7-36-2 and 7-36-30 with its claim that "central assessment . . . is intended to apply only to . . . traditional, regulated telecommunications companies[.]" If the Legislature had intended to limit the Department's authority to centrally assess only "traditional" telecommunications companies that use the USOA as Cable One contends, it would have made little sense to amend the Code in 1985 as it did. We cannot ignore the Legislature's express removal and replacement of "telephone" and "telegraph" and assume the 1985 amendments do not evince legislative

[2]The 1985 amendment allowed election of either of the two prescribed valuation methods for only the 1986 and 1987 property tax years. *See* 1985 N.M. Laws, ch. 109, § 6(G). A 1987 amendment extended the ability to elect a valuation method through the 1989 property tax year. *See* 1987 N.M. Laws, ch. 206, § 1. In 1989, the Legislature amended Section 7-36-30 to its current form, which continues to allow the taxpayer to select between the two valuation methods provided in Sections 7-36-30(D) and (F). *See* 1989 N.M. Laws, ch. 112, § 1; § 7-36-30(C).

intent to change the then-existing law and broaden the scope of the Department's central assessment authority. *See State v. Adam M.*, 1998-NMCA-014, ¶¶ 19-20, 124 N.M. 505, 953 P.2d 40 (rejecting a request to read into a statute language that the Legislature had deleted); *In re Estate of Greig*, 1988-NMCA-037, ¶ 12, 107 N.M. 227, 755 P.2d 71 (explaining that "[w]hen the [L]egislature enacts a new law or amends an existing one, it does so for the express purpose of changing the law as it previously existed"). In light of this legislative history and the clear, unambiguous definition of "communications system," we conclude that the Legislature intended to grant the Department the authority to classify Cable One's property as "communications system" and assess it under Section 7-36-30 when Cable One elected to repurpose portions of its system in order to provide two-way communications services (i.e., internet and VoIP) to its customers.[3]

II. Cable One's Other Arguments

{24} Cable One makes a number of other arguments regarding why its property should not be subject to central assessment by the Department. We briefly address each one.

A. The Failure of H.B. 617 During the 2008 Legislative Session

{25} Cable One argues that absent action by the Legislature to amend the Code, the Department is bound by its previous interpretation that Cable One is not subject to central assessment and must leave valuation of its property to county assessors. Cable One points to a failed attempt by the Legislature in 2008 to amend Section 7-36-30's definition of "communications system" as evidence that the Legislature did not intend for its property to be centrally assessed under the then-existing—and still-existing—definition of "communications system." Given our foregoing analysis of and conclusion regarding Section 7-36-30, we find it unnecessary to address arguments related to what intent may be gleaned from the Legislature's failure to amend the definition of "communications system" in 2008, other than to caution parties and district courts against jumping to and relying on legislative inaction as somehow providing evidence of legislative intent. *See Wegner v. Hair Prods. of Texas*, 2005-NMCA-043, ¶ 7, 137 N.M. 328, 110 P.3d 544 ("Legislative silence is not a reliable indicator of intent."); *see also Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶¶ 29-33, 125 N.M. 401, 962 P.2d 1236 (refusing to consider evidence of "legislative history" and construe "the language of statutory provisions that were never enacted" because such evidence "tells us nothing dispositive about the Legislature's intentions" and instead reaffirming that courts are to "determine legislative intent primarily from" the language of the statute itself).

B. Overreach by the Department

{26} Cable One also argues that the Department never "attempt[ed] to clarify or broaden the . . . Code through a regulation or ruling" and that the Department's sua sponte decision in 2008 to begin centrally assessing Cable One and similar companies was an unlawful assertion of authority. Again, for the reasons previously discussed, we conclude that the Department was not required to "clarify or broaden" the interpretation of what property was subject to central assessment under Sections 7-36-2(B)(2) and 7-36-30 in order to assess Cable One because the Legislature had already provided the Department with such authority.

C. Whether the Department Was Required to Leave Assessment of Cable One's Property to County Assessors and Allow County Assessors to Value Cable One's Property in Accordance with Section 7-36-2(F)

{27} Finally, Cable One argues that the Department does not have sole authority to value "communications system" property and contends that Section 7-36-2(F) provides county assessors with the ability to "value property belonging to companies subject to central assessment." Section 7-36-2(F) provides

> The [D]epartment is authorized to enter into one or more agreements with each county assessor . . . under which the county assessor agrees to perform the valuation of property for which the [D]epartment is responsible under Subsection B of this section but which property is not subject to the special methods of valuation set forth in Sections 7-36-27, 7-36-28[,] and 7-36-30 through 7-36-32.

According to Cable One, this subsection indicates that the Legislature (1) "contemplated that some property of 'communications systems' would not be susceptible to valuation under either of [Section 7-36-30's] special methods," and (2) "chose not to vest [the Department] with plenary power to use any other method to value such property." Cable One misconstrues Section 7-36-2.

{28} Subsection F *permits*—but does not require—the Department to enter into agreements with county assessors to have county assessors perform valuations *if and only if* it is for property listed Section 7-36-2(B) that "is not subject to the special methods of valuation set forth in Sections 7-36-27, 7-36-28[,] and 7-36-30 through 7-36-32." The only type of property listed in Section 7-36-2(B) that is not subject to a special valuation method in the enumerated sections is "public utility" property. All other types of property—railroad, communications system, pipeline, and airline—have prescribed special methods of valuation. *See* Section 7-36-27 (providing a special method of valuation for oil, natural gas, carbon dioxide, and liquid hydrocarbons pipelines); § 7-36-28 (providing a special method of valuation for water pipelines); § 7-36-30 (providing a special method of valuation for "communications system" property); § 7-36-31 (providing a special method of valuation for railroads); § 7-36-32 (providing a special method of valuation for commercial aircraft). Cable One's claim that Section 7-36-2(F) allows county assessors to value "communications system" property under a valuation method other than those provided in Section 7-36-30 is incorrect.

CONCLUSION

{29} For the foregoing reasons, we reverse the district court's grant of summary judgment in favor of Cable One and remand for entry of judgment in light of this opinion.

{30} IT IS SO ORDERED.
J. MILES HANISEE, Judge

WE CONCUR:
MICHAEL E. VIGIL, Judge
M. MONICA ZAMORA, Judge

[3]While in no way necessary to our holding, we observe its consistence with those of other state appellate courts that have considered similar challenges brought by Cable One. *See Kay-Decker v. Iowa State Bd. of Tax Review*, 857 N.W.2d 216, 217 (Iowa 2014) (holding that Cable One's provision of VoIP service allowed it to be subjected to central assessment as a "telephone company operating a line in this state" under Iowa Code §§ 433.1 (2003), 433.12 (2008)); *Cable One, Inc.*, 304 P.3d at 1109 (holding that "Cable One is a telecommunications company under [Ariz. Rev. Stat. Ann.] § 42-14401 [(1999)] and therefore subject to central assessment by the [Arizona] Department [of Revenue]")

Certiorari Granted, February 19, 2018, No. S-1-SC-36865

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-018

No. A-1-CA-34419 (filedDecember 13, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CRYSTAL ORTIZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Stan Whitaker, District Judge

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

Bennett J. Baur,
Chief Public Defender
Kathleen T. Baldridge,
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Stephen G. French, Judge

{1} Defendant Crystal Ortiz appeals her convictions for great bodily harm by vehicle (driving while intoxicated (DWI)), contrary to NMSA 1978, Section 66-8-101(B), (C) (2004, amended 2016); aggravated battery (deadly weapon-vehicle), contrary to NMSA 1978, Section 30-3-5(C) (1969); and aggravated DWI, contrary to NMSA 1978, Section 66-8-102(A), (B) (2010, amended 2016). Defendant did not appeal her conviction for leaving the scene of an accident (great bodily harm). On appeal, Defendant argues that: (1) her convictions violate her right to be free from double jeopardy, and (2) the district court erred in refusing to grant her duress defense instructions. This case requires this Court to decide whether Defendant was entitled to a duress instruction on great bodily harm by vehicle, aggravated battery, and the strict liability crime of aggravated DWI. We hold that the duress instruction was applicable to the facts of the case and should have been given for aggravated battery (deadly weapon-vehicle) and great bodily harm by vehicle (DWI) based on Defendant's prima facie evidence. We affirm Defendant's conviction for the strict liability crime of aggravated DWI. Because we reverse Defendant's appealed convictions for aggravated battery (deadly weapon-vehicle) and great bodily harm by vehicle (DWI) based on instructional error, we do not address Defendant's double jeopardy claim.

BACKGROUND

{2} Prior to trial, Defendant alerted the district court that she intended to present the affirmative defense of duress as she was forced to flee from Mr. Hughes (Victim) fearing great bodily harm. Again, after the defense rested, Defendant and the State discussed the duress defense with the district court. The district court denied Defendant's duress instructions the next day before closing arguments.

{3} On appeal, Defendant challenges the district court's denial of the duress instruction for three of her convictions: great bodily harm by vehicle, aggravated battery, and aggravated DWI. Defendant argues that the district court erred in denying the duress instructions, claiming that she had presented a prima facie case for the giving of the duress instructions and that a reasonable view of the evidence supported her defense.

STANDARD OF REVIEW

{4} "The propriety of jury instructions given or denied is a mixed question of law and fact" and is "reviewed de novo." *State v. Munoz*, 1998-NMSC-041, ¶ 8, 126 N.M. 371, 970 P.2d 143 (internal quotation marks and citations omitted). "When considering a defendant's requested instructions, we view the evidence in the light most favorable to the giving of the requested instruction." *State v. Wyatt B.*, 2015-NMCA-110, ¶ 33, 359 P.3d 165, citing *State v. Romero*, 2005-NMCA-060, ¶ 8, 137 N.M. 456, 112 P.3d 1113; *see State v. Hill*, 2001-NMCA-094, ¶ 5, 131 N.M. 195, 34 P.3d 139. Our Supreme Court has recognized that "[t]he duress defense is similar, in this context, to other justification defenses," such as necessity, coercion, or self-defense. *State v. Castrillo*, 1991-NMSC-096, ¶ 6, 112 N.M. 766, 819 P.2d 1324.

{5} "The defense of duress is a question for the jury." *Esquibel v. State*, 1978-NMSC-024, ¶ 9, 91 N.M. 498, 576 P.2d 1129, *overruled on other grounds by State v. Wilson*, 1994-NMSC-009, ¶ 6, 116 N.M. 793, 867 P.2d 1175. "To warrant submission to the jury of the defense of duress, a *defendant* must make a prima facie showing that [she] was in fear of immediate and great bodily harm to [herself] . . . and that a reasonable person in [her] position would have acted the same way under the circumstances." *Castrillo*, 1991-NMSC-096, ¶ 4 (emphasis added); *see also State v. Rios*, 1999-NMCA-069, ¶ 7, 127 N.M. 334, 980 P.2d 1068. New Mexico courts have "required the state to disprove such defenses beyond a reasonable doubt." *State v. Lopez*, 1990-NMCA-016, ¶ 9, 109 N.M. 578, 787 P.2d 1261."[T]he district court must instruct on the defense [of duress] only if it is raised by the defendant and only if, on the basis of the evidence at trial (whether offered by the state or by the defendant), a reasonable juror could have a reasonable doubt arising from the defense." *Id*. "The test is not how the judge would weigh the [duress] evidence as a fact[-]finder; the true test is whether any juror could be justified in having a reasonable doubt about whether the accused acted [under duress]." *State v. Guerra*, 2012-NMSC-014, ¶ 14, 278 P.3d 1031. "If any reasonable minds could differ, the instruction should be given." *State v. Rudolfo*, 2008-NMSC-036, ¶ 27, 144 N.M. 305, 187 P.3d 170.

DISCUSSION

{6} Defendant argues that her trial testimony and evidence, when viewed in the light most favorable to the giving of the requested instruction, was sufficient to satisfy her burden in her prima facie case and create a reasonable doubt in the mind

of a juror, and therefore the duress instruction should have been given. We begin by examining Defendant's testimony at trial.

{7} Defendant testified that she had a relationship with Victim several years before the instant events. Victim had become a good friend of her father's. Victim became aggressive when he drank and ultimately, according to Defendant's testimony, he raped her three years earlier. Approximately three years later, she again became friendly with Victim. During this three year hiatus in their relationship, Defendant's father and Victim remained good friends. On the night in question, Defendant and Victim had been out drinking, along with Defendant's father, and eventually ended up at Victim's house. Defendant stated that she was intoxicated, and Victim drove her car to his house.

{8} Once at Victim's house and without invitation, Victim stood over Defendant and tried to kiss her and touch her face. Defendant repeatedly told him to stop. Defendant did not slap or push Victim. Before Defendant attempted to flee from the house, the first time, Victim continued to physically touch Defendant and was "trying to pull [her] into him." Victim pulled a button off Defendant's clothing and ripped her shirt. When Defendant tried to leave Victim's house, Victim got angry and threw a pillow, knocking over a tower of CDs.

{9} At this time, Defendant realized that Victim still had her car keys. Victim would not allow Defendant to call her father, grabbed Defendant's phone from her, and when Defendant tried to leave, Victim physically blocked the door. Once Defendant was able to regain control of her keys and phone, Defendant made it out the door and into her car. Defendant testified, "Well, my thought was to drive away first and then to call [my father]." Defendant had started her vehicle *before* Victim jumped in.

{10} After Victim jumped into the vehicle, Defendant repeatedly ordered Victim out of the vehicle but he would not leave. As Defendant started to drive home, Victim was yelling and screaming at Defendant. At which point, Defendant again tried to call her father. When Victim grabbed the phone from Defendant, Victim also grabbed Defendant's hair, causing the car to jerk. As Victim grabbed Defendant's hair and the phone, Victim jumped out of the car and started to run around to the front of the car. It was then that the car jumped the curb and hit a fence. Defendant believed that Victim had jumped out of the car before Defendant's car hit the fence. During Defendant's testimony, she stated that she accidentally swerved into Victim, as Defendant did not know Victim was going to keep running forward. Defendant does not dispute that she struck Victim.

{11} Defendant argues that her testimony was sufficient to warrant the duress instruction, specifically UJI 14-5130 NMRA, for great bodily harm by vehicle and aggravated battery. The three elements contained in the instruction are:

> (1) the defendant committed the crime under threat,
>
> (2) the defendant feared immediate [great] bodily harm to [herself] or others if [she] failed to commit the crime, and
>
> (3) a reasonable person in the defendant's position would have acted in the same way under the circumstances.

Rios, 1999-NMCA-069, ¶ 7; *see* UJI 14-5130.

{12} Defendant argues that her testimony was also sufficient to warrant the duress instruction for the strict liability crime of aggravated DWI, providing:

> (1) the defendant acted under unlawful and imminent threat of death or serious bodily injury,
>
> (2) the defendant did not find [herself] in a position that compelled [her] to violate the law due to [her] own recklessness,
>
> (3) [the defendant] had no reasonable legal alternative, and
>
> (4) [the defendant's] illegal conduct was directly caused by the threat ofharm.

Rios, 1999-NMCA-069, ¶ 25; *see State v. Baca*, 1992-NMSC-055, ¶ 19, 114 N.M. 668, 845 P.2d 762.

{13} The State argues that Defendant failed to present sufficient evidence on the "immediacy" requirement and the "reasonableness" requirement of both instructions. Therefore, the State asserts that Defendant was not entitled to the duress instruction.

I. Great Bodily Harm by Vehicle (DWI) and Aggravated Battery (Deadly Weapon-Vehicle)

{14} In *Rudolfo*, a case involving self-defense as justification, our Supreme Court stated that the standard for fear of immediate great bodily harm is a subjective one (immediate danger and actual fear from the perspective of Defendant) and the standard for whether a reasonable person would have acted in the same way as Defendant is an objective one (hypothetical behavior of a reasonable person under the same circumstances). 2008-NMSC-036, ¶ 17; *see State v. Duncan*, 1990-NMCA-063, ¶ 24, 113 N.M. 637, 830 P.2d 554 (same). The subjective fear of immediate great bodily harm by a defendant depends on the circumstances of *each case*. *See Esquibel*, 1978-NMSC-024, ¶ 12. In *Esquibel*, the defendant escaped from prison some forty-eight to seventy-two hours after the most recent threat of harm. *Id.* Despite the passage of time, our Supreme Court held that a reasonable juror could conclude that the defendant subjectively feared immediate great bodily harm. *Id.* "Under the circumstances of [*Esquibel*], the passage of two to three days between threat and escape does *not* suffice to remove the defense of duress from the consideration of the jury." *Id.* (emphasis added).

{15} Here, Defendant testified that after returning to Victim's house, Victim tried to kiss her and touch her face. Despite being told to stop, Victim continued his physical touching, pulled a button off her clothing and ripped her shirt. Having managed to secure her car keys, Defendant testified that she was able to escape Victim's house and get to her car, whereupon Victim continued his pursuit and got into the front passenger seat, refusing to leave. Once in the car, in what could only be inferred by a reasonable juror from Defendant's testimony as a continuation of the assault, Victim continued to yell and scream at Defendant. Defendant testified that Victim grabbed her hair, causing the car to jerk. Victim jumped out of the car and started to run around to the front of the vehicle. Defendant admitted that she struck Victim.

{16} We conclude that Defendant made a prima facie showing of duress by presenting evidence to establish that: (1) Defendant was previously raped by Victim years earlier; (2) Defendant fled Victim's home in reasonable fear of immediate bodily harm—being raped by Victim again; (3) Victim's continued conduct when he immediately followed Defendant to her car and jumped into the vehicle, reasonably continued Defendant's fear of immediate bodily harm; and (4) Defendant's continued fear of immediate bodily harm remained even after Victim jumped out of Defendant's vehicle and began running around to the front because Victim was

still in a position to re-engage in his assaultive behavior. We conclude that a jury could also find that an objectively reasonable person would have continued to try to get away from Victim's assaultive behavior and would have attempted to drive away from the scene to escape further assaults by Victim once he exited Defendant's car. Thus, Defendant established both the subjective "immediacy" prong and the objective "reasonableness" prong for a prima facie defense of duress and the district court should have instructed the jury accordingly."If the evidence supports a theory of the case, a defendant is entitled to [an] instruction on that theory." *Castrillo*, 1991-NMSC-096, ¶ 4.

{17} Having concluded that Defendant was entitled to the duress instruction pursuant to UJI 14-5130, we hold that the State was improperly relieved of its burden of proof under the duress instruction. "The burden is on the state to prove beyond a reasonable doubt that the defendant did not act under such reasonable fear." UJI 14-5130. A defendant is entitled to jury instructions on her theory of the case if there is evidence to support the instruction. As a result, the failure to give such a duress instruction—UJI 14-5130—for the charges of great bodily harm by vehicle and aggravated battery was reversible error.

II. Aggravated DWI

{18} Defendant argues that she was entitled to a *Rios* duress instruction for the crime of aggravated DWI. "This Court has held that DWI is a strict liability offense." *Rios*, 1999-NMCA-069, ¶ 6. As noted above, our case law has altered the second and third elements of the duress defense relative to a strict liability crime. As a result, the second and third elements for a strict liability crime of DWI would be, "(2) [Defendant] did not find [herself] in a position that compelled [her] to violate the law due to [her] own recklessness, [and] (3) [Defendant] had no reasonable legal alternative[.]" *Id.* ¶ 25. Our Supreme Court in *Baca* teaches that use of the duress defense in a strict liability crime may be tempered with a narrow exception, by utilizing these two points in the instruction, "without vitiating the protectionary purpose of the strict liability statute." 1992-NMSC-055, ¶ 19. Without inclusion of these two elements in a strict liability duress instruction, we see no other reasonable manner in which to properly inform a jury of the evidentiary requirements placed upon a defendant. "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883. Because aggravated DWI is a strict liability crime, we conclude that the *Rios* instruction would be the proper jury instruction for Defendant's duress defense as opposed to the unmodified UJI 14-5130. We now turn to Defendant's argument that her prima facie case legally entitled her to the modified duress instruction for the strict liability crime of aggravated DWI.

{19} After returning to Victim's house, Defendant testified that Victim stood over her and tried to kiss her, touched her face, pulled Defendant into him, pulled a button off her clothing, and ripped her shirt. When she attempted to leave Victim's house, Victim blocked the door. Victim prevented Defendant from calling her father. When Defendant secured her keys, she fled to her car. Upon entering her car, Victim then sprinted out to the car and forced his way into the right passenger seat, refused to leave, and continued to yell and scream at Defendant.

{20} The State responds that Defendant failed to address the reasonable legal alternatives to her commission of the crime of aggravated DWI. According to the State, the evidence established numerous legal alternatives to driving, including whether Defendant could have: (1) called her father or the police; (2) asked Victim's roommate for assistance; (3) after Victim ceased blocking the door, left without her phone or car keys; (4) gone to a neighbor's house; or (5) after securing her phone and car keys, simply walked out the door, gotten into her vehicle, locked the doors, and then called for assistance. The State argues that, as a result of these failures to address the evidence presented regarding reasonable legal alternatives available, Defendant made the unreasonable decision to drive her vehicle upon exiting Victim's home.

{21} On cross-examination Defendant testified, "Well, my thought was to drive away first and then to call [my father]." Defendant had started her vehicle before the Victim had jumped in. The State also points out that on cross-examination of Defendant relative to the issue of seeking assistance of Victim's roommate, Defendant testified that the roommate, "wasn't somebody I really knew. I mean, I don't know. I just wanted to get out of the house." Thus, the State points out that Defendant either failed to address the reasonable legal alternatives to driving that were available as part of her prima facie case or she failed to dispute or rebut the evidence presented by the State regarding the reasonable legal alternatives to driving that were available to her. We therefore address whether Defendant, "failed to show that [she] exhausted all legal alternatives to [her crime of aggravated DWI]," under the facts of this case. *Baca,* 1992-NMSC-055, ¶ 22.

{22} In *Castrillo,* the series of events that led to the unreasonable illegal act of a convicted felon purchasing a firearm occurred over a period of months. 1991-NMSC-096, ¶ 2. The defendant could have called the police and therefore the defendant was unreasonable in choosing an illegal alternative. *Id.* ¶ 18. In *Baca*, a prisoner in the penitentiary armed himself with a shank two days after being confronted by another prisoner, without having informed a guard or requesting appropriate security arrangements after the first confrontation. 1992-NMSC-055, ¶ 22. In both cases, our Supreme Court noted that "[t]he obvious response to threatened violence—especially a nebulous, potential, future violence—is not to resort to [criminal conduct]." *Id.* ¶ 21 (internal quotation marks and citation omitted).

{23} In *Rios*, this Court reviewed a DWI strict liability crime on facts more pertinent to those in this appeal. 1999-NMCA-069, ¶ 1. The defendant sought refuge in his truck, and as the attack continued, the defendant started the vehicle and began to drive out of the parking lot. *Id.* ¶ 2. In examining whether the defendant acted under an imminent threat of death or serious bodily injury and therefore had no reasonable legal alternative to DWI, this Court concluded that the defendant had not met his burden of establishing the objective element of reasonable legal alternative by "jumping behind the wheel of a vehicle and taking off." *Id.* ¶¶ 26-27 (internal quotation marks omitted).

{24} The defense of duress must be construed differently in the context of a strict liability crime. "Specifically, the elements of immediacy and reasonableness must be construed narrowly so that the high level of protection afforded by a statute [implicating] strict liability is not vitiated." *Baca*, 1992-NMSC-055, ¶ 16. It is against this jurisprudential framework that we analyze whether Defendant made a prima facie showing of duress in a strict liability case such as the one before this Court.

{25} Defendant maintains that the immediacy of Victim's threats and her attendant responses thereto were a reasonable legal alternative because Victim's assaultive

behavior, both in Victim's home and continuing into Defendant's vehicle was imminent, not nebulous, potential, or future in nature. We address the immediacy issue first. Defendant argues that once she exited Victim's home, and as soon as she got into the vehicle, Victim rushed out to the vehicle and got in, which she claimed left her no opportunity to lock the doors. We conclude that, viewing the evidence in the light most favorable to giving Defendant's requested duress instruction, there was sufficient evidence presented to support Defendant's position that she was in immediate fear of great bodily harm and this justified allowing the jury to assess the immediacy of Defendant's fear. Therefore, the subjective immediacy element of a duress instruction was satisfied by Defendant's evidence.

{26} We now turn to the evidence regarding whether Defendant had no reasonable legal alternative to driving away from Victim's home. We conclude that the prima facie evidence Defendant presented did not satisfy the objective third element of the *Rios* instruction—no reasonable legal alternative—for receiving a duress instruction to a strict liability crime. *Rios*, 1999-NMCA-069, ¶ 25. Numerous legal non-driving alternatives were presented by the State's evidence showing that Defendant was not required to drive away from Victim's home in an intoxicated state. However, Defendant testified that she had already made the decision that she intended to get out of Victim's home, drive away in her vehicle, and then call her father. Her testimony was, "Well, my thought was to drive away first and then to call [my father]." Defendant also started her car before Victim ran over and jumped inside. Based upon the evidence presented, the other legal alternatives were not even considered at the time of the incident or factually overcome after being raised by the State at trial. Thus, Defendant failed to objectively meet her initial burden for a duress instruction—establishing that no other reasonable legal alternatives existed to driving away from Victim's home intoxicated. *See Baca*, 1992-NMSC-055, ¶ 22 (recognizing the alternatives presented and affirming the district court's ruling that the defendant "failed to show that he exhausted all legal alternatives to his [strict liability criminal offense]"). As a result, the district court did not err in refusing to give the modified duress instruction for the strict liability charge of aggravated DWI.

CONCLUSION

{27} We affirm Defendant's convictions for aggravated DWI and leaving the scene of an accident (great bodily harm). We reverse Defendant's convictions for great bodily harm by vehicle and aggravated battery, and we remand these charges to the district court for further proceedings and a new trial.

{28} IT IS SO ORDERED.
STEPHEN G. FRENCH, Judge

WE CONCUR:
TIMOTHY L. GARCIA, Judge

JONATHAN B. SUTIN, Judge (specially concurring).

SUTIN, Judge (specially concurring).

{29} While I concur in the majority opinion, I have concerns that the opinion may not fully handle some of the issues. I write separately in hopes that our Supreme Court will take certiorari and address what appear to me to be problems inherent in duress instruction cases. The case at hand is difficult conceptually, factually, and with regard to rule applicability. It offers food for thought and cries out for a bit of clarity.

{30} In considering whether to give a duress instruction, the district court must determine whether, assuming the defendant is convicted of the crime charged, the defendant has established a prima facie case that the commission of the crime occurred out of duress—that is, that the defendant feared immediate great bodily harm if he did not commit the crime and that a reasonable person would have acted in the same way under the circumstances. Of course, the defendant who goes to trial does not and will not admit having committed the crime. It is and must be a hypothetically committed crime.

{31} The only Uniform Jury Instruction on the duress defense, UJI 14-5130, reads in part:

> If the defendant feared immediate great bodily harm to himself or another person if he did not commit the crime and if a reasonable person would have acted in the same way under the circumstances, you must find the defendant not guilty.

The state of the law presents some concerns.

{32} First, there exist two different tests for giving the duress defense depending upon whether the crime is or is not a strict liability crime. Non-strict liability crimes require UJI 14-5130. Strict liability crimes require a different, court-created instruction. Yet the committee commentary in UJI 14-5130 plainly states that this instruction "applies to all crimes, other than homicide[.]" *See Rios*, 1999-NMCA-069, ¶ 25 (describing the four elements of a strict liability crime). A clear inconsistency.

{33} Second, one test, if not the primary test, to be applied in deciding whether to give UJI 14-5130 "is whether any juror could be justified in having a reasonable doubt about whether the accused acted [under duress]." *Guerra*, 2012-NMSC-014, ¶ 14. That test nowhere appears in UJI 14-5130, and in the case before us, were the test to be applied, given the facts one has to speculate as to what the result would be not only with respect to each crime, but also as between the aggravated DWI (strict liability) and the two other crimes (not strict liability), given that the criminal activity appears to have stemmed from Defendant's fear and attempts to escape harm. There is no easy distinction to be made.

{34} Third, a general principle involving instructing the jury is that the district court is to consider the evidence in a light most favorable to giving the instruction. Yet, combined with the juror-reasonable-doubt test, one, again, would have to similarly speculate as to what the results would be. Again, no easy rule application can be made.

{35} Fourth, a question exists as to the usefulness of attempting distinctions between a "subjective" test involving fear and an "objective" test involving the reasonable person and reasonable juror. Are these tests properly applied by a district court? Does the subjective reasonableness test include whether, under the circumstances, no "reasonable alternative" existed? Is it a test more properly applied by a jury after the instruction is given? If the latter, how is the jury to be instructed on subjective and objective? How is the court or jury to make an informed, rational decision as to the emotional (fear) and the rational (alternative) under circumstances in which the criminal activity, be it a strict liability crime or not, stems from a defendant's legitimate fear and attempts to escape?

{36} Fifth, in regard to the defense as to Defendant's driving into Victim in the case before us, it must be assumed, because of Defendant's convictions, that she drove into Victim intending to harm him. The oddity that hits one in the face is that the

duress instruction issue here is meaningless without a conviction. If Defendant intended to harm Victim and intentionally drove into him, what fact possibly exists to support a prima facie showing of a right to the duress instruction—given that there can be no question that Defendant had the alternative of driving away instead of intentionally driving into Victim. This type of analytic insight into the facts of the case together with the majority opinion's analysis indicate the complexity, conceptual difficulty, and rule application problems that attend duress instruction cases.

{37} Until the foregoing concerns about the analyses and tests to be applied in duress cases are addressed and the job of the district and appellate courts made less of a crapshoot, I have chosen to specially concur with the hope that our Supreme Court takes on the issue. Although the record in this case might have been better developed and the briefs better written, this case seems to me to be a good case in which to do so.

JONATHAN B. SUTIN, Judge

Certiorari Denied, January 9, 2018, No. S-1-SC-36798

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-019

No. A-1-CA-35307 (filed November 16, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
DAMON LEWIS,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Christina P. Argyres, District Judge

L. HELEN BENNETT
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for Appellee

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JOHN KLOSS,
Assistant Attorney General
Albuquerque, New Mexico
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Opinion

Julie J. Vargas, Judge

{1} Having denied Appellant's motion for rehearing, we withdraw the opinion filed on August 31, 2017, and substitute the following in its place. The State asks us to reverse the district court's sanction of dismissal with prejudice of Defendant's shoplifting charges resulting from the State's failure to timely turn over recordings of witness identification interviews. Because the district court failed to explain the manner in which it considered culpability, prejudice, and lesser sanctions, as required by *State v. Harper*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25, and clarified in *State v. Le Mier*, 2017-NMSC-017, 394 P.3d 959, we reverse the decision of the district court and remand the case for further consideration of the propriety of the sanction in light of these factors.

I. BACKGROUND

{2} Defendant Damon Lewis, was indicted for shoplifting and conspiracy to commit shoplifting on June 25, 2014. The district court issued a scheduling order requiring that the parties complete all witness interviews by July 17, 2015, and file all pre-trial motions, excluding motions in limine, by July 28, 2015. The district court set the docket call for October 26, 2015, and trial on a trailing docket beginning November 2, 2015.

{3} Three months after the deadline to file pre-trial motions, Defendant filed a motion to dismiss the case or suppress the photo array identifications. In his motion, Defendant asserted that the police failed to record the photo array identifications contrary to the police department's standard operating procedures, reasoning that because the State had not produced any recording during discovery as required by Rule 5-501 NMRA, it must have failed to collect and preserve that evidence.

{4} On the first day of trial, the district court addressed Defendant's motion to dismiss, noting it was untimely. Defense counsel advised the court that, since filing his motion, the State had provided the recordings he presumed were lost, destroyed, or nonexistent. In response, the State pointed to a speed letter issued to Defendant, explaining that the recordings had been checked into evidence for as long as the case had been pending and were therefore available to Defendant. The State conceded that it had "definitely violated" the rule requiring it to provide copies of audio, video, and audio-video recordings made by law enforcement officers, *see* LR2-400.1(D) NMRA, but argued that the court had discretion under *Harper* to impose a lesser sanction than dismissal or suppression. *See* 2011-NMSC-044. Noting its obligation to impose sanctions, and after rejecting monetary sanctions as a remedy, the district court dismissed the case with prejudice, citing the State's continuing duty to disclose and its "blatant violation of the discovery rules." The State appealed.

II. DISCUSSION

{5} We review the district court's imposition of sanctions for an abuse of discretion. *Le Mier*, 2017-NMSC-017, ¶ 22. To dismiss Defendant's case, the district court relied on LR2-400.1. The rule applies to cases filed in the Second Judicial District Court on or before June 30, 2014. The rules of criminal procedure and existing case law apply to these cases "only to the extent they do not conflict" with the special calendar rule. LR2-400.1(A), (B). The rule requires the parties to disclose "all discovery described in Rule 5-501(A)(1)-(6) NMRA" as well as the "phone numbers and e-mail addresses of all witnesses if available, copies of documentary evidence and audio, video, and audio-video recordings made by law enforcement officers[,]" and to provide "a 'speed letter' authorizing the defendant to examine physical evidence in the possession of the [s]tate." LR2-400.1(D). These disclosures must be made within ten days of the effective date of the rule, or no later than February 12, 2015, if not already disclosed. LR2-400.1(D). The parties are also subject to "a continuing duty to disclose additional information within five (5) days of receipt of such information." LR2-400.1(D)(2). Should either party fail to comply with the discovery requirements set forth in the rule, the district court "shall impose sanctions, which may include dismissal of the case with or without prejudice, prohibiting the party from calling a witness or introducing evidence, monetary sanctions . . ., or any other sanction deemed appropriate by the court." LR2-400.1(D)(4). Further, where a party "fails to comply with any provision of the scheduling order, the court shall impose sanctions as the court determines is appropriate in the circumstances[.]" LR2-400.1(J)(4).

{6} In *Harper*, our Supreme Court held that "exclusion of witnesses requires an intentional violation of a court order, prejudice to the opposing party, and consideration of less severe sanctions[.]" 2011-NMSC-044, ¶ 2. The *Harper* court pointed out that dismissal and witness exclusion are extreme sanctions, to be used only in exceptional cases. *Id.* ¶¶ 16, 21. Our Supreme Court later sought to "clarify the circumstances under which a court may permissibly exclude a witness as a discovery sanction." *Le Mier*, 2017-NMSC-017, ¶ 1. According to *Le Mier*, "*Harper* did not establish a rigid and mechanical analytic

framework . . . so rigorous that courts may impose witness exclusion only in response to discovery violations that are egregious, blatant, and an affront to their authority." *Le Mier*, 2017-NMSC-017, ¶ 16. The Court further explained that a district court "must evaluate the considerations identified in *Harper*—culpability, prejudice, and lesser sanctions—when deciding whether to exclude a witness and must explain their decision to exclude or not exclude a witness within the framework articulated in *Harper*[.]" *Le Mier*, 2017-NMSC-017, ¶ 20. Despite this obligation, the district court continues to possess the "broad discretionary authority to decide what sanction to impose when a discovery order is violated." *Id.* ¶ 22. Thus, according to *Le Mier*, "it is not the case that witness exclusion is justified only if all of the *Harper* considerations weigh in favor of exclusion." *Le Mier*, 2017-NMSC-017, ¶ 20. Instead, the district court may use suppression as a sanction for failure to comply with a discovery order "to maintain the integrity and schedule of the court even though the defendant may not be prejudiced." *Id.* (internal quotation marks and citation omitted).

{7} Using this framework to guide its assessment of the district court's discretion in imposing sanctions, the *Le Mier* court then assessed the *Harper* factors. *Le Mier*, 2017-NMSC-017, ¶¶ 24-29. Looking first to the culpability factor, the Court noted that the facts of that case were particularly compelling, with the state flagrantly disregarding multiple extensions and warnings from the district court. Concluding that the state's conduct was sufficiently culpable to justify exclusion, the Court also noted that "a single violation of a discovery order may suffice to support a finding of culpability." *Id.* ¶ 24. The Court similarly found no abuse of discretion in the district court's prejudice determination, reasoning that "[w]hen a court orders a party to provide discovery within a given time frame, failure to comply with that order causes prejudice both to the opposing party and to the court." *Id.* ¶ 25. The prejudice to the defendant, according to the Court, was that his "day in court" had been needlessly delayed and that he had been subjected to "the possibility of trial by surprise[.]" *Id.* The Court explained that the district court had been prejudiced by wasting its time and disrupting its docket to the detriment of other parties and the entire justice system. *Id.* ¶ 26. Finally, the Court concluded that the sanction imposed by the district court had been the least severe sanction available, noting that the district court "was not obligated to consider every conceivable lesser sanction before imposing witness exclusion." *Id.* ¶ 27. Instead, the district court satisfied its burden by "fashion[ing] the least severe sanction that best fit the situation and which accomplished the desired result." *Id.* The Court reasoned that the progressive sanctions imposed by the district court were evidence that the district court imposed the least severe sanction appropriate to the circumstances. *Id.* ¶ 28. The Court further condoned witness exclusion as a sanction in that case because it "ensured that the court's authority to efficiently administer the law and ensure compliance with its orders was vindicated." *Id.* ¶ 29.

{8} Because the rules of criminal procedure and existing case law apply to this case "only to the extent they do not conflict" with the special calendar rule, LR2-400.1(A),(B), we must determine whether a conflict exists. While the language of the rule makes sanctions mandatory for violations of discovery obligations and scheduling order deadlines, it leaves the decision of the type of sanction to impose to the discretion of the district court. The rule provides no guidance as to the considerations to be made when assessing sanctions. Our Supreme Court, however, has set out guidelines for assessing sanctions in *Harper* and *Le Mier*. *Le Mier*'s requirements that a court must both evaluate the considerations identified in *Harper* and explain its decision within the *Harper* framework in determining what type of sanction to impose, merely supplement the rule without conflicting with it. As no conflict exists between the rule and established precedent, we continue to rely on *Harper*'s use of culpability, prejudice, and lesser sanctions as appropriate tools for evaluating the type of sanction that the district court may impose. Further, though *Harper* and *Le Mier* address a district court's exclusion of a witness as a sanction, rather than the dismissal with prejudice employed in this case, both dismissal and witness exclusion constitute "extreme" sanctions. *See Harper*, 2011-NMSC-044, ¶¶ 16, 21. The considerations relevant to both sanctions are similar, and we conclude it is appropriate to apply the *Harper* and *Le Mier* considerations here.

{9} The State concedes that it violated its initial disclosure obligations under LR2-400.1. The rule requires that "copies of documentary evidence and audio, video, and audio-video recordings" be provided within ten days of February 2, 2015, if not already disclosed. LR2-400.1(D). The State also had a "continuing duty to disclose additional information to [the defendant] within five (5) days of receipt of such information." LR2-400.1(D)(2). Here, the recordings were not provided to Defendant until November 16 or 17, 2015, just a day or so before trial was to begin and well outside of any disclosure period provided for by the rule.

{10} We disagree with the State's argument that providing the speed letter satisfied the requirements of LR2-400.1(D). The rule requires the parties to provide "copies of documentary evidence and audio, video, and audio-video recordings made by law enforcement officers or others, *and*, where necessary, a 'speed letter' authorizing the defendant to examine physical evidence in the possession of the State." LR2-400.1(D) (emphasis added). The requirements of LR2-400.1(D) were not satisfied by the provision of a speed letter because the language of the rule requires production of physical copies of documentary and audio-visual evidence in addition to a speed letter. *See id.* The State's failure to provide the recordings was a clear violation of the rule, regardless of whether Defendant was given a speed letter. The plain language of the rule indicates that a speed letter is not intended to serve as an alternative to the State's obligation to produce actual copies of the documentary and audio-visual evidence as required by the rule.

{11} The State having violated its discovery obligations set forth in LR2-400.1(D), the district court was required to impose sanctions. Those sanctions are subject to the considerations enunciated in *Harper* and *Le Mier*. *Le Mier* makes it clear that, even when the special calendar rule requires imposition of sanctions, the district court "must evaluate . . . culpability, prejudice, and lesser sanctions[,]" as enunciated in *Harper*. *Le Mier*, 2017-NMSC-017, ¶ 20. Upon weighing those factors, the district court then has discretion to decide which sanction to impose, but has an obligation to explain the reasons for its decision. *Id.*

{12} In this instance, the district court's assessment of the *Harper* factors is virtually nonexistent. *Le Mier* requires the district court to not only weigh the degree of culpability and extent of prejudice, but also explain its decision regarding applicability of lesser sanctions on the record. In this case, we do not have the benefit of looking at the sanction imposed through the lens of a thorough record that indicates a careful consideration of the *Harper* factors. Instead, we are left to determine whether the district court abused its discretion by arriving at the most extreme sanction available in response to an apparently unremarkable fact pattern. Though the district court was unquestionably aware of its obligation to consider the *Harper* factors, nothing in the record reveals

the district court's reasons for imposing a sanction of dismissal with prejudice or the facts on which the district court based its decision. The limited record in this case is inadequate to determine whether the district court exercised due care in making its decision to impose a severe sanction contrary to *Le Mier's* specific requirement that a district court "*must explain* [its] decision[.] 2017-NMSC-017, ¶ 20 (emphasis added). As such, the district court's imposition of its sanction—dismissal with prejudice—cannot presently be evaluated or justified by this Court, and we must reverse and remand the matter to the district court for further proceedings.

{13} To illustrate the inadequacy of the record made in this case, we discuss the *Harper* factors—as modified by *Le Mier*—and the district court's assessment of each, beginning with culpability. *Le Mier* moves courts away from the *Harper* requirement that bad faith or intransigence exist prior to assessing sanctions against a party. *Harper*, 2011-NMSC-044, ¶ 17. In *Le Mier*, our Supreme Court emphasized the mandatory nature of a court's orders, stating that "[p]arties must obey discovery orders" and explaining that "[o]ur system of justice would be neither orderly nor efficient" if parties were not held to comply with those orders. 2017-NMSC-017, ¶ 24. Though *Le Mier* dealt with multiple violations, it acknowledged that "a single violation of a discovery order may suffice to support a finding of culpability[,]" acknowledging a rebuttable presumption of culpability when a discovery order is violated. *Id.* The degree of culpability, however, is a fact-specific inquiry for the district court to consider in assessing sanctions against a party. It is through this consideration of degree that bad faith or intransigence now factors into a district court's calculation of appropriate sanctions. *See id.* ¶ 17. However, the district court made no such assessment here.

{14} As to prejudice, *Le Mier* explains that "[w]hen a court orders a party to provide discovery within a given time frame, failure to comply with that order causes prejudice both to the opposing party and to the court." *Id.* ¶ 25. Thus, under *Le Mier*, every discovery order violation gives rise to some degree of prejudice. Unlike the circumstances in *Le Mier*, this case involved no additional extensions and hearings regarding discovery issues requiring the district court to resolve the issue or effect compliance with the discovery order. Instead, after the deadline for discovery and pre-trial motions had expired, Defendant filed a motion to dismiss the case or suppress the photo array identification when he realized, a few weeks before trial, that the State had not produced a video of the identification. Nowhere in the record, however, did the district court address prejudice.

{15} Finally, we look at whether the district court considered lesser sanctions prior to dismissing the case with prejudice. *Le Mier* reminds us that "the district court was not obligated to consider every conceivable lesser sanction" before imposing dismissal with prejudice. *Id.* ¶ 27. It was only required to fashion the least severe sanction that it felt fit the situation and achieved the desired result. *Id.* The district court's consideration of lesser sanctions in this case was cursory at best. The district court began by reciting the sanctions listed in the rule, "which may include dismissal of the case with or without prejudice, prohibiting the party from calling witnesses or introducing evidence, [and] monetary sanctions[.]" LR2-400.1(D)(4). The court noted that "monetary sanctions aren't doing anything" and, after reciting language from the rule regarding both parties' duty to disclose, dismissed the case with prejudice. There was no discussion of witness or evidence exclusion, which had been requested by Defendant in the alternative, nor was there any discussion of dismissal without prejudice. The district court made no other statements on the record explaining its reasons for choosing the extreme sanction imposed—dismissal with prejudice—over any other lesser sanction.

{16} Despite the broad discretion *Le Mier* provides district courts when imposing sanctions, we remind our district courts that any decision to impose severe sanctions requires an adequately developed record that an appellate court can substantively review. While we may have expressed some concern with the severity of the sanction imposed in the present case—circumstances that appear much less egregious than the circumstances addressed in *Le Mier*—this does not preclude the possibility that the district court could have developed an adequate record finding the State culpable, perceiving sufficient prejudice to Defendant or the court, and determining that the discovery violation was sufficiently egregious to warrant a dismissal with prejudice rather than the lesser sanction requested by Defendant. We are also fully aware of our duty to view the evidence and all inferences in the light most favorable to the district court's decision, *see Le Mier*, 2017-NMSC-017, ¶ 22, but without an adequate record explaining the district court's ruling and reasoning, we cannot properly perform our role as an appellate court. In this case, the district court simply failed to satisfy the requirement that it develop an adequate record and explain its reasons for imposing such a severe sanction over other available alternatives. We make no determination regarding whether dismissal with prejudice was the proper sanction in this case. We therefore reverse the district court's sanction of dismissal with prejudice and remand for further consideration in light of this opinion.

{17} Finally, the State also argues on appeal that the district court erred in considering and ruling on Defendant's untimely motion to dismiss. Because the State admitted it "definitely violated" its discovery obligation, and it waited until the day before trial to actually produce the discovery, we conclude the district court did not abuse its discretion in considering and ruling on Defendant's untimely motion to dismiss. *See* LR2-400.1(J)(3) (stating that "for good cause shown" the scheduling order deadlines may be extended, provided the extension does not result in an extension of the trial date). In making this argument, the State seeks a ruling that the district court cannot impose a sanction of dismissal for discovery violations once the motions deadline has passed. A district court is not prevented from imposing a sanction of dismissal for discovery violations once the motions deadline has passed. Nothing in the language of LR2-400.1 supports such an outcome. To read LR2-400.1 otherwise would lead to an illogical result, allowing the State to disregard the discovery requirements of LR2-400.1, turn things over outside the discovery deadline, argue a defendant cannot move for dismissal as a sanction because the motions deadline has run, and thereby avoid any repercussions for its discovery violations. *See State v. House*, 2001-NMCA-011, ¶ 18, 130 N.M. 418, 25 P.3d 257 (recognizing that when arguments appear illogical to this Court they can be rejected on that basis). We do not read the rule to limit the district court in such a manner, particularly where the local rule contains no language to suggest such an illogical application and result would be appropriate.

III. CONCLUSION

{18} We reverse and remand based on the lack of stated support for the dismissal.

{19} IT IS SO ORDERED.
JULIE J. VARGAS, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge
TIMOTHY L. GARCIA, Judge

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Positions

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13th Judicial District Attorney
Senior Trial Attorney, Trial Attorney, Assistant Trial Attorney
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Slingshot, the result of a merger between Law 4 Small Business (L4SB) and Business Law Southwest (BLSW) back in July 2017, is seeking one (1) additional litigator with 1-5 years of experience, to join our high-tech, entrepreneurial team. We desire motivated self-starters who feel ready to be first-chair in a complex litigation. Learn more by going to slingshot.law/seeking. Tired of practicing law the traditional way? Come join a very progressive firm that is intent on becoming a leader in practical, pragmatic legal services focused to the exclusive needs of business. Learn why we're doing law different.

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Guebert Bruckner Gentile P.C. seeks an attorney with up to five years experience and the desire to work in tort and insurance litigation. If interested, please send resume and recent writing sample to: Hiring Partner, Guebert Bruckner Gentile P.C., P.O. Box 93880, Albuquerque, NM 87199-3880. All replies are kept confidential. No telephone calls please.

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.

Lawyer

Egolf + Ferlic + Harwood, LLC is looking for a hardworking lawyer to join our practice. The ideal candidate will have private sector litigation experience, including trial practice. She or he will be eager to work hard on cases that will advance the law in New Mexico and produce meaningful results for our clients and our communities. We look forward to welcoming a lawyer who possesses impeccable writing and research skills and who can manage important cases from start to finish. Please be in touch if you think you will be a good candidate for this position, want to enjoy a collegial workplace, seek opportunities for professional advancement, and understand the importance of the Oxford comma. You may send your letter of interest, resume and writing sample to our firm administrator, Manya Snyder, at Manya@EgolfLaw.com. We look forward to you joining our team!

Assistant City Attorney Positions

The City of Albuquerque Legal Department is hiring multiple Assistant City Attorney positions in the areas of real estate and land use, governmental affairs, immigration and civil rights, general commercial transaction issues, and civil litigation. The department's team of attorneys provide legal advice and guidance to City departments and boards, as well as represent the City and City Council on complex matters before administrative tribunals and in New Mexico State and Federal courts. Attention to detail and strong writing skills are essential. Five (5)+ years' experience is preferred. Salary will be based upon experience. Please submit resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or amaragon@cabq.gov.

Litigation Attorney

The Albuquerque branch of Fadduol, Cluff, Hardy & Conaway PC, a plaintiff's firm with branches in Texas and New Mexico, seeks a litigation attorney. Opportunity to join a highly successful, and growing, law practice. Three year's general litigation experience preferred along with specific experience in areas including investigation, pleading, discovery, motion practice, and trial. Spanish bilingual ability is a plus. Top 20% of graduating law school class required or, alternatively, documented success in multiple trials required. Full benefits. Salary at, or above, competition as base with a generous, discretionary bonus program awarded. Must be willing to travel, both in and out of state, work hard, and be a conscientious team player. Must care about clients and winning. Send resumes to hdelacerda@fchclaw.com.

Staff Attorney

New Mexico Center on Law and Poverty (www.nmpovertylaw.org) seeks full-time staff attorney for our Public Benefits Team to provide legal representation, policy advocacy, and community education to address hunger and secure fundamental fairness in the administration of the public safety net for low-income New Mexicans. Required: Law degree and license; minimum two years as an attorney; excellent research, writing, and legal advocacy skills; 'no-stone-unturned' thoroughness and persistence; leadership; ability to be articulate and forceful in the face of powerful opposition; commitment to economic and racial justice. Preferred: knowledge and experience in advocacy, lobbying, legislative and government administrative processes; experience working with diverse community groups and other allies; familiarity with poverty law; Spanish fluency. Varied, challenging, rewarding work. Good non-profit salary. Excellent benefits. Balanced work schedule. Apply in confidence by emailing a resume and a cover letter describing your commitment to social justice and to the mission of the NM Center on Law and Poverty to veronica@nmpovertylaw.org. Please put your name in the subject line. EEOE. People with disabilities, people of color, and people who have grown up in low-income communities are especially encouraged to apply.

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Respected Albuquerque firm seeks an attorney with at least two years of experience for associate position with future prospects for becoming a shareholder. Our firm offers a wide variety of civil practices areas. Applicants should be interested in serving the needs of our business clientele, and have an interest in litigation. Please visit our website for more information about our practice areas and attorneys. Moses, Dunn, Farmer and Tuthill, P.C. has been serving New Mexico clients for more than 63 years. Please send your resume to Alicia L. Gutierrez, P.O. Box 27047, Albuquerque, NM, 87125.

Senior Trial Attorney

The Third Judicial District Attorney's Office in Las Cruces is looking for a Senior Trial Attorney. Requirements: Licensed attorney to practice law in New Mexico plus a minimum of four (4) years as a practicing attorney in criminal law or three (3) years as a prosecuting attorney. Salary Range: $59,802-$74,753 Salary will be based upon experience and the District Attorney's Personnel and Compensation Plan. Submit Resume to Whitney Safranek, Human Resources Administrator at wsafranek@da.state.nm.us. Further description of this position is listed on our website http://donaanacountyda.com/.

Senior Assistant City Attorney/ Prosecutor, Assistant City Attorney

City of Las Cruces – Senior Assistant City Attorney/Prosecutor; Assistant City Attorney/Prosecutor. Closing date: Open until filled. Senior Assistant City Attorney salary range: $67,381.64 – $101,072.46 annually. Assistant City Attorney salary range: $58,102.98 - $72,628.73 annually. This posting is for a Municipal Court Prosecutor. Fulltime regular, exempt position. Applicants for this Prosecutor position may also be considered for a position that performs a variety of legal duties to support the City Attorney's office which may include legal assessments and recommendations; factual and legal analysis to determine whether legal issues should be prosecuted or defended based on the facts of law and evidence; preparation and presentation of legal documents, analyses, and City code revisions, and other legal measures. Minimum requirements: Juris Doctor Degree plus one (1) year of experience in criminal prosecution. A combination of education, experience, and training may be applied in accordance with City of Las Cruces policy. Member of the New Mexico State Bar Association, licensed to practice law in the state of New Mexico; active with all New Mexico Bar annual requirements. Valid driver's license may be required or preferred. Visit website http://agency.governmentjobs.com//lascruces/default.cfm for further information, job posting, requirements and online application process.

Eleventh Judicial District Attorney's Office, Div II

The McKinley County District Attorney's Office is currently seeking immediate resumes for two (2) Assistant Trial Attorneys and one (1) Senior Trial Attorney. Former position is ideal for persons who recently took the NM bar exam and persons who are in good standing with another state bar. Senior Trial Attorney position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence. Persons who are in good standing with another state bar or those with New Mexico criminal law experience in excess of 5 years are welcome to apply. The McKinley County District Attorney's Office provides regular courtroom practice and a supportive and collegial work environment. Enjoy the spectacular outdoors in the adventure capital of New Mexico. Salaries are negotiable based on experience. Submit letter of interest and resume to Paula Pakkala, District Attorney, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter and resume to PPakkala@da.state.nm.us by 5:00 p.m. June 1, 2018.

Attorney Associate

The Administrative Office of the Courts (AOC) is accepting applications for a permanent, full-time Attorney Associate. Under the direction of AOC general counsel, plan, organize, direct, and manage the statewide program for Alternative Dispute Resolution (ADR), including supervision of the Children's Court Mediation Program (CCMP) and the Magistrate Court Mediation Program (MCMP). Coordinate the work of volunteers, contract personnel and outside entities. Work with statewide district courts to implement or enhance ADR programs. May supervise judicial branch program staff and provide professional support to judicial commission(s). Under general direction, as assigned by a supervision attorney, review cases, perform legal research, evaluation, analysis, and writing and make recommendations concerning the work of the Court or Judicial Entity. Salary: $58,506.24 - $73,132.80 per year (salary based on qualifications and experience). For a detailed job description, requirements and application/resume procedure please refer to https://www.nmcourts.gov/careers.aspx or contact Administrative Office of the Courts Human Resources at 505-827-4810.

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PT/FT attorney for expanding law firm in Santa Fe. Email resume to xc87505@gmail.com. All inquiries are maintained as confidential.

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Small litigation firm seeks motivated attorney with 2-3 years of experience. Must have strong research and writing skills. Salary based on experience. Send resume and salary requirements to PO Box 16270, ABQ, NM 87191-6270 or lawfirm9201@gmail.com.

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Pueblo of Isleta
Request for Interested Parties
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The Pueblo of Isleta ("Owner") is seeking to hire a Contract Public Defender for conflict cases. To request further details, please contact both of the following individuals by email: Elaine Zuni, Procurement - Director, Pueblo of Isleta; Email:poi70301@isletapueblo.com; Phone: (505) 869-9738; Sophie Cooper, Public Defender, Pueblo of Isleta; Email: poi09012@isletapueblo.com; Phone: (505) 869-9826

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New Mexico State Personnel Office

To provide legal representation to the New Mexico State Personnel Office and the State of New Mexico in arbitration cases, prohibited practice complaints and grievance proceedings related to any collective bargaining agreement in place with the State of New Mexico and/or the Public Employee Bargaining Act, and in resulting appeals to New Mexico District Court, Court of Appeals, or the Supreme Court. Qualifications require a juris doctorate degree as a practicing attorney with a current State Bar of New Mexico license. Interested parties with the following qualifications are encouraged to review the complete and detailed FY19 RFP by accessing the State Personnel website at www.spo.state.nm.us Copies of the RFP are available Monday-Friday, 8am-5pm, at the State Personnel Office, 2600 Cerrillos Road, Santa Fe, NM. For questions, please call George Ecklund, Chief Procurement Officer, State Personnel Office at 505-476-7844. Deadline for submission of response to this FY19 RFP is May 11, 2018 at 3pm, MST.

Mid-level Associate Attorney

Mid-level Associate Attorney – civil litigation department of AV Rated firm. Licensed and in good standing in New Mexico with three plus years of experience in litigation (civil litigation preferred). Experience in handling pretrial discovery, motion practice, depositions, trial preparation, and trial. Civil defense focus; knowledge of insurance law also an asset. We are looking for a candidate with strong writing skills, attention to detail and sound judgment, who is motivated and able to assist and support busy litigation team in large and complex litigation cases and trial. The right candidate will have an increasing opportunity and desire for greater responsibility with the ability to work as part of a team reporting to senior partners. Please submit resume, writing sample and transcripts to palvarez@rmjfirm.com.

Paralegal

Team, Talent, Truth, Tenacity, Triumph. These are our values. (Please read below concerning how to apply.) 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 www.HurtCallBert.com/jobs. Emailed applications will not be considered.

Legal Assistant/Paralegal
Sole practitioner personal injury law firm in Albuquerque seeks an experienced full-time Legal Assistant/Paralegal (5+ years). The ideal candidate should be highly motivated, well organized, detail oriented, and can work independently. Bilingual (Spanish) preferred, but not required. All responses are strictly confidential. Salary DOE plus benefits. Please submit your letter of interest, resume, references, and salary requirements to: LegalAssistantNM@gmail.com

Receptionist / File Clerk
Small uptown Albuquerque family law firm seeks full-time receptionist / file clerk to join our team M-TH 8:00-5:30, F 8:00-noon. We offer competitive pay, benefits upon hiring, including health insurance and paid sick & annual leave & Simple IRA match, in a positive and friendly workplace. Applicants should be adept in MS Word, Outlook & Excel; legal experience a plus but not required. This position requires strong customer service skills, efficiency, and organization. Please submit resume to info@nmdivorcecustody.com or call Juan Diego at 505-881-2566.

Paralegal
The University of New Mexico Office of University Counsel (OUC) offers an opportunity for an experienced, detail-oriented paralegal with at least five years of legal experience to join the OUC. Candidates must have experience in document production, as well as strong organizational, communication and computer skills. Prior experience with the New Mexico Inspection of Public Records Act is preferred. The successful candidate will compile, review and organize documents requested for inspection under the direction of the Custodian of Public Records. The position will also manage the online public records portal, draft response letters, coordinate responses to requests with other UNM departments, and work closely with OUC attorneys. For more information regarding closing dates, minimum requirements, and instructions on how to apply, please visit our website at http://unmjobs.unm.edu, call 505-277-6947, or visit the UNM HR Service Center at 1700 Lomas NE, Suite 1400, Albuquerque, NM 87131. Reference Req. #4486. Best Consideration Date: May UNM is an equal opportunity employer. EEO/AA/Minorities/Females/Vets/Disabled/and other protected classes.

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

Legal Assistant
Downtown insurance defense firm seeking FT legal secretary with 3+ yrs. recent litigation experience. Current knowledge of State and Federal District Court rules a must. Prior insurance defense experience preferred. Strong work ethic, positive attitude, superior grammar, clerical and organizational skills required. Good benefits. Salary DOE. Send resume and salary history to: Office Administrator, Madison, Mroz, Steinman & Dekleva, P.A., P.O. Box 25467, Albuquerque, NM 87125-5467 or fax to 505-242-7184.

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.

Experienced Paralegal Seeks Employment In Santa Fe
Highly experienced (20+ years) and recommended paralegal wishes part-time or contract employment in Santa Fe only. For resume and references, please e-mail 'santafeparalegal@aol.com'.

Office Space

Uptown's Best Office Space
2550SF of prime office space located off the second floor lobby with immediate access to elevators and 1st floor staircase, has great presence. High end remodel. Building signage available. Great access to I-40 adjacent to Coronado and ABQ Uptown malls. On site amenities include Bank of America and companion restaurants. Call John Whisenant or Ron Nelson (505) 883-9662 for more information.

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.

Professional Law Offices
Professional law offices for lease adjacent to Santa Fe district court at 311 Montezuma Avenue. $4400/mo for 2505 SF + utilities. 505-629-0825 LNMREB#18556

820 Second Street NW
820 Second Street NW, offices for rent, one to two blocks from courthouses, all amenities including copier, fax, telephone system, conference room, high-speed internet, phone service, receptionist, call Ramona at 243-7170.

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.

Downtown Las Cruces Office Space 500 North Church Street
Professional office space in Downtown Las Cruces within walking distance of Downtown restaurants and businesses, Federal Court, District Court and Municipal Court. Just completed interior remodel of building. Tenants have access to large reception area, conference rooms, library and kitchen area. Front patio is gated. Receptionist, copy machine, postage machine, utilities and janitorial service are provided. Phone and internet available. Building has refrigerated air. Ample parking for clients. Variable size office spaces are available starting at $550 per month. For more information contact Martha at 575-526-3338 or martha@picklawllc.com.

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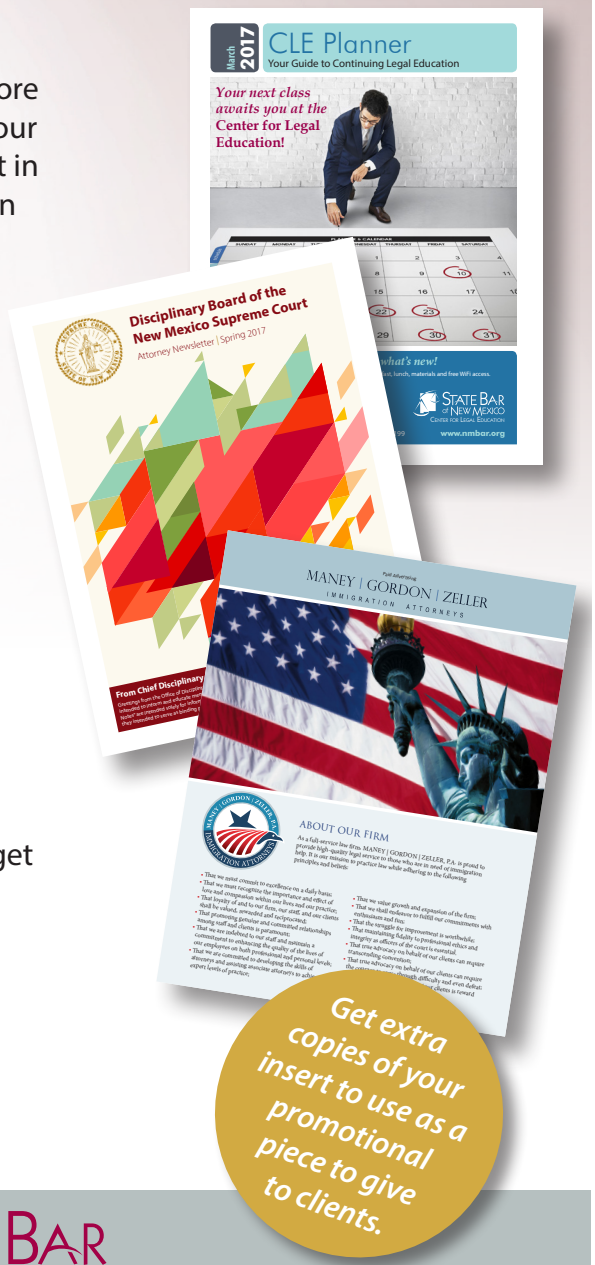

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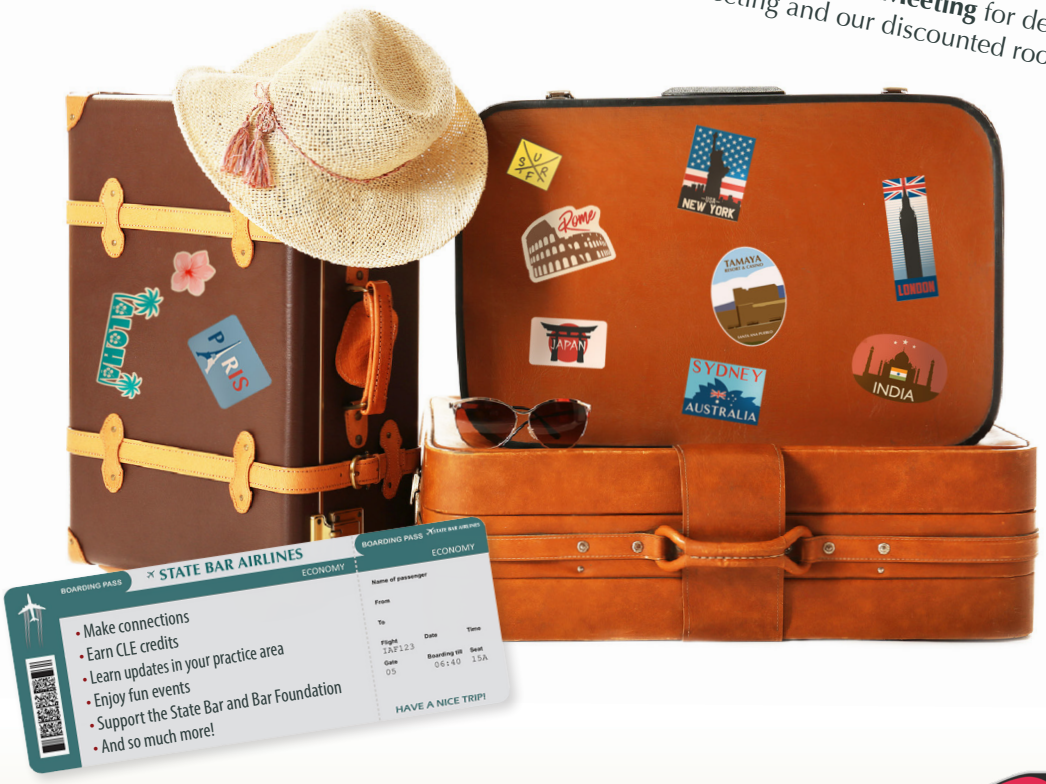

Red Raider Hospitality Lounge

— Sponsored by the Texas Tech School of Law —

The Texas Tech University School of Law continues to show their support of the State Bar of New Mexico as the proud sponsor of the 2018 Red Raider Hospitality Lounge!

State Bar of New Mexico

The $26 resort fee has been waived for State Bar of New Mexico Annual Meeting attendees.