Official Publication of the State Bar of New Mexico

Bar Bulletin

May 23, 2018 • Volume 57, No. 21

What About Oaxaca, by Melinda Silver (see page 3)

www.melindasilverfineart.com

Inside This Issue

-State Bar of New Mexico-

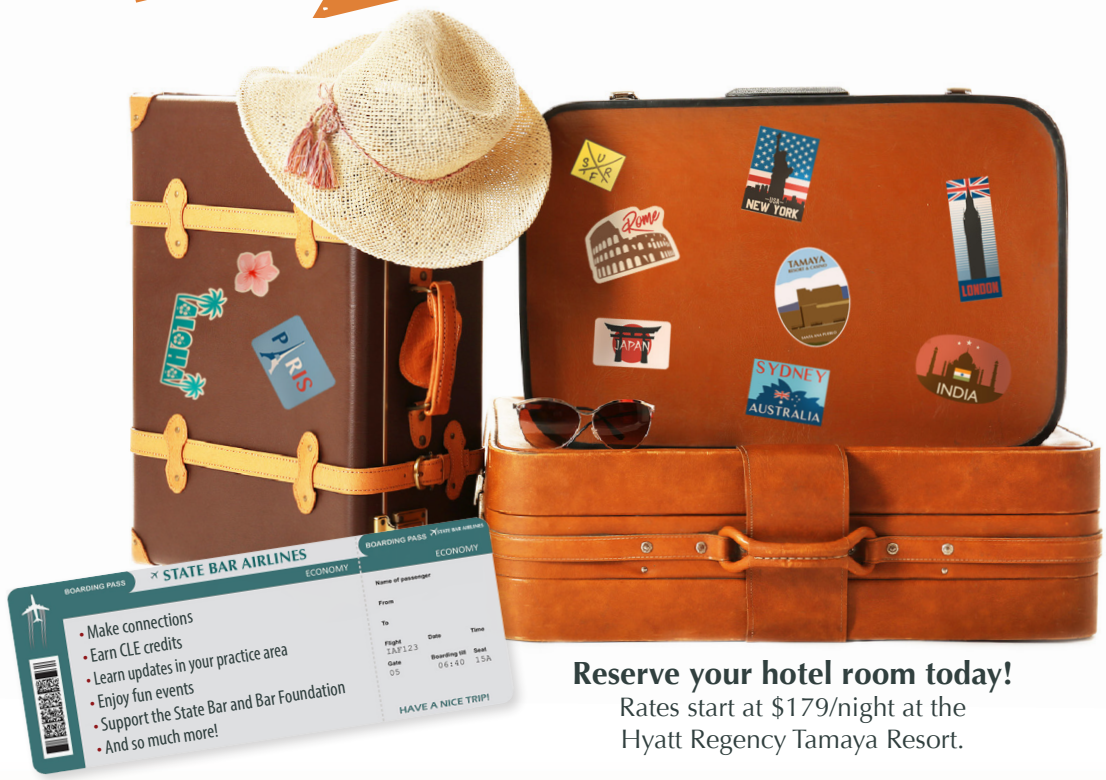
2018 Annual Meeting

Hyatt Regency
TAMAYA RESORT
Santa Ana Pueblo

Aug. 9-11

Registration is now open!

Visit **www.nmbar.org/AnnualMeeting** to reserve your spot today.



Reserve your hotel room today!
Rates start at $179/night at the
Hyatt Regency Tamaya Resort.

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.

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6
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23
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6-9 p.m., State Bar Center, Albuquerque, 505-797-6094

June

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

6
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7
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10–11:15 a.m., Edgewood Senior Center, Edgewood, 1-800-876-6657

About Cover Image and Artist: Melinda Silver is a passionate painter who works in acrylics, encaustics and mixed media, painting layers and then destroying those layers to capture the tension and mystery of geological, social, political, religious and personal change. She worked many years as a commercial artist for print media. Always interested in making this world a better place, she attended and graduated from the UNM School of Law, and practiced both locally and in Washington D.C. Now she works in her newly remodeled studio in Santa Fe. She finds working with the abstract requires a leap of faith which is fascinating, terrifying and gratifying. For inquiries or to arrange a studio visit, contact Silver at melindasilver@gmail.com or at www.melindasilverfineart.com.

Notices

Court News

New Mexico Supreme Court

The Investiture Ceremony for The Honorable Gary L. Clingman

State Bar members invited to attend the investiture ceremony for Hon. Gary L. Clingman as associate justice of the Supreme Court of New Mexico on June 15, at 4 p.m., Suprume Courtroom 237 Son Gaspar Ave., Santa Fe, N.M. A reception will immediately following the ceremony in the Supreme Court Law Library.

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 through May -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.

New Mexico Judicial Compensation Committee Notice of Public Meeting

The Judicial Compensation Committee will meet on June 12, from 9:30 a.m.-12:30 p.m., in Room 208 of the New Mexico Supreme Court, 237 Don Gaspar, Santa Fe, to discuss fiscal year 2020 recommendations for compensation for judges of the magistrate, metropolitan and district courts, the Court of Appeals, and justices of the Supreme Court. The Commission will thereafter provide its judicial compensation report and recommendation for FY2020 compensation to the legislature prior to the 2019 session. The meeting is open to the public. For an agenda or more information, call Jonni Lu Pool, Administrative Office of the Courts, 505-476-1000.

Professionalism Tip

With respect to opposing parties and their counsel:

I will agree to reasonable requests for extensions of time or waivers of formalities when legitimate interests of my client will not be adversely affected.

State Bar News

Attorney Support Groups

- June 4, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- June 11, 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#.
- June 18, 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.

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.

Committee on Women and the Legal Profession

Nominations Open for 2017 Justice Pamela Minzner Award

The Committee on Women seeks nominations of New Mexico attorneys who have distinguished himself or herself during 2017 by providing legal assistance to women who are underrepresented or under deserved, or by advocating for causes that will ultimately benefit and/or further the rights of women. If you know of an attorney who deserves to be added to the award's distinguished list of honorees, submit 1-3 nomination letters describing the work and accomplishments of the nominee that merit recognition to Quiana Salazar-King at Salazar-king@law.unm.edu by June 29. The award ceremony will be held on Aug. 30 at the Albuquerque Country Club. This award is named for Justice Pamela B. Minzner, whose work in the legal profession furthered the causes and rights of women throughout society. Justice Minzner was the first female chief justice of the New Mexico Supreme Court and is remembered for her integrity, strong principals, and compassion. Justice Minzner was a great champion of the Committee and its activities.

Legal Resources for the Ederly Program

Two Upcoming Legal Workshops

The State Bar of New Mexico's Legal Resources for the Elderly Program (LREP) is offering two free legal workshops in Edgewood June 7, 10 a.m.-1 p.m. at Edgewood Senior center and in Socorro June 19, 10 a.m.-1 p.m., at Socorro County Senior Center. Call LREP at 800-876-6657 for more information.

2018 Annual Meeting

Resolutions and Motions

Resolutions and motions will be heard at 1 p.m., Aug. 9, at the opening of the State Bar of New Mexico 2018 Annual Meeting at the Hyatt Regency Tamaya Resort & Spa, Santa Ana Pueblo. To be presented for consideration, resolutions or motions must be submitted in writing by July 9 to Executive Director Richard Spinello, PO Box 92860, Albuquerque, NM 87199; fax to 505-828-3765; or email rspinello@nmbar.org.

Young Lawyers Division

Volunteers Needed for Veterans Civil Legal Clinic

The YLD seeks volunteers to staff the Veterans Civil Legal Clinic from 8:30-10:30 a.m. on June 12, at the N.M. Veteran's Memorial located at 1100 Louisiana Blvd SE in Albuquerque. Volunteers should arrive at 8 a.m. for orientation and complimentary breakfast. The clinics offer veterans a broad range of veteran-specific and non-veteran specific legal services, including family law, consumer rights, worker's comp, bankruptcy, driver's license restoration, landlord/tenant, labor/employment and immigration. To volunteer, visit https://form.jotform.com/71766385703969.

UNM School of Law

Law Library Hours

Through May 26

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 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 Criminal Defense Lawyers Association

Expert Essentials CLE

Expert testimony is vital but can be difficult to communicate to a jury of laypersons. To decrease such risks, the New Mexico Criminal Defense Lawyers Association has assembled a robust schedule of experts to explore these issues first-hand. Sign up for the Expert Essentials CLE on June 8, in Albuquerque. Special guests include Professor Christopher McKee from the University of Colorado and Professor Shari Berkowitz from California State University. Afterwards, NMCDLA members and their families and friends are invited to our annual membership party and silent auction. Visit www.nmcdla.org to join NMCDLA and register for the seminar today.

Albuquerque Bar Association

Membership Luncheon

Join the Albuquerque Bar Association for its Membership Luncheon on June 5, from 11:30 a.m.- 1 p.m. at the Hyatt Regency Albuquerque 330 Tijeras NW, Albuquerque, NM, 87102. The luncheon will feature Mayor Tim Keller. Lunch $30 for members and $40 for non-members with a $5 walk-up fee. Register by 5 p.m. June 1. Registration checks can be mailed to: Albuquerque Bar Association PO Box 40 Albuquerque, NM 87103. Electronic registration details to follow.

Other News

New Mexico Workers' Compensation Administration

Request for Comments

The director of the Workers' Compensation Administration, 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 Aug. 26. Anyone who wants 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.Bludworth@state.nm.us.

Legal Education

May

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

30 **Basics of Cyber-Attack Liability and Protecting Clients**
1.0 G
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

June

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

8 **Expert Essentials**
5.5 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org, 505-992-0050, info@nmcdla.org

8 **Text Messages & Litigation: Discovery and Evidentiary Issues**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Closely Held Company Merger & Acquisitions, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **Closely Held Company Merger & Acquisitions, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **My Client's Commercial Real Estate Mortgage Is Due, Now What?**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Practice Management Skills for Success**
5.0 G, 1.0 EP
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**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

22 **How to Practice Series: Probate and Non-Probate Transfers (2018)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Basic Guide to Appeals for Busy Trial Lawyers (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Strategies for Well-Being and Ethical Practice (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

22 **How to Avoid Potential Malpractice Pitfalls in the Cloud**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

25 **The Ethics of Bad Facts and Bad Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

26 **Ethical Issues and Implications on Lawyers' Use of LinkedIn**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

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

27 **Roadmap/Basics of Real Estate Finance, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

28 **Social Media as Investigative Research and Evidence**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

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

29 **The Ethics of Social Media Research**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Fourth Annual Symposium on Diversity and Inclusion – Diversity Issues Ripped from the Headlines, II (2018)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **New Mexico DWI Cases: From the Initial Stop to Sentencing; Evaluating Your Case (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Abuse and Neglect Case in Children's Court (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

July

3 **Employment Investigations: Figuring it Out/Avoiding Liability**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Baskets and Escrow in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Selection and Preparation of Expert Witnesses in Litigation**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Protecting Subtenant Clients in Leasing**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Roadmap of VC and Angel, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Roadmap of VC and Angel, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

20 **2018 Family and Medical Leave Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

20 **The Duty to Consult with Tribal Governments: Law, Practice and Best Practices (2017)**
2.3 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics (2017)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **Due Diligence in Commercial Real Estate Transaction**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Estate and Gift Tax Audits**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Mediating with a Party with a Mental Illness/Disability**
2.0 EP
Live Seminar/ Teleseminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Litigation and Argument Writing in the Smartphone Age (2017)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Bankruptcy Fundamentals for the Non-Bankruptcy Attorney (2018)**
3.0 G
Live Replay, Albuquerque
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27 **Attorney vs. Judicial Discipline (2017)**
2.0 EP
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27 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **Lawyer Ethics and Disputes with Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

Opinions

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

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

Effective May 11, 2018

PUBLISHED OPINIONS

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A-1-CA-36169	HSD v. M Lundy	Affirm	05/07/2018
A-1-CA-36298	L Burrell v. A Niman	Reverse	05/07/2018
A-1-CA-36838	L Provost v. A Jaramillo	Dismiss	05/07/2018
A-1-CA-34471	State v. J Manning	Affirm	05/08/2018
A-1-CA-35073	State v. S Centeno	Affirm	05/08/2018
A-1-CA-35668	State v. B Torres Jr	Affirm	05/08/2018
A-1-CA-31243	State v. J Ochoa	Affirm	05/09/2018
A-1-CA-36063	State v. C Frost	Reverse	05/09/2018
A-1-CA-35120	A Jones v. City of Albuquerque	Affirm	05/10/2018
A-1-CA-35805	State v. R Sampson	Affirm	05/10/2018
A-1-CA-36901	L Chapman v. Apache Sales Inc.	Affirm	05/10/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF ADDRESS AND/OR TELEPHONE CHANGES

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective May 23, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2018 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-088.1	Peremptory excusal of a district judge; recusal; procedure for exercising	03/01/2018
Rules of Criminal Procedure for the District Courts		
5-302A	Grand jury proceedings	04/23/2018

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

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-017
No. S-1-SC-35183 (filed February 22, 2018)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
EDWARD JAMES TAPIA, SR.,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
William C. Birdsall, District Judge

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Opinion

Petra Jimenez Maes, Justice

{1} In this case we address an issue of first impression: whether evidence of non-violent crimes committed in the presence of a police officer after an unconstitutional traffic stop must be suppressed under the Fourth Amendment of the United States Constitution (Fourth Amendment) and Article II, Section 10 of the New Mexico Constitution (Article II, Section 10). Defendant Edward Tapia, Sr. entered a conditional plea of guilty to one count of forgery, for signing his brother's name to a traffic citation charging failure to wear a seat belt in a motor vehicle, and reserved his right to appeal. *See State v. Tapia*, 2015-NMCA-055, ¶¶ 1, 5, 348 P.3d 1050. He appealed to the Court of Appeals which reversed his conviction. *Id.* ¶ 1. The State petitioned for a writ of certiorari, which we granted. *See* Rule 12-502 NMRA.

I. Facts and Procedure

{2} Because Defendant entered a conditional guilty plea, there was no trial. Therefore, the facts are taken from the suppression hearing, the findings of fact and conclusions of law entered by the district court, and the plea hearing. On August 8, 2012, Defendant and his companions were traveling westbound on U.S. Highway 64 toward Farmington, in San Juan County. Defendant was a passenger in the back seat of the car. New Mexico State Police Officer Tayna Benally stopped the car because it was going forty miles per hour in a fifty-five-mile-per-hour zone and because she was unable to read the license plate. After contacting the driver, Benally noticed Defendant was not wearing a seat belt. When asked about this, Defendant told Benally he was wearing a lap belt. Benally asked him to lift his shirt so she could verify he was wearing a lap belt. Defendant complied and lifted his shirt, and Benally observed he was not wearing a lap belt. At this point, Benally asked Defendant for his driver's license. Defendant said he didn't have any identification. Benally then asked Defendant to write down his name, date of birth, and social security number. He wrote down "Robert Tapia DOB 03/22/1968" and said he did not know his social security number.

{3} Benally contacted San Juan County Dispatch and asked for a description of Robert Tapia. The description given was inconsistent with Benally's observations of Defendant's appearance. Despite the inconsistencies, Benally issued a "no seat belt" citation for Robert Tapia, and Defendant signed the citation as Robert Tapia.

{4} While Benally was dealing with Defendant, another officer at the scene spoke with a second male passenger. The second passenger informed the second officer that Defendant's real name was Edward Tapia. The second officer had Defendant exit the car and confirm his name. Defendant said his name was Robert Tapia but then restated his birth date as March 22, 1974. The second officer informed Benally of what the second passenger had told him, and Benally then arrested Defendant for concealing identity. Later, at the jail, Defendant's real identity was confirmed as Edward Tapia. His birth date and social security number were also confirmed, and Benally discovered there was an outstanding warrant for Defendant's arrest for failing to appear at the San Juan Magistrate Court in Aztec, New Mexico.

{5} Defendant was charged with forgery, contrary to NMSA 1978, Section 30-16-10(A) (2006); concealing identity, contrary to NMSA 1978, Section 30-22-3 (1963); and seat belt violation, contrary to NMSA 1978, Section 66-7-372(A) (2001).

{6} Defendant filed in the Eleventh Judicial District Court a motion to suppress all evidence obtained by Benally, challenging the constitutionality of the traffic stop. The district court heard the motion to suppress, held that the traffic stop was unlawful because the driver had made no moving violations and the license plate was concededly visible to the officer, and suppressed the evidence of the seat belt violation. However, the evidence of concealing identity and forgery was not suppressed. The district court found that those crimes "had not yet been committed at the time of the stop," that "[e]vidence of those crimes did not exist at the time of the stop," and concluded that "an unlawful stop does not justify the commission of new crimes."

{7} Defendant entered a conditional guilty plea to the forgery charge, admitted to two prior offenses for habitual sentencing purposes, and reserved the right to appeal the suppression issue as to both forgery and concealing identity. The district court accepted the plea and sentenced Defendant to eighteen months in the Department of Corrections, with all but forty-five days of the sentence suspended in favor of unsupervised probation. Pursuant to the plea, the Defendant appealed his conviction to the Court of Appeals.

{8} The Court of Appeals reversed the ruling of the district court and held that "the commission of a non-violent, identity-related offense in response to unconstitutional police conduct does not automatically purge the taint of the unlawful police conduct under federal law." *Tapia*, 2015-NMCA-055, ¶ 17. The Court of Appeals then engaged in an attenuation analysis and held that "the discovery

of the evidence of concealing identity and forgery was not sufficiently removed from the taint of the illegal stop to justify admitting the evidence notwithstanding the exclusionary rule." *Id.* ¶ 19. Concluding that the crimes of concealing identity and forgery should have been suppressed under the Fourth Amendment, the Court of Appeals did not reach defendant's state constitutional claim. *Id.* ¶ 20.

{9} The State petitioned for certiorari to review the issue of whether a new crime exception to the exclusionary rule, which this Court has previously recognized for violent crimes, also applies to non-violent, identity-related crimes. *See* N.M. Const. art. VI, § 3; NMSA 1978, § 34-5-14 (1972); Rule 12-502. We granted certiorari under Rule 12-502(C)(2)(d)(iii) as this case presents a significant constitutional question.

II. Standard of Review

{10} "In reviewing a trial court's denial of a motion to suppress, we observe the distinction between factual determinations which are subject to a substantial evidence standard of review and application of law to the facts[,] which is subject to de novo review." *State v. Nieto*, 2000-NMSC-031, ¶ 19, 129 N.M. 688, 12 P.3d 442 (alteration in original) (internal quotation marks and citation omitted). The district court made findings of facts and conclusions of law. The parties do not dispute the pertinent facts, only the application of law to those facts; therefore, our review is de novo. *Id.* ¶ 19; *see State v. Pierce*, 2003-NMCA-117, ¶¶ 1, 10, 134 N.M. 388, 77 P.3d 292 (stating that when the facts are not in dispute on a motion to suppress, we determine whether the law was correctly applied to those facts).

III. Discussion

{11} The State argues that the new crime exception to the exclusionary rule does not make a categorical distinction between violent and non-violent crimes and that the potential deterrence of unlawful searches and seizure by the State is outweighed by the cost of excluding evidence of identity crimes. Defendant asks this Court to affirm the Court of Appeals ruling that the crimes of concealing identity and forgery should have been suppressed under the Fourth Amendment and asks alternatively for suppression under Article II, Section 10.

{12} Under the interstitial approach adopted in *State v. Gomez*, 1997-NMSC-006, ¶ 21, 122 N.M. 777, 932 P.2d 1, we ask "first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached." *Id.* ¶ 19. If it is not, we examine the state constitutional claim. *Id.* However, "we may diverge from federal precedent where the federal analysis is flawed, where there are structural differences between the state and federal governments, or because of distinctive New Mexico characteristics." *State v. Garcia*, 2009-NMSC-046, ¶ 27, 147 N.M. 134, 217 P.3d 1032 (citing *Gomez*, 1997-NMSC-006, ¶ 19).

A. Attenuation Doctrine and the New Crime Exception

{13} The Fourth Amendment prohibits unreasonable searches and seizures by police. *Herring v. United States*, 555 U.S. 135, 139 (2009). "As a general rule, the federal constitution . . . requires suppression of evidence obtained in a manner that runs afoul of the Fourth Amendment." *State v. Santiago*, 2010-NMSC-018, ¶ 10, 148 N.M. 144, 231 P.3d 600. The requirement that evidence obtained as a result of an unconstitutional search or seizure be suppressed is known as the "exclusionary rule." *State v. Ingram*, 1998-NMCA-177, ¶ 9, 126 N.M. 426, 970 P.2d 1151. The purpose of the exclusionary rule under the Fourth Amendment has been articulated as the deterrence of unlawful government behavior. *See Elkins v. United States*, 364 U.S. 206, 217 (1960) (stating purpose of the exclusionary rule is "to deter—to compel respect for the constitutional guaranty . . . by removing the incentive to disregard it"). "[T]he exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and . . . 'evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree.'" *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)). The rule is not absolute, but "applicable only . . . where its deterrence benefits outweigh its substantial social costs." *Strieff*, 136 S. Ct. at 2061 (omission in original) (internal quotation marks and citation omitted).

{14} The United States Supreme Court has thus recognized three exceptions to the exclusionary rule involving the causal relationship between the unconstitutional act and the discovery of evidence.

> First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. Third . . . is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.

Id. at 2061 (omission in original) (internal quotation marks and citations omitted).

{15} Under the attenuation doctrine, the government can admit evidence when "the relationship between the unlawful search or seizure and the challenged evidence becomes sufficiently weak to dissipate any taint resulting from the original illegality." *United States v. Smith*, 155 F.3d 1051, 1060 (9th Cir. 1998). The United States Supreme Court in *Brown v. Illinois* identified three factors by which a court may determine if seized evidence has been purged of the taint of the original illegality: (1) the lapsed time between the illegality and the acquisition of the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *See* 422 U.S. 590, 603-04 (1975).

{16} "It was [the attenuation doctrine] that spawned the new crime exception to the exclusionary rule." Christopher J. Dunne, *State v. Brocuglio: The Supreme Court of Connecticut's Modification of the New Crime Exception to the Exclusionary Rule*, 23 QLR 853, 860 (2004). The new crime exception was first articulated by the Eleventh Circuit Court of Appeals in *United States v. Bailey*, 691 F.2d 1009 (11th Cir. 1983). *See* Dunne, *supra*, at 861. In *Bailey*, the Court of Appeals held that "notwithstanding a strong causal connection in fact between lawless police conduct and a defendant's response, if the defendant's response is itself a new, distinct crime, then the police constitutionally may arrest the defendant for that crime." 691 F.2d at 1016-17.

{17} Whether the new crime exception is part of the attenuation doctrine or a separate exception to the exclusionary rule is unclear. 1 *McCormick on Evidence* § 180, at 972-73 (Kenneth S. Broun ed., 7th ed. 2013) ("Some courts appear to

regard the doctrine as simply a specialized application of the attenuation of taint doctrine, under which intervening voluntary criminal conduct usually and perhaps inevitably attenuates the taint of illegality preceding that conduct. . . . Other courts appear to regard the doctrine as a separate exception to exclusionary requirements, based on considerations distinguishable from those supporting the attenuation of taint doctrine." (footnotes omitted)).[1]

{18} The Tenth Circuit Court of Appeals adopted the new crime exception in *United States v. Waupekenay*, 973 F.2d 1533 (10th Cir. 1992), a case that arose out of New Mexico. In *Waupekenay*, the defendant pointed a rifle at tribal officers after they unlawfully entered his home. *Id.* at 1535. The Court concluded that despite the unlawful entry, the defendant no longer had a reasonable expectation of privacy when he assaulted the officers and that the evidence against him would not be suppressed under the Fourth Amendment. *Id.* at 1536-38. The opinion notes that courts have applied different rationales in similar cases but concludes "whatever rationale is used, the result is the same: Evidence of a separate, independent crime initiated against police officers in their presence after an illegal entry or arrest will not be suppressed under the Fourth Amendment." *Id.* at 1538.

{19} *Waupekenay* involved a defendant reacting violently toward police officers, and many states, including New Mexico, have adopted the new crime exception to the exclusionary rule in such cases. *Id.* at 1537 (listing numerous cases); *see State v. Travison B.*, 2006-NMCA-146, ¶ 11, 140 N.M. 783, 149 P.3d 99. In *Travison B.*, officers improperly entered the scene of a domestic disturbance and encountered an angry child, who then battered the officers. 2006-NMCA-146, ¶ 2. The Court of Appeals essentially adopted the new crime exception without explicitly stating so when it concluded that "[a]lthough precipitated by the [unlawful] entry, [c]hild's actions against the officers constituted new criminal activity that is not subject to the exclusionary rule." 2006-NMCA-146, ¶ 9.

{20} Cases where defendants committed an identity-related crime in the presence of police after an unlawful search or seizure are much less common but do exist. Two federal appellate courts have ruled that identity-related crimes committed in the presence of officers after an illegal seizure were not protected under the Fourth Amendment. *See United States v. Pryor*, 32 F.3d 1192, 1195-1196 (7th Cir. 1994) (involving a defendant's misrepresentation of identity to federal agents); *United States v. Garcia-Jordan*, 860 F.2d 159, 161 (5th Cir. 1988) (holding that a defendant's false statement of citizenship was a new and distinct crime committed in the border agent's presence and not barred by the exclusionary rule).

{21} Some state courts have also held that identity crimes committed after a Fourth Amendment violation fall under the new crime exception to the exclusionary rule. *See, e.g.*, *People v. Diamond*, 353 N.Y.S.2d 688, 690-91 (1974) (impersonating a transit authority conductor was a new crime not tainted by illegal arrest); *State v. Suppah*, 369 P.3d 1108, 1112 (Or. 2016) (*Suppah II*) (concluding a defendant's commission of new crime of providing deputy with false name and address sufficiently attenuated taint of illegal stop); *State v. Earl*, 2004 UT App 163, ¶¶ 23-24, 92 P.3d. 167 (holding that a defendant giving officer a false name and birth date was an intervening act and not the product of the officer's illegal entry into the home in which defendant was staying); *but see State v. Brocuglio*, 779 A.2d 793, 801-802 (Conn. App. Ct. 2001) (holding that a defendant's verbal utterances to the officers requesting that they leave his property or he would let his dog loose did not constitute a new, distinct crime).

{22} Defendant asks us to limit the application of the attenuation for new crimes to only those cases where an individual endangers the safety of police or the public. Defendant points out that in New Mexico the early cases holding new crimes that were sufficiently attenuated from the initial illegality involved assaults and threats against officers during unlawful searches and seizures. *See, e.g.*, *State v. Chamberlain*, 1989-NMCA-082, 109 N.M. 173, 783 P.2d 483; *State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464. Based on that history, Defendant suggests that the new crime attenuation analysis was "meant to protect police officers and the public from violent conduct." And Defendant points out that the analysis has evolved into a "virtually automatic and deeply-ingrained exception to the exclusionary rule" when the case involves violence, threats, or resistance to law enforcement officers. *See, e.g.*, *United States v. Sprinkle*, 106 F.3d 613, 619 (4th Cir.1997) (holding that firing of gun at officer after initial unlawful stop triggered exception to exclusionary rule); *People v. Villarreal*, 604 N.E.2d 923, 928 (Ill. 1992) (declining to apply exclusionary rule to suppress evidence of aggravated battery regardless of legality of officers' entry into home); *Commonwealth v. Johnson*, 245 S.W.3d 821, 824 (Ky. Ct. App. 2008) (finding illegal entry into residence by police officer did not render evidence of subsequent assault against officer inadmissible under exclusionary rule); *State v. Herrera*, 48 A.3d 1009, 1026 (N.J. 2012) (finding exclusionary rule does not apply to evidence of defendants' attempt to murder state trooper, regardless of the illegality of the initial stop).

{23} The State contends the Court of Appeals applied the correct analysis to the facts but came to the wrong conclusion in reversing the district court. According to the State, the Court of Appeals erred "in weighing the potential for deterrence too greatly and discounting the societal cost of excluding evidence of identity crimes." The State submits that under federal law there should always be a balancing of the costs and benefits of exclusion and that the Court of Appeals improperly discounted the costs of excluding evidence of non-violent, identity-related crimes. The State also suggests that non-violent crimes can be as socially harmful as violent crimes and that we should look to the penalty for an offense as it "'reveals the legislature's judgment about the offense's severity.'" (quoting *Lewis v. United States*, 518 U.S. 322, 326 (1996) (discussing the right to jury trial)).

{24} By contrast, Defendant directs this Court to three cases from other jurisdictions that have declined to extend the new crime exception to non-violent acts by a defendant: *People v. Brown*, 802 N.E.2d 356 (Ill. App. Ct. 2003), *State v. Badessa*, 885 A.2d 430 (N.J. 2005), and *State v. Suppah*, 334 P.3d 463 (Or. Ct. App. 2014) (*Suppah I*). We find these cases distinguishable for the reasons below.

{25} With regard to *Suppah*, the Oregon Supreme Court has reversed the Oregon Court of Appeals in *Suppah I* since Defendant filed his brief. *See Suppah II*, 369 P.3d at 1108. The facts in *Suppah* are similar to this case. The defendant in *Suppah* was driving his girlfriend's car and was stopped for a traffic violation that was later determined to be improper. *Id.* at

[1]The State asserts that "[t]here is no categorical or bright-line [new crime] exception."

1110-11. The defendant knew his driver's license was suspended and did not want his girlfriend's car to get towed, so he gave the deputy his friend's name and birth date and said he did not have a physical or mailing address. *Id.* at 1110. The deputy checked the information with a dispatcher who told the deputy that the false name came back as having a suspended license. *Id.* The deputy cited the defendant for driving on a suspended license but did not cite the defendant for the traffic violation that led him to stop the defendant in the first place. *Id.*

{26} A month after the traffic stop, the defendant called the police and told them he had lied about his name. *Id.* As a result, the state dismissed the charges against the defendant's friend and charged the defendant with driving while suspended and giving false information to a police officer. *Id.* Before trial, the defendant moved to suppress the false statements he made to police when he was stopped and the statements he made a month afterward. *Id.* at 1110-11. The trial court denied the motion to suppress, concluding that the defendant's decision to give the deputy a false name and his decision to come forward with truthful information a month later were not the product of the unlawful stop. *Id.* After a bench trial, the court found the defendant guilty of giving false information to a police officer but not guilty of driving while suspended. *Id.*

{27} On initial appeal, the Oregon Court of Appeals agreed with the defendant that the evidence should have been suppressed and reversed the trial court's judgment. *Suppah I*, 334 P.3d at 476. The Oregon Supreme Court reversed the Court of Appeals and affirmed the trial court's denial of the motion to suppress. *Suppah II*, 369 P.3d at 1117, concluding that "in giving the deputy a false name and address . . . , defendant knowingly chose to do something other than what the deputy had asked. . . . The reason for defendant's misrepresentation was unconnected, other than in a 'but-for' sense, from the unlawful stop that preceded it." *Id.* at 1116. The Oregon Supreme Court held "the stop had no appreciable effect on the defendant's decision to give the deputy a false name and date of birth," and it was the defendant's independent, unprompted decision that "attenuated the taint of the unlawful stop." *Id.* at 1117.

{28} Second, Defendant relies on the holding in *Badessa* where the New Jersey Supreme Court found that evidence gathered by the police after an unconstitutional traffic stop should have been excluded in a prosecution for refusal to submit to a breathalyzer test. *See* 885 A.2d 430. In *Badessa*, the defendant was stopped by police after he turned onto a side street in an apparent attempt to evade a DWI checkpoint. *Id.* at 433. Police observed signs of intoxication coming from the defendant and had him perform field sobriety tests. *Id.* After completing the tests, the officer arrested the defendant for driving while under the influence. *Id.* Later at the police station, the defendant refused to submit to a breathalyzer test, so he was charged with DWI and refusal to submit to a breathalyzer test which is a distinct crime under New Jersey law. *Id.* The defendant challenged the legality of the stop. The trial court found that the officer did not have probable cause to stop the defendant for DWI but did have probable cause to request the breathalyzer test and acquitted the defendant on the DWI charge but convicted him for refusing the breathalyzer test. *Id.* at 433. An appellate panel concluded that although the officer lacked probable cause for the stop, there was probable cause to support the request for the breathalyzer test. *Id.* at 434. The panel affirmed the conviction for refusing to submit to the breathalyzer test, indicating that the refusal was sufficiently attenuated from the illegal stop to justify admission of the refusal evidence. *Id.*

> **{29}** The New Jersey Supreme Court disagreed, stating:
>
> Under the present circumstances, we cannot subscribe to the [s]tate's position that a breathalyzer refusal and DWI are distinct for purposes of an exclusionary rule analysis. . . . The facts necessary to prosecute those two offenses are inextricably intertwined. After all, to secure a refusal conviction, the [s]tate must prove that the arresting officer had probable cause to believe that the person had been driving while under the influence and was placed under arrest for DWI."

Id. at 436 (internal quotation marks and citations omitted).

{30} The New Jersey refusal statute's dual requirements of probable cause and an arrest for DWI were critical to the refusal analysis and thus the outcome of the case. In other words, the New Jersey statute rendered the crime of refusing a breath test "inextricably intertwined" with a DWI arrest and compelled a conclusion that refusal could not be attenuated from an initial stop for DWI. *Id.*; *see* N.J. Stat. Ann. § 39:4-50.4a. The *Badessa* case is thus distinguishable from the present case based on the specific crimes at issue and the New Jersey refusal statute's treatment of those crimes.

{31} No such specific statutory treatment applies to the crimes with which Defendant was charged in this case. In New Mexico, concealing identity and forgery may be distinct crimes from, and not conditioned upon, conduct giving rise to an initial stop. *See State v. Ruffins*, 1990-NMSC-035, ¶ 11, 109 N.M 668, 789 P.2d 616 (holding that forgery is completed when a defendant possessing the requisite intent: (1) falsely makes or alters a writing which purports to have legal efficacy, (2) physically delivers a forged writing, or (3) passes an interest in a forged writing); § 30-22-3 ("Concealing identity consists of concealing one's true name or identity, or disguising oneself with intent to obstruct the due execution of the law or with intent to intimidate, hinder or interrupt any public officer or any other person in a legal performance of his duty or the exercise of his rights under the laws of the United States or of this state.").

{32} Finally, *People v. Brown* is no more persuasive. In *People v. Brown*, a police officer unlawfully detained Brown simply because he was standing in front of a closed business. 802 N.E.2d at 357-58. The officer asked Brown for identification and Brown replied he had none. *Id.* at 358. When the officer asked Brown for his name, address, and date of birth, Brown provided a false name and date of birth. *Id.* The officer then radioed in this information and discovered there was a warrant for Brown's arrest. *Id.* Brown was ultimately charged with obstructing justice, giving a false name, and falsely stating that he was not carrying identification. *Id.* Brown moved to suppress his statements as they were obtained as a result of his unlawful detention. *Id.* at 357-58. The trial court granted the motion to suppress. *Id.* at 357. The state appealed, and the Appellate Court of Illinois affirmed the trial court, concluding that Brown was simply responding to the officer's questioning in conjunction with the illegal seizure and that "[r]efusing to provide identification does not raise the same policy concerns as assaulting a law enforcement officer." *Id.* at 360.

{33} We decline to follow the reasoning in *People v. Brown*, 802 N.E.2d at 368. While we acknowledge that like the defendant in *People v. Brown*, Defendant was unlawfully seized when speaking with Benally, Defendant's statements to Benally were not directly connected to the seizure except in a "but-for" sense. Benally's observation that Defendant was not wearing a seat belt prompted her to ask him for identification. There is nothing that indicates Benally obtained the evidence of Defendant's false statements by exploiting the unlawful seizure.

{34} The parties do not dispute the district court's finding that Benally lacked reasonable suspicion to initiate the traffic stop. The question before this Court is: do the *Brown v. Illinois* factors suggest Defendant's conduct was sufficiently attenuated between the initial stop and Defendant's false identification to render the exclusionary rule inapplicable to the new evidence. This is an issue of first impression before the Court.

{35} We now apply the three general attenuation factors from *Brown v. Illinois* to assess the attenuation in this case between the illegal police conduct and the discovery of evidence. The first consideration requires that we review the lapsed time between the illegality and the acquisition of the evidence, which in this case favors suppression, as it was only a short time between the traffic stop and Defendant's false identification. A little more time passed before Defendant signed the traffic citation containing his brother's identifiers, but it was still only minutes.

{36} The second consideration requires that we look to any intervening circumstances that serve to attenuate the illegal detention from the discovery of the evidence. An intervening circumstance is one that breaks the relationship between the illegal conduct and the evidence obtained. Various courts have concluded a defendant's independent criminal act may itself constitute an intervening circumstance sufficient to purge the taint of the initial illegality. *United States v. King*, 724 F.2d 253, 256 (1st Cir. 1984) (concluding a "shooting was an independent intervening act which purged the taint of the prior illegality"); *State v. Nelson*, 2015 OK CR 10, ¶ 23, 25, 356 P.3d 1113 (holding defendant's behavior in walking away from traffic stop for failing to signal left-hand turn was an intervening circumstance which purged any taint originating from the illegal stop). To hold otherwise "would allow a defendant carte blanche authority to go on whatever criminal rampage he desired and do so with virtual legal impunity as long as such actions stemmed from the chain of causation started by the police misconduct." *See State v. Miskimins*, 435 N.W.2d 217, 221 (S.D. 1989). And in many scenarios, courts conclude that even independent, non-violent criminal acts following an unlawful detention may constitute intervening circumstances, reasoning that the conduct is neither natural nor predictable, and thus insufficiently connected to the initial illegality to warrant application of the exclusionary rule. *See, e.g.*, *Ellison v. State*, 410 A.2d 519, 527 (Del. Super. Ct. 1979).

{37} Here, Defendant's misrepresentation of his identity was such an intervening circumstance. Although the interaction between the police and Defendant came about initially as a result of the unlawful seizure, the Defendant's response to Officer Benally was not a natural or predictable progression from the unlawful seizure but rather an unprompted act of his own free will.

{38} The third consideration requires that we assess the purpose and flagrancy of the police misconduct. Nothing in the record indicates that Benally initiated the traffic stop for the specific purpose of investigating Defendant or for some other merely pretextual reason. And nothing indicates Benally approached and addressed Defendant for arbitrary reasons or to provoke additional wrongdoing; rather, she addressed Defendant based on her observation that he was not wearing a seat belt. Benally had probable cause to believe that Defendant was violating the law; and under conditions of a lawful traffic stop, her course of conduct thereafter would not have been unlawful. This third consideration tips the balance away from suppression because nothing suggests that admission of the evidence will embolden police to engage in unconstitutional traffic stops. Benally's behavior cannot reasonably be viewed as flagrant misconduct of a police officer searching for evidence. Accordingly, the Fourth Amendment analysis does not require excluding evidence of concealing identity because it was free of the taint of the unlawful seizure.

B. State Constitutional Grounds

{39} Because we conclude that the Fourth Amendment does not offer Defendant protection here, we must address his challenge under Article II, Section 10. *See Gomez*, 1997-NMSC-006, ¶ 19. Under the interstitial approach we adopted in *Gomez*, "we may diverge from federal precedent where the federal analysis is flawed, where there are structural differences between the state and federal governments, or because of distinctive New Mexico characteristics." *Garcia*, 2009-NMSC-046, ¶ 27.

1. Preservation of State Constitutional Issue

{40} Because the Court of Appeals found the crimes of concealing identity and forgery should have been suppressed under the Fourth Amendment, it did not address Defendant's challenge under Article II, Section 10. Therefore, as an initial matter, we must determine whether Defendant properly preserved his argument under the New Mexico Constitution for appellate review. *See State v. Ketelson*, 2011-NMSC-023, ¶ 10, 150 N.M. 137, 257 P.3d 957. The State concedes that Defendant's state constitutional claim was adequately preserved. Nevertheless, the rule of preservation must still be met. The requirements for preservation of state constitutional claims were enunciated in *Gomez*, 1997-NMSC-006, ¶¶ 22-23. When, as is the case here, a state constitutional provision has previously been interpreted more expansively than its federal counterpart, trial counsel must develop the necessary factual basis and raise the applicable constitutional provision in trial court. *Id.* ¶ 22.

{41} Defendant explicitly cited Article II, Section 10 in his motion to suppress. However, in his motion to suppress, Defendant only discussed the facts leading up to the traffic stop to argue the officer lacked reasonable suspicion. Very few facts regarding the crimes of concealing identity and forgery were developed in the motion hearing. It is in the findings of fact and conclusions of law that the district court states, "[I]t was during the issuance of the citation that the charged crimes of concealing identity and forgery are alleged to have occurred." The district court concluded that an unlawful stop does not justify the commission of new crimes and that the evidence of the forgery and concealing identity was admissible at trial.

{42} We find that despite this marginal record, the necessary factual basis was still developed and the district court's ruling was fairly invoked. Therefore, Defendant's Article II, Section 10 challenge was adequately preserved. We next determine whether Article II, Section 10 affords Defendant greater protection than the Fourth Amendment and requires suppression of the evidence of the crimes of concealing identity and forgery committed after an unlawful traffic stop.

2. Article II, Section 10

{43} Article II, Section 10 provides that "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures . . . ." N.M. Const. art. II, § 10. Similar to the Fourth Amendment, this clause embodies "the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions." *State v. Gutierrez*, 1993-NMSC-062, ¶ 46, 116 N.M. 431, 863 P.2d 1052. "The key inquiry under Article II, Section 10 is reasonableness." *Ketelson*, 2011-NMSC-023, ¶ 20. "We avoid bright-line, per se rules in determining reasonableness; instead, we consider the facts of each case." *State v. Granville*, 2006-NMCA-098, ¶ 18, 140 N.M. 345, 142 P.3d 933.

{44} Defendant argues that upholding the district court ruling would create a bright-line, per se standard whereby the commission of non-violent identity offenses would always be sufficient to purge the taint of an unconstitutional seizure and would thus contradict our preference to consider the facts of each case. Defendant also argues that unlike the federal exclusionary rule, which only applies "where its deterrence benefits outweigh its substantial social costs," *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) (internal quotation marks and citation omitted), the primary focus of the state exclusionary rule is securing privacy interests, which is achieved by putting individuals in the same position as if the misconduct had not occurred, *see State v. Trudelle*, 2007-NMCA-066, ¶ 40, 142 N.M. 18, 162 P.3d 173 ("The purpose of the state exclusionary rule[, to ensure freedom from unreasonable search and seizure,] is accomplished by doing no more than return the parties to where they stood before the right was violated."). Finally, Defendant argues that the three-factor federal attenuation analysis is flawed in that it fails to account for the greater protection of privacy granted under Article II, Section 10.

{45} The State argues that the Court of Appeals properly applied the federal analysis but neglected to balance the costs and benefits of exclusion and that as a result, the Court of Appeals drew a categorical distinction between violent and non-violent new crimes which will lead to a systematic under-valuation of the societal costs of excluding evidence of crimes such as forgery or giving a false identity. The State suggests that this Court adopt an appropriate balancing test for evaluating attenuation under the state Constitution.

{46} While we have repeatedly expressed that Article II, Section 10 provides broader protection of individual privacy than the Fourth Amendment, the key inquiry is still one of reasonableness, which "depends on the balance between the public interest and the individual's interest in freedom from police intrusion upon personal liberty." *Ketelson*, 2011-NMSC-023, ¶ 20. Article II, Section 10 is "a foundation of *both* personal privacy and the integrity of the criminal justice system, as well as the ultimate regulator of police conduct." *State v. Garcia*, 2009-NMSC-046, ¶ 31 (emphasis added). "To evaluate whether a search and seizure violates the protections of the New Mexico Constitution, courts judge 'the facts of each case by balancing the degree of intrusion into an individual's privacy against the interest of the government in promoting crime prevention and detection.'" *State v. Davis*, 2015-NMSC-034, ¶ 100, 360 P.3d 1161 (*Davis II*) (Chávez, J., specially concurring) (quoting *State v. Jason L.*, 2000-NMSC-018, ¶ 14, 129 N.M. 119, 2 P.3d 856).

{47} Application of the three-part federal attenuation analysis comports with our preference to assess the reasonableness of law enforcement by considering the totality of the circumstances of each case. *See State v. Leyva*, 2011-NMSC-009, ¶ 55, 149 N.M. 435, 250 P.3d 861. Defendant's assertion that the federal attenuation analysis is flawed because it fails to account for the heightened protections of privacy under Article II, Section 10 is unpersuasive. The federal attenuation analysis has already been applied to Article II, Section 10 in instances involving confessions or consent to search. In *State v. Monteleone*, 2005-NMCA-129, ¶¶ 17, 21, 138 N.M. 544, 123 P.3d 777, the Court of Appeals applied the three-part federal analysis to determine whether the defendant's consent to search his apartment was sufficiently attenuated from the taint of the officers' illegal entry. 2005-NMCA-129, ¶¶ 18-19. The Court concluded that the defendant's consent was not sufficiently attenuated from the officers' illegal entry and therefore suppressed the state's evidence under both the Fourth Amendment and Article II, Section 10. *Id.* ¶¶ 21-22. Though *Monteleone* dealt with a defendant's consent to search, the application of the attenuation analysis protected Monteleone's state constitutional rights, and we do not see why its application in that case or in this case is flawed. In addition, the greater protections afforded vehicle passengers in New Mexico are not through an application of the federal attenuation factors to this case. *See, e.g.*, *State v. Portillo*, 2011-NMCA-079, ¶ 22-23, 150 N.M. 187, 258 P.3d 466 (holding Article II, Section 10, unlike Fourth Amendment, allows officer to only ask passenger questions related to the reason for the stop or otherwise supported by reasonable suspicion).

{48} While Officer Benally's decision to initiate the stop was mistaken, her conduct thereafter was lawful. Officer Benally reasonably requested Defendant's identification after observing the seat belt violation. We therefore conclude that the benefits of deterrence in this case are not outweighed by the cost of excluding the evidence of Defendant's crimes. Though a passenger in an automobile has a right to be free of unreasonable seizure by the government, the passenger's unprovoked and willful criminal acts after an unreasonable traffic stop cannot be sanctioned. The violation of Defendant's Fourth Amendment or Article II, Section 10 rights does not confer upon him a license to commit new crimes, whether they be physical resistance or more passive forms of resistance to government authority. *See Waupekenay*, 973 F.2d at 1537. Accordingly, we conclude that the important principle of deterrence of police misconduct does not weaken the exclusionary rule under Article II, Section 10, and all evidence obtained by flagrant or deliberate misconduct shall be suppressed. But were we to draw a line based merely upon the nature of the violation, it would embolden individuals to engage in non-violent yet still criminal acts that compromise the integrity of the criminal justice system. Defendant's impersonation of his brother and forging his brother's signature on a traffic citation could have caused his brother real harm had it not been discovered. Forgery was a third-degree felony until the statute was amended in 2006 to make it a fourth-degree felony when there is no quantifiable damage or the damage is $2,500 or less. *See* § 30-16-10(B). The 2006 amendment also made forgery a second-degree felony when the damage is over $20,000. *See* § 30-16-10(E). The fact that the Legislature chose to keep all forgeries as felony offenses and increased the punishment for serious forgery cases shows it considers this crime harmful to society.

{49} Finally, Defendant does not present any basis for us to conclude that this case involves structural differences between the

federal and state governments other than the differences already articulated between the Fourth Amendment and Article II, Section 10. However, our finding that the new crimes sufficiently purged the taint of the primary illegality removed those crimes from the greater protection that New Mexico law provides from unreasonable searches and seizures involving automobiles.

IV. CONCLUSION

{50} We hold that the new crime exception to the exclusionary rule may apply to both violent and non-violent crimes committed in response to unlawful police action. Defendant's attempts to conceal his identity after the unlawful traffic stop sufficiently purged the taint of the initial illegality so as to render the exclusionary rule inapplicable under both the Fourth Amendment and Article II, Section 10 of the New Mexico Constitution. The evidence of the seat belt violation obtained as a direct result of the unlawful stop was correctly suppressed. Accordingly, we reverse the Court of Appeals and reinstate Defendant's conviction.

{51} IT IS SO ORDERED.
PETRA JIMENEZ MAES, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice
BARBARA J. VIGIL, Justice

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-018
No. S-1-SC-36127 (filed February 22, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
SHANAH CHADWICK-MCNALLY,
Defendant-Appellant.

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

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Opinion

Judith K. Nakamura, Chief Justice

{1} Defendant Shanah Chadwick-McNally is charged with an open count of first-degree murder and faces a potential sentence of life without the possibility of release or parole (LWOP). She argues in this interlocutory appeal that, due to her possible LWOP sentence, she must be afforded the heightened procedural protections that apply when the State seeks the death penalty. *See, e.g.*, Rule 5-704 NMRA (setting forth procedures that must be followed in death penalty cases).

{2} We hold that death penalty procedures do not apply in this case for the simple reason that "[t]he extraordinary penalty of death" is not implicated. *See, e.g.*, *State v. Martinez*, 2002-NMSC-008, ¶ 8, 132 N.M. 32, 43 P.3d 1042 ("The extraordinary penalty of death demands heightened scrutiny of its imposition."). Consequently, we agree with the district court that Rule 5-704 does not apply and that Defendant is not entitled to a hearing under *State v. Ogden*, 1994-NMSC-029, 118 N.M. 234, 880 P.2d 845, to test whether the alleged aggravating circumstances are supported by probable cause. We also agree that the Capital Felony Sentencing Act (the Act) as amended in 2009 neither requires nor prohibits bifurcated guilt and sentencing proceedings. NMSA 1978, §§ 31-20A-1 to -6 (1979, as amended through 2009). Lastly, we conclude that the Act precludes consideration of evidence of mitigating circumstances for sentencing purposes. We affirm and remand for proceedings consistent with this opinion.

I. BACKGROUND

{3} The State charged Defendant with an open count of first-degree murder, a "capital felony," *see* NMSA 1978, § 30-2-1(A) (1994), and with one count each of first-degree kidnapping, robbery, and conspiracy to commit robbery. The charging document specifically alleged two aggravating circumstances related to the first-degree murder charge: (1) Defendant committed the murder with the intent to kill in the commission of or attempt to commit kidnapping, and (2) Defendant committed the murder for the purpose of preventing the victim from testifying about the crime. *See* § 31-20A-5 (setting forth seven aggravating circumstances for which a defendant found guilty of a capital felony shall be sentenced to LWOP under Section 31-20A-2).

{4} The State later sought guidance about whether the procedures that apply in death penalty proceedings would be required in Defendant's case, in which the State is seeking an LWOP sentence. The State argued that death penalty procedures are inapplicable because Rule 5-704 applies only to death penalty cases and because the 2009 amendments to the Act repealed most of the procedural protections that had applied when the death penalty was in force, including bifurcated guilt and sentencing proceedings and the consideration of mitigating circumstances. The State conceded, however, that "prosecutors in other New Mexico judicial districts . . . have apparently been utilizing death penalty procedures and Rule 5-704 in LWOP cases."

{5} After the pretrial conference, the district court issued an order holding that death penalty procedures do not apply in Defendant's case and that Defendant is precluded from presenting evidence of mitigating circumstances to the jury. The court also found that the order involved "a controlling question of law as to whether defendants in capital felony cases facing the possibility of life without parole should be afforded the procedural safeguards provided, under Rule 5-704 or other law, to defendants facing a possible death sentence."

{6} Defendant filed an application for interlocutory appeal under Rule 12-203(A) NMRA, which we granted. We have jurisdiction under Article VI, Section 2 of the New Mexico Constitution and NMSA 1978, Section 39-3-3(A)(3) (1972). *See State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821 (holding that this Court has "jurisdiction over interlocutory appeals in situations where a defendant may possibly be sentenced to life imprisonment or death").

II. DISCUSSION

{7} Our analysis proceeds in two parts. We first briefly review the 2009 amendments to the Act and Rule 5-704. We then address Defendant's arguments about the procedures that must be followed when the State seeks an LWOP sentence.

A. The 2009 Amendments to the Act and Rule 5-704

{8} New Mexico abolished the death penalty in 2009 for crimes committed on or after July 1, 2009. *See* 2009 N.M. Laws, ch. 11, §§ 5-7. In place of the death penalty, the 2009 law established a new maximum sentence for defendants convicted of a capital felony: "life imprisonment without possibility of release or parole[,]" abbreviated in this opinion as LWOP. Section 31-20A-2; *see also* NMSA 1978, § 31-21-10(C) (2009) ("An inmate of an institution who was sentenced to life imprisonment without possibility of release or parole is not eligible for parole and shall remain incarcerated for the entirety of the inmate's natural life.").

{9} The 2009 legislation also repealed much of the Act as it had existed when the death penalty was in force. *See* 2009 N.M. Laws, ch. 11, § 5 (repealing Sections 31-20A-1, -2.1 through -4, and -6). The repealed provisions guaranteed certain procedural safeguards for defendants who faced a possible death sentence, including separate, bifurcated guilt and sentencing proceedings; the weighing of aggravating and mitigating circumstances to determine whether the defendant should be sentenced to death or life imprisonment; and automatic appellate review of any case in which the defendant was sentenced to death. *See generally* §§ 31-20A-1 to -6 (1979, as amended through 1991). New Mexico originally adopted these safeguards after the United States Supreme Court held that statutes with similar protections "withstood constitutional scrutiny" in death penalty proceedings. *See State v. Garcia*, 1983-NMSC-008, ¶ 25, 99 N.M. 771, 664 P.2d 969 (noting that Sections 31-20A-1 to -6 "were modeled after similar statutes . . . [that] have withstood constitutional scrutiny by the United States Supreme Court").

{10} As a result of the 2009 law, the Act now consists of just two provisions. Section 31-20A-5 sets forth the aggravating circumstances that must be proven, in addition to the defendant's guilt of the underlying capital felony, if the State chooses to seek an LWOP sentence. And Section 31-20A-2 prescribes how a defendant convicted of a capital felony shall be sentenced—whether to life imprisonment or LWOP—based on a finding of at least one aggravating circumstance.

{11} Death penalty proceedings are also subject to Rule 5-704. The rule incorporates the procedures formerly required under the Act when the death penalty was in effect, *see, e.g.*, Rule 5-704(D)(1) (providing that the procedures set forth in Section 31-20A-1 shall be followed unless the defendant requests separate juries for trial and sentencing purposes), and imposes additional procedures that must be followed when the state seeks the death penalty. *E.g.*, Rule 5-704(C) ("The defendant in a death penalty case must be represented by at least two (2) attorneys.

{12} This Court amended Rule 5-704 shortly after the death penalty was abolished. *In re Death Penalty Sentencing Jury Rules*, 2009-NMSC-052, 147 N.M. 302, 222 P.3d 674. In our order approving the amendments, we acknowledged that the death penalty had been abolished, but we also noted that "the death penalty remains a sentencing option for a limited number of cases alleging crimes committed before July 1, 2009." *Id.* So, in response to "concerns expressed by the Governor, the Legislature, and others regarding the death penalty system in New Mexico," we approved amendments to Rule 5-704 that established additional procedures that apply in death penalty proceedings. *Id.*; *e.g.*, Rule 5-704(D) (setting forth procedures for "separate trial and sentencing juries" upon notice from a defendant who "may be punished upon conviction by the penalty of death"). Notably, the amended rule makes no reference to an LWOP sentence.

B. Whether Death Penalty Procedures Apply in This Case

{13} With this context in hand, we turn to the four issues presented. First, whether Rule 5-704 applies in this case. Second, if Rule 5-704 does not apply, whether Defendant is entitled to "comparable procedures," including a hearing to determine whether the State's alleged aggravating circumstances are supported by probable cause. Third, whether the Act expressly prohibits bifurcated proceedings and whether Defendant should be permitted to "reserve consideration" of the aggravating circumstances until after the jury has considered her guilt or innocence. And finally, whether the sentencing scheme under the Act precludes the presentation of evidence of mitigating circumstances in this case and whether such an interpretation would violate the federal or state constitutions. These are questions of law, and our review is de novo. *AFSCME Council 18 v. State*, 2013-NMCA-106, ¶ 6, 314 P.3d 674.

1. Rule 5-704 Applicability

{14} Whether Rule 5-704 applies in this case is not a difficult question. The rule's language—and indeed its very title, "Death penalty; sentencing,"—establishes its singular application to death penalty cases. *See generally* Rule 5-704 (using the words "death penalty" twenty times throughout the rule without reference to an LWOP sentence and repeatedly referring to the sentence of death). More substantively, the rule's numerous procedural requirements reflect the constitutional principle that death penalty cases are different. *Martinez*, 2002-NMSC-008, ¶ 8 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."))

{15} Defendant has not cited, nor are we aware of, any authority that would require applying Rule 5-704 to this case, in which the State is seeking an LWOP sentence and not the death penalty. Absent a constitutional or legislative directive, we will not impose the rule's considerable demands more broadly than they were intended. We decline to extend the application of Rule 5-704 to this case.

2. Comparable Procedures

{16} Next, Defendant argues that if Rule 5-704 does not apply in this case, the district court "at a minimum" must hold a hearing under *Ogden* to determine whether the alleged aggravating circumstances are "inapplicable or insufficiently supported." We disagree.

{17} We held in *Ogden* that "[a] defendant who has been notified that the State will seek the death penalty may move to dismiss an aggravating circumstance before trial." 1994-NMSC-029, ¶ 15. To effectuate that right, we authorized district courts to "conduct a limited evidentiary hearing" to determine whether "there is probable cause to believe an aggravating circumstance is present." *Id.* ¶ 17-18. We later amended Rule 5-704 to make the procedure mandatory in death penalty cases. *See* Rule 5-704(B) NMRA (2004) ("No later than ninety (90) days prior to trial, the court shall hold a hearing to determine whether or not there is probable cause to believe that one or more aggravating circumstances exist.").

{18} *Ogden* was premised on "[o]ur view that it is important to curtail unwarranted death-penalty prosecutions . . . [because] they are qualitatively and quantitatively distinct from other criminal proceedings." 1994-NMSC-029, ¶ 10. We noted that death penalty prosecutions and sentencing command extra judicial resources; are uniquely complex and demanding; require bifurcated proceedings, a death-qualified jury, more skilled and experienced prosecutors and defenders, and extensive investigation into the defendant's background for proof of mitigating circumstances; and entail significant pretrial motions, applications, and hearings. *Id.* ¶¶ 11-12.

{19} The considerations that we credited in *Ogden* do not carry the same force when, as in this case, the heightened procedural requirements and complexities of a death penalty proceeding are not present. Put simply, the State's decision to seek an LWOP sentence does not invoke the unique complexities and demands of a death penalty case. The district court

therefore correctly determined in Defendant's case that a hearing is not warranted under *Ogden* as the State is not seeking the death penalty.

3. Bifurcated Proceedings

{20} Defendant argues that the sentencing scheme under the Act does not expressly prohibit bifurcation. Defendant also argues, as a matter of public policy, that parties should be permitted "to reserve consideration of aggravating factors for a subsequent hearing following the guilt-innocence phase" in LWOP cases.

{21} Unlike when the death penalty was in force, the Act is now otherwise silent about the procedures that must be followed in a case like Defendant's, including whether bifurcated guilt and sentencing proceedings are permitted or required. *See* §§ 31-20A-2, -5. "We do not read language into the Act that is not there." *State v. Wyrostek*, 1994-NMSC-042, ¶ 17, 117 N.M. 514, 873 P.2d 260. We follow our previous holdings on this question and decline to require or permit bifurcated proceedings *as a matter of course* "absent a clear directive from the Constitution." *State v. Rudy B.*, 2010-NMSC-045, ¶ 58, 149 N.M. 22, 243 P.3d 726; *see State v. Luna*, 1980-NMSC-009, ¶ 23, 93 N.M. 773, 606 P.2d 183 (concluding that due process does not require bifurcation of guilt and insanity proceedings), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 130, app. A (1990).

{22} Whether bifurcated proceedings are appropriate must be determined on a case-by-case basis, after the issue has been properly raised and argued under the Rules of Criminal Procedure for the District Courts. *See* Rule 5-601(B) NMRA ("Any defense, objection or request which is capable of determination without a trial on the merits may be raised before trial by motion."); *cf.* Rule 5-203(C) NMRA (providing that a district court "may order separate trials of offenses . . . or provide whatever other relief justice requires" when it "appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants").

4. Evidence of Mitigating Circumstances

{23} Defendant argues that the sentencing scheme under the Act does not prohibit the presentation of mitigating evidence. Defendant also argues that the district court's conclusion that the Act does not permit evidence of mitigating circumstances violates the United States and New Mexico Constitutions. We disagree with both arguments.

{24} "'A trial court's power to sentence is derived exclusively from statute.'" *State v. Chavarria*, 2009-NMSC-020, ¶ 12, 146 N.M. 251, 208 P.3d 896 (quoting *State v. Martinez*, 1998-NMSC-023, ¶ 12, 126 N.M. 39, 966 P.2d 747). "This limitation on judicial authority reflects the separation of powers notion that 'it is solely within the province of the Legislature to establish penalties for criminal behavior.'" *Martinez*, 1998-NMSC-023, ¶ 12 (quoting *State v. Mabry*, 1981-NMSC-067, ¶ 18, 96 N.M. 317, 630 P.2d 269). "This Court must construe statutes, if possible, to give effect to their objective and purpose and to avoid absurd results." *State v. Begay*, 2017-NMSC-009, ¶ 9, 390 P.3d 168. "The primary indicator of legislative intent is the plain language of the statute." *State v. Johnson*, 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d 863.

{25} The plain language of Section 31-20A-2, as amended in 2009, is unequivocal with respect to sentencing:

> If a jury finds, beyond a reasonable doubt, that one or more aggravating circumstances exist, . . . the defendant *shall* be sentenced to life imprisonment without possibility of release or parole. If the jury does not make the finding that one or more aggravating circumstances exist, the defendant *shall* be sentenced to life imprisonment.

(Emphasis added.) Under the statute's plain language, the determinative factors are the jury's findings of guilt and of one or more aggravating circumstances. When both findings are present, an LWOP sentence is mandatory and cannot be mitigated. *See State v. Cabezuela*, 2015-NMSC-016, ¶ 11, 350 P.3d 1145 ("Mandatory life sentences, with or without the possibility of parole after thirty years, are for capital felonies and are not subject to mitigation." (citing *State v. Juan*, 2010-NMSC-041, ¶ 42, 148 N.M. 747, 242 P.3d 314)). Neither the district court nor the jury has discretion to deviate from the statute's command. *See* NMSA 1978, § 12-2A-4(A) (1997) ("'Shall' . . . express[es] a duty, obligation, requirement or condition precedent."). The inability to exercise any sentencing discretion precludes the admission of mitigating evidence for sentencing purposes. The district court correctly concluded that Defendant is precluded under the Act from presenting evidence of mitigating circumstances for sentencing purposes. Defendant's constitutional arguments do not cause us to doubt this conclusion.

{26} Defendant argues that interpreting the Act to preclude the introduction of mitigating evidence would be contrary to an "emerging Eighth and Fourteenth Amendment categorical approach" holding mandatory LWOP sentences to be unconstitutional for juvenile offenders. *See Miller v. Alabama*, 567 U.S. 460, 465 (2012) ("[M]andatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"). Defendant's reliance on federal authorities that apply to juvenile offenders is misplaced.

{27} The United States Supreme Court in *Harmelin v. Michigan* considered whether the imposition of a mandatory LWOP sentence without consideration of "so-called mitigating factors," was cruel and unusual punishment under the Eighth Amendment. 501 U.S. 957, 994 (1991). The Court determined that imposition of the mandatory LWOP sentence was not cruel and unusual punishment as the individualized sentencing requirements imposed in death penalty proceedings do not extend to non-death penalty proceedings. *Id.* at 995-96. Applied to this case, *Harmelin* establishes that the Act does not violate the Eighth Amendment by imposing a mandatory LWOP sentence without consideration of an adult defendant's "individualized" or mitigating circumstances.

{28} Defendant argues that *Harmelin*'s continued validity is in doubt because of more recent cases addressing the constitutionality of mandatory LWOP sentences for juveniles. *E.g.*, *Miller*, 567 U.S. at 465 (holding that a mandatory LWOP sentence for a juvenile violates the Eighth Amendment). These cases are readily distinguishable. They result from the Court's determination that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471; *see also Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that the death penalty for juvenile offenders violates the Eighth Amendment). Nothing in these cases undermines *Harmelin*'s holding with regard to LWOP sentences for adults. *See* Michael M. O'Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78 Mo. L. Rev. 1087, 1088 (2013) (concluding that *Graham* and *Miller* "do not provide much basis for sweeping reversals of adult LWOP sentences"). Defendant's federal constitutional rights were not violated by the district court's decision to preclude her from presenting evidence of mitigating circumstances.

{29} Defendant argues in the alternative that she is entitled to greater protections under the New Mexico Constitution. We do not reach this issue because Defendant did not cite any authority in the district court to support her general assertion that she is entitled to greater protections under the state constitution. *See State v. Leyva*, 2011-NMSC-009, ¶ 49, 149 N.M. 435, 250 P.3d 861 (reviewing requirements for preserving a state constitutional claim for appellate review).

III. CONCLUSION

{30} We affirm that neither Rule 5-704 nor *Ogden* apply in this case. We further affirm that Defendant may not introduce evidence of mitigating circumstances for sentencing purposes. We remand for further proceedings consistent with this opinion. On remand, Defendant may pursue bifurcation under the rules of criminal procedure if she wishes to do so. This opinion has no bearing on her entitlement to bifurcation.

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

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

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-019
No. S-1-SC-35121 (filed February 22, 2018)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
STEFAN CHAKERIAN,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Stan Whitaker, District Judge

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

DANE ERIC HANNUM
Albuquerque, New Mexico
for Respondent

Opinion

Petra Jimenez Maes, Justice

{1} New Mexico law provides a motorist arrested for driving while under the influence of intoxicating liquor (DWI) the right to an independent chemical test in addition to the test administered by the police. *See* NMSA 1978, § 66-8-109(B) (1993). In this case we address (1) whether the arresting officer denied Defendant Stefan Chakerian this right when the officer provided Defendant with a telephone and telephone directory, but took no additional steps to help Defendant arrange for the test; and (2) what role law enforcement officers have after an arrestee expresses a desire for an additional test under Section 66-8-109(B). The Court of Appeals held that Section 66-8-109(B) requires law enforcement to "meaningfully cooperate" with an arrestee who desires to obtain an additional chemical test, and reversed Defendant's DWI conviction. *State v. Chakerian*, 2015-NMCA-052, ¶ 19, 348 P.3d 1027.

{2} We hold that Section 66-8-109(B) requires law enforcement to advise an arrestee of the arrestee's right to be given an opportunity to arrange for a qualified person of the arrestee's own choosing to perform a chemical test in addition to any test performed at the direction of the arresting officer. This section does not, however, confer any additional obligation on law enforcement to facilitate the arrestee in actually arranging for the test. Accordingly, we reverse the Court of Appeals and affirm the metropolitan court convictions of DWI and speeding. Because the convictions are affirmed, we do not address the issue of what the sanction should be when the State denies a driver the statutory right to an independent test. We remand to the metropolitan court for further proceedings in accordance with this opinion.

I. FACTS AND PROCEDURAL HISTORY

{3} Albuquerque Police Officer Mark Aragon pulled over Defendant Stefan Chakerian around 2 a.m. for speeding on Central Avenue in Albuquerque. Officer Aragon approached Defendant and, after he smelled alcohol on Defendant's breath, began a DWI investigation. After the investigation, Officer Aragon arrested Defendant for DWI and took him to the Southeast Albuquerque Police Department (APD) substation in order to conduct a breath alcohol test. Before beginning the breath test, Officer Aragon read the implied consent rule to Defendant, which included Defendant's right to an independent test performed by a person of Defendant's own choosing. At the substation, the Intoxilyzer 8000 machine malfunctioned after the first breath test, and the test could not be completed. Officer Aragon then drove Defendant to the downtown Prisoner Transport Center (PTC) to attempt another breath test. At the PTC, Officer Aragon was able to obtain two breath samples from Defendant, which indicated breath alcohol concentrations of .12 and .11, respectively. These breath alcohol concentrations were recorded onto a breath card.

{4} After completing the test, Officer Aragon drove Defendant to the Metropolitan Detention Center (MDC). At the MDC,[1] Defendant told Officer Aragon that he wanted an additional chemical test. Officer Aragon allowed Defendant access to a telephone, a phone directory, and a pen while they waited for a routine medical screening of Defendant. Officer Aragon testified that Defendant had access to a telephone and telephone directory for twenty to thirty minutes; Defendant testified that he had this access for approximately ten to fifteen minutes. When the time came for the medical screening, Defendant told Officer Aragon he was finished with the telephone and telephone directory.

{5} Defendant moved to suppress the admission of the breath card at trial in the metropolitan court on the grounds that he was not afforded his right to an independent test pursuant to Section 66-8-109(B). The trial judge denied the motion but stated, "I just don't see, the way things happened, that he was really afforded an opportunity to have a blood test given to him." The judge admitted the breath card and found Defendant guilty of DWI and speeding.

{6} Defendant appealed to the district court. He argued that the trial judge found he was not afforded his right to a reasonable opportunity for an independent test and, therefore, the trial judge erred in admitting the breath card. The State argued that the trial judge made no finding that Defendant was not given a reasonable opportunity for an independent test and that the trial judge correctly denied Defendant's motion to suppress the breath card.

{7} The district court affirmed the DWI conviction on the grounds that Defendant failed to establish any prejudice regardless of whether he was given a reasonable opportunity to obtain an independent test or not,

[1]The Court of Appeals opinion states Defendant requested an additional test and was granted access to the telephone at the PTC. *Chakerian*, 2015-NMCA-052, ¶ 4. The record reflects Defendant's request took place at the MDC

citing *State v. Gardner*, 1998-NMCA-160, ¶ 13, 126 N.M. 125, 967 P.2d 465 (explaining the burden is on a defendant to "show prejudice from the statutory violation[] before suppression of the test results or setting aside the conviction[] [is] required"). Defendant appealed to the Court of Appeals. In a divided decision, the majority concluded that the plain meaning of Section 66-8-109(B) "imposes a duty upon the State, a duty that requires law enforcement to meaningfully cooperate with an arrestee's express desire to arrange for an independent blood test. The level of meaningful cooperation required by law enforcement will depend upon the facts and circumstances in each particular case." *Chakerian*, 2015-NMCA-052, ¶ 19. The Court determined that Defendant was not afforded his right of a reasonable opportunity to arrange for an independent chemical test and reversed the district court's affirmation of the metropolitan court judgment. *Id.* ¶¶ 23, 33. The Court remanded the case to the trial court to determine the sanctions for the statutory violation. *Id.* ¶¶ 32-33.

{8} Dissenting from the majority, Judge Zamora argued that Section 66-8-109(B) does not require police to assist an arrestee in arranging and effectuating an independent test. "The way our statutory provision is currently written means being informed of this statutory right, being given a reasonable opportunity to arrange for the independent testing, and nothing more." *Chakerian*, 2015-NMCA-052, ¶ 44 (Zamora, J., dissenting).

{9} The State petitioned this Court to review the Court of Appeals opinion, arguing that the Court of Appeals erred by (1) interpreting Section 66-8-109(B)(1) to include an affirmative duty on law enforcement to provide a "meaningful opportunity" for a DWI suspect to procure an independent chemical test, and (2) allowing the State to be sanctioned for failing to provide this meaningful opportunity. We granted certiorari pursuant to Rule 12-502 NMRA.

II. STANDARD OF REVIEW

{10} In this case we must interpret the meaning of Section 66-8-109(B). Statutory interpretation is a matter of law and is reviewed de novo. *State v. Johnson*, 2001-NMSC-001, ¶ 5, 130 N.M. 6, 15 P.3d 1233. Our main goal when interpreting statutory language "is to give effect to the Legislature's intent." *State v. Almanzar*, 2014-NMSC-001, ¶ 14, 316 P.3d 183 (internal quotation marks and citation omitted). To discern the Legislature's intent, the Court "look[s] first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* (alteration in original) (internal quotation marks and citation omitted). "When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Johnson*, 2001-NMSC-001, ¶ 6 (internal quotation marks and citation omitted).

III. DISCUSSION

{11} The State argues that the plain language of Section 66-8-109(B) only requires law enforcement to advise the arrestee of the right to be given an "opportunity to arrange" for an independent test but does not require law enforcement to make the opportunity "meaningful." The State relies on the principle that when the language of a statute is clear and unambiguous, the judiciary must apply the statute as written and refrain from interpreting it to include any additional requirements that the statute does not already set forth. *See Almanzar*, 2014-NMSC-001, ¶ 14; *State v. Hubble*, 2009-NMSC-014, ¶ 10, 146 N.M. 70, 206 P.3d 579 ("We will not read into a statute language which is not there, especially when it makes sense as it is written.").

{12} Defendant asks this Court to affirm the judgment of the Court of Appeals and its conclusions that the opportunity for an independent test described in Section 66-8-109(B) must be "meaningful" and the police must "meaningfully cooperate" with an arrestee's express desire to arrange for an independent chemical test. Defendant frames the right to an additional test as a matter of due process to challenge the reliability of the State's evidence.

{13} The Court of Appeals agreed with this view, concluding, "Section 66-8-109(B) affords fundamental fairness and at the same time, constitutional due process." *Chakerian*, 2015-NMCA-052, ¶ 18. Given this framing of the statutory right, the Court determined that law enforcement must do something more than just provide an arrestee the opportunity to arrange a test. "[T]he opportunity provided must be meaningful" and police must "meaningfully cooperate" with an arrestee's desire to obtain an additional test. *Id.* ¶¶ 19, 22. The Court held, "[d]oing nothing more than providing access to a [telephone directory] and telephone in the early morning hours fails to rise to the level of meaningful cooperation required by Section 66-8-109(B)." *Chakerian*, 2015-NMCA-052, ¶ 20.

A. Section 66-8-109(B) does require law enforcement to cooperate with an arrestee to obtain an additional chemical test

{14} Any person who operates a motor vehicle in New Mexico consents to chemical testing of the person's breath, blood, or both if the person is arrested on suspicion of DWI. *See* NMSA 1978, § 66-8-107(A) (1993). The choice of the initial test is "as determined by a law enforcement officer." *Id.*; *see also Fugere v. State Taxation & Revenue Dep't, Motor Vehicle Div.*, 1995-NMCA-040, ¶ 25, 120 N.M. 29, 897 P.2d 216. Section 66-8-109(B) provides a right to additional testing as follows:

> The person tested shall be advised by the law enforcement officer of the person's right to be given an opportunity to arrange for a physician, licensed professional or practical nurse or laboratory technician or technologist who is employed by a hospital or physician of [the person's] own choosing to perform a chemical test in addition to any test performed at the direction of a law enforcement officer.

The arresting law enforcement agency is required to pay for the additional test. *Id.* § 66-8-109(E). Notably absent from the statute is any language regarding the consequences for noncompliance.

{15} A majority of states have statutes similar to Section 66-8-109(B). *See, e.g.*, Arizona, Ariz. Rev. Stat. Ann. § 28-1388(C) (1999) ("The person tested shall be given a reasonable opportunity to arrange for any physician, registered nurse or other qualified person of the person's own choosing to administer a test or tests in addition to any administered at the direction of a law enforcement officer."); Oregon, Ore. Rev. Stat. § 813.150 (2017) ("[A] person shall be permitted upon request, at the person's own expense, reasonable opportunity to have any licensed physician and surgeon, licensed professional nurse or qualified technician, chemist or other qualified person of the person's own choosing administer a chemical test or tests of the person's breath or blood for the purpose of determining the alcoholic content of the person's blood . . . ."); *see also* Florida, Fla. Stat. Ann. § 316.1932(3) (West 2006); Idaho, Idaho Code § 18-8002(4)(e) (2014); Illinois, 625 Ill. Comp. Stat. Ann. 5/11-501.2(a)(3) (West 2018); Nevada, Nev. Rev. Stat. § 484C.180(1) (2009); Texas, Tex. Transp. Code Ann. § 724.019(a) (West 1995); Utah, Utah Code Ann. § 41-6a-520(4)(a) (West 2017).

{16} Of the jurisdictions that have addressed the issue, the majority have concluded that police have no duty to assist the arrestee and no obligation to provide the

arrestee transportation to obtain an independent chemical test. *See, e.g.*, *Schulz v. Comm'r of Pub. Safety*, 760 N.W.2d 331, 334 (Minn. Ct. App. 2009) ("Other than providing a telephone, an officer has no obligation to assist a driver to obtain an additional test."); *State v. Jasa*, 901 N.W.2d 315, 326 (Neb. 2017) (holding police "are under no duty [under Neb. Rev. Stat. § 60-6,199 (1993)] to assist in obtaining such testing beyond allowing telephone calls to secure the test" (internal quotation marks and citation omitted)); *Schroeder v. State, Dep't of Motor Vehicles and Pub. Safety*, 772 P.2d 1278, 1281 (Nev. 1989) (per curiam) ("The police must not hinder an individual's timely, reasonable attempts to obtain an independent examination, but they need not assist him."); *State v. Tompkins*, 795 N.W.2d 351, 355 (N.D. 2011) ("An arresting officer has no duty to assist the accused in obtaining an independent blood-alcohol test [but] [i]f the accused makes a reasonable request for an independent test, however, law enforcement must not interfere to the extent a reasonable opportunity to obtain the test is denied." (internal citations omitted)); *see also State v. Hedges*, 154 P.3d 1074, 1078 (Idaho Ct. App. 2007); *State v. Sidmore*, 951 P.2d 558, 570 (Mont. 1997); *State v. McNichols*, 906 P.2d 329, 333 (Wash. 1995) (en banc); *but see, Unruh v. State*, 669 So. 2d 242, 243-44 (Fla. 1996) (holding "law enforcement must render reasonable assistance in helping a DUI arrestee obtain an independent blood test upon request"); *Commonwealth v. Long*, 118 S.W.3d 178, 183 (Ky. Ct. App. 2003) (holding that Kentucky's "[independent test] statute requires some minimal police allowance and assistance").

{17} The only New Mexico case that has addressed Section 66-8-109(B) follows the majority of jurisdictions' interpretation but does not provide an answer to the issue of the role of law enforcement. In *State v. Jones*, 1998-NMCA-076, ¶ 22, 24, 125 N.M. 556, 964 P.2d 117, the Court of Appeals held that Section 66-8-109(B) entitles arrestees to a reasonable opportunity to contact a person of their choosing to draw and analyze their blood. This includes the right to be given access to a telephone to contact the person of their choosing to perform the chemical test. *Jones*, 1998-NMCA-076, ¶ 25. The Court held "our statute does not guarantee the arrestee an additional test will be performed, but only that the arrestee will be given a reasonable opportunity to arrange for an additional test." *Id.* ¶ 24.

{18} The only explicit duties that Section 66-8-109 places on law enforcement following the arrest of a person on suspicion of DWI are (1) that the arresting officer advise the arrestee of his or her right to an opportunity to arrange for an additional test, *see* § 66-8-109(B), and (2) if the arrestee exercises this right, that the agency represented by the arresting officer pay the cost of the additional test, *see* § 66-8-109(E). Accordingly, based on the plain language of Section 66-8-109, law enforcement is required to provide a reasonable opportunity for an arrestee to arrange for an additional chemical test by a qualified professional in addition to any test performed at the direction of law enforcement, and to pay for that test if the arrestee chooses to have it. We next address whether Defendant was afforded a reasonable opportunity in this case.

B. Officer Aragon did not deny Defendant a reasonable opportunity to contact a person of his choosing for a chemical test

{19} Defendant expressed a desire for an additional test; Officer Aragon provided Defendant with access to a telephone and a telephone directory for approximately fifteen to twenty minutes. On cross-examination, when Officer Aragon was asked whether he saw Defendant make any calls, he testified that

> [Defendant] didn't make a call. He wrote some numbers down. He wrote some numbers down out of the phone book. I didn't ask him what the phone numbers were or what they're—I saw him write down some numbers.

{20} Officer Aragon further testified that when asked, Defendant said he was "finished." And when Defendant was asked why he did not press the matter of obtaining the second test, he said that he believed it was already too late. Defendant stated, "So much time had elapsed I didn't think it would matter." Defendant also testified, "The officer was not being very helpful in this regard. It was basically . . . 'You have the right to do this, and that's all I'm going to tell you.'" Defendant testified that he wanted a second test but didn't know where to look in the directory and there were no listings under "phlebotomists."

{21} This indicates Defendant was generally aware of his right to an additional test and understood that he could arrange for a chemical test from a person of his choosing. The statute provides only that a qualified person may perform the chemical test. It does not limit the arrestee's ability to contact someone other than the person who will actually perform the test, such as a friend or family member, to ask for help making arrangements for the test.

{22} Officer Aragon gave Defendant approximately fifteen minutes with a phone and phone book to seek an additional test. During the fifteen minutes, Defendant chose not to make any phone calls. Officer Aragon did not obstruct the Defendant from calling anyone. Based on the totality of the circumstances, Officer Aragon's actions here were sufficient to afford Defendant a reasonable opportunity to obtain an independent chemical test. We hold that the Court of Appeals erred in interpreting Section 66-8-109(B) to impose a duty upon law enforcement to "meaningfully cooperate" with a DWI suspect to procure an independent chemical test. At a minimum, the arrestee must be provided with the means to contact a person of the arrestee's choosing in order to arrange for a chemical test. Accordingly, we hold that the State did not deny Defendant his statutory right of a reasonable opportunity to arrange for an independent chemical test by a person of Defendant's own choosing.

{23} Because we conclude that law enforcement officers are not required to go beyond the explicit mandates of Section 66-8-109(B) and Defendant was not denied his statutory right, we need not address the second issue raised by the State concerning whether the Court of Appeals erred in interpreting Section 66-8-109(B) to allow the State to be sanctioned for failing to provide a meaningful opportunity.

IV. CONCLUSION

{24} We reverse the Court of Appeals and conclude that Defendant was afforded his statutory right to an opportunity to arrange for an independent chemical test. Section 66-8-109(B) imposes the duty on law enforcement to advise an arrestee of the right to an additional test and to provide the arrestee the means to arrange for a qualified person to conduct a chemical test. Police may not unnecessarily hinder or interfere with an arrestee's attempt to exercise the right to an additional test. Accordingly, we affirm Defendant's convictions and remand for further proceedings in accordance with this opinion.

{25} IT IS SO ORDERED.
PETRA JIMENEZ MAES, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice
BARBARA J. VIGIL, Justice

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-020

No. S-1-SC-35641 (filed March 1, 2018)

NATALIE F. GARCIA,
Plaintiff-Respondent,
v.
HATCH VALLEY PUBLIC SCHOOLS,
Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Douglas R. Driggers, District Judge

ETHAN WATSON
ELIZABETH L. GERMAN
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DANIELA LABINOTI
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for Respondent

Opinion

Petra Jimenez Maes, justice

{1} Plaintiff Natalie Garcia, *née* Watkins, sued her former employer, Defendant Hatch Valley Public Schools (HVPS), for employment discrimination under the New Mexico Human Rights Act (NMHRA), NMSA 1978, § 28-1-7(A), (I) (2004). Plaintiff alleged that HVPS terminated her employment as a school bus driver based on her national origin, which she described as "German" and "NOT Hispanic." HVPS successfully moved for summary judgment in the district court, and the Court of Appeals reversed, focusing on Plaintiff's "primary contention" that HVPS had discriminated against her and terminated her employment because she is not Hispanic. *Garcia v. Hatch Valley Pub. Schs.*, 2016-NMCA-034, ¶¶ 11, 48, 369 P.3d 1.

{2} We granted certiorari under Rule 12-502 NMRA and reverse the Court of Appeals. We hold that summary judgment in HVPS's favor was appropriate because Plaintiff failed to establish a prima facie case of discrimination and failed to raise a genuine issue of material fact about whether HVPS's asserted reason for terminating her employment was pretextual. In so holding, we also conclude that (1) the Court of Appeals properly focused on Plaintiff's contention that she is not Hispanic in analyzing her discrimination claim, (2) Plaintiff may claim discrimination under the NMHRA as a non-Hispanic, and (3) the plain language of the NMHRA does not place a heightened evidentiary burden on a plaintiff in a so-called "reverse" discrimination case.

I. BACKGROUND

{3} HVPS hired Plaintiff as a school bus driver in August of 2008 and renewed her contract for the 2009-2010 school year. In April of 2010, HVPS notified Plaintiff by letter that it would "terminate" her employment at the end of her contract and that it would not offer her a contract for the 2010-2011 school year. HVPS explained that it was terminating Plaintiff's employment "due to an unsatisfactory evaluation."

{4} Plaintiff filed a complaint against HVPS with the Equal Employment Opportunity Commission (EEOC) alleging race and national origin discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-17 (2012). Plaintiff contended that her supervisor, Stephanie Brownfield, had discriminated and retaliated against her because Plaintiff is White and non-Hispanic. The EEOC issued an order of non-determination, and Plaintiff timely filed suit, alleging *inter alia* claims of discrimination and retaliation under the NMHRA, Section 28-1-7(A), (I), based upon Plaintiff's race and national origin. After a series of procedural steps, most of which are not relevant to this appeal, Plaintiff narrowed her complaint to a claim of discrimination under the NMHRA based on her national origin, which she characterized as "German" and "NOT Hispanic."

{5} HVPS later moved for summary judgment and we address the summary judgment proceedings in detail below. For present purposes, we note that the district court ruled in HVPS's favor, concluding that the uncontroverted evidence showed that Brownfield was unaware that Plaintiff was of German descent and that Plaintiff's national origin, therefore, could not have been a motivating factor in the termination of her employment. The district court concluded in the alternative that Plaintiff had failed to raise a genuine issue of material fact to establish that HVPS's "stated legitimate business reason for the termination of her employment was pretextual."

{6} Plaintiff appealed, and the Court of Appeals reversed. *Garcia*, 2016-NMCA-034, ¶ 49. The Court focused on Plaintiff's claim that she was discriminated against because she is not Hispanic and applied the federal burden-shifting framework that we approved in *Smith v. FDC Corp.* for analyzing a discrimination claim under the NMHRA to HVPS's motion for summary judgment. 1990-NMSC-020, ¶ 9, 109 N.M. 514, 787 P.2d 433 ("The evidentiary methodology adopted [in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)] provides guidance for proving a violation of the [NMHRA]."). The Court of Appeals concluded that Plaintiff had established a prima facie case of discrimination and had raised a genuine issue of material fact on the issue of pretext, citing evidence of a Hispanic employee who reportedly had a dirty bus but was not fired. *Garcia*, 2016-NMCA-034, ¶¶ 45, 47. The Court therefore held the ultimate question of whether HVPS had discriminated against Plaintiff was for the jury to decide. *See id.* ¶¶ 46-47. We review additional facts and procedural history as necessary throughout this opinion.

II. DISCUSSION

{7} We granted certiorari on three issues: (1) whether the Court of Appeals erred in analyzing Plaintiff's claim for *national origin* discrimination as a claim for reverse *racial* discrimination; (2) if the Court of Appeals properly analyzed Plaintiff's national origin discrimination claim as a reverse racial discrimination claim, whether the Court erred in holding that so-called reverse discrimination plaintiffs do not have to meet a higher standard

under the NMHRA; and (3) whether the Court of Appeals erred in reversing the district court's grant of summary judgment in favor of HVPS. These are questions of law, which we review de novo. *See Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 8, 139 N.M. 12, 127 P.3d 548.

A. The Court of Appeals Properly Focused on Plaintiff's Contention that She Is Not Hispanic in Analyzing Her Discrimination Claim

{8} As a threshold issue, we first address an aspect of this case that became unnecessarily complicated due to HVPS's litigation strategy in the district court. We discuss the issue in some detail to discourage similar tactics that needlessly consume the resources of courts and litigants alike. Like the Court of Appeals, we hold that the district court improperly focused on whether Brownfield knew that Plaintiff was of German descent when it granted summary judgment in HVPS's favor. *See Garcia*, 2016-NMCA-034, ¶ 10. We consider Plaintiff's alleged Germanic origins to be a false issue in this case, inserted only in response to HVPS's formalistic challenge to a routine discrimination claim.

{9} Throughout this litigation, Plaintiff's consistent position has been that she was treated differently than her Hispanic coworkers and ultimately terminated because she is not Hispanic. Plaintiff identified herself in her original complaint as "a female citizen of the United States of America," and she alleged that she "was subjected to discrimination . . . because of her race and/or national origin being of Caucasian descent." *See* § 28-1-7(A) (prohibiting discrimination by an employer based, *inter alia*, on a person's race or national origin). Plaintiff elaborated that she was treated differently than her coworkers "due to her not being Hispanic." She also alleged specific examples of how she was treated differently from various coworkers, whom she described as "being of Hispanic Origin" or "of Hispanic descent."

{10} HVPS moved for judgment on the pleadings and, in its motion, revealed that it fully understood the basis of Plaintiff's claim. In HVPS's own words, "Plaintiff is apparently claiming she was discriminated against because she is a white non-Hispanic American." HVPS argued, however, that Plaintiff had failed to state a claim for *racial* discrimination because "White persons and Hispanic persons are both of the Caucasian race." HVPS similarly argued that Plaintiff had failed to state a claim for *national origin* discrimination because Plaintiff had failed to specify her national origin; more specifically, HVPS argued that identifying herself as an "American citizen" was insufficient. HVPS summed up the nature of its argument as follows at the hearing on its motion:

> I'm not denying that there can be discrimination based on one's ethnicity, but those are more properly alleged or more properly pled in the [NMHRA] under other issues besides race or national origin. If they are under national origin, there has to be a national origin. American does not cut it. It's not our job to help the plaintiff plead her case. She pleads her case, and then we respond.

{11} The district court denied the motion but specifically found that "Plaintiff's Complaint [did] not set forth the elements necessary to state a cause of action for national origin discrimination." The district court therefore gave Plaintiff leave to amend her complaint and warned that "her cause of action will be dismissed unless the Amended Complaint sets forth the elements necessary to go forward with her claims." Plaintiff promptly amended her complaint, dropping *racial* discrimination as a basis for recovery and amending her *national origin* discrimination claim by describing herself for the first time as "German" and "of German descent." Her amended complaint, however, continued to allege that "she was treated differently than other . . . workers due to the fact that she was **NOT Hispanic**" and continued to describe her coworkers who allegedly received more favorable treatment as "**ALL Hispanic**." (Bold face in original.)

{12} Defendant eventually moved for summary judgment on the grounds that Plaintiff had failed to raise a genuine issue of material fact that Plaintiff's supervisor, Brownfield, knew that Plaintiff is German. The motion for summary judgment did not meaningfully address that Plaintiff's national origin discrimination claim also was based on her being NOT Hispanic.[1] The district court granted summary judgment in HVPS's favor, specifically finding that Plaintiff's national origin discrimination claim failed because Brownfield was not aware of Plaintiff's German national origin, and therefore Plaintiff's national origin "could not, as a matter of law, have been a motivating factor in the termination of her employment."

{13} This procedural history evinces an approach to litigation that we have repeatedly criticized. We have held that "the principal function of pleadings is to give fair notice of the claim asserted." *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 12, 335 P.3d 1243 (quoting *Malone v. Swift Fresh Meats Co.*, 1978-NMSC-007, ¶ 10, 91 N.M. 359, 574 P.2d 283). We also have emphasized "our policy of avoiding insistence on hypertechnical form and exacting language." *Zamora*, 2014-NMSC-035, ¶ 10. The record is clear that HVPS understood the basis for Plaintiff's claim from the beginning of this litigation—that she was discriminated against because she is not Hispanic. Equally clear is that HVPS has never argued that the *New Mexico* Human Rights Act permits discrimination between Hispanics and non-Hispanics in the workplace. And rightly so; such an argument would be preposterous. *Cf., e.g.*, *State ex rel. League of Women Voters of N.M. v. Advisory Comm. to the N.M. Compilation Comm'n*, 2017-NMSC-025, ¶¶ 25-34, 401 P.3d 734 (reviewing the history of state constitutional provisions that prohibit discrimination against New Mexico's Spanish-speaking population with respect to voting and educational rights).

{14} HVPS's argument, instead, has always been semantic: the discrimination alleged by Plaintiff is based on "ethnic characteristics" and therefore does not amount to *racial* or *national origin* discrimination. Notably, the NMHRA does not explicitly prohibit discrimination based on one's ethnicity or "ethnic characteristics." *See* § 28-1-7(A) (prohibiting discrimination based on "race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition"). We therefore suspect that HVPS would have made similar arguments had Plaintiff based her claims on her color or ancestry; for example, that Whites and Hispanics are both the same color, or that being White

[1]HVPS argues for the first time on appeal that Plaintiff similarly failed to introduce admissible evidence that Brownfield was aware that Plaintiff is not Hispanic or perceived Plaintiff as not Hispanic. HVPS did not make this argument in the district court, and we therefore decline to address it on appeal. *See Juneau*, 2006-NMSC-002, ¶ 12 ("Not having requested or received a ruling on the question of protected activity, [the defendant] failed to preserve any such challenge for consideration by this Court.").

and of Caucasian descent are not proper descriptors of one's ancestry. HVPS does not identify which of the remaining classes protected under the NMHRA—if any—could bear the weight of Plaintiff's claim.

{15} HVPS's semantic attacks on Plaintiff's claims embody the "technical niceties or procedural booby traps New Mexico left behind more than seventy years ago." *Zamora*, 2014-NMSC-035, ¶ 14 (internal quotation marks omitted). Unfortunately, its strategy succeeded and led to the addition of an allegation that was used as a basis for dismissing her lawsuit. Had Plaintiff's Germanic origins been at the root of her discrimination claim, perhaps summary judgment for HVPS would have been appropriate based on Brownfield's asserted lack of knowledge that Plaintiff is German. *See, e.g.*, *Kruger v. Cogent Commc'ns, Inc.*, 174 F. Supp. 3d 75, 82-83 (D.D.C. 2016) (denying a motion to dismiss a claim for national origin discrimination because the complaint alleged that plaintiff's supervisor made statements and references to the plaintiff's German last name and referred to the plaintiff as a "Nazi"). But to allow HVPS to avoid a jury trial by sidestepping Plaintiff's primary theory of liability—that her employment was terminated because she is not Hispanic—would elevate form over substance. By its own admission, HVPS had adequate notice of the actual basis of Plaintiff's discrimination claim from the beginning of the lawsuit. *See, e.g.*, *Salas v. Wisc. Dep't of Corrs.*, 493 F.3d 913, 923 (7th Cir. 2007) (holding that the plaintiff's national origin claim based upon being Hispanic did not deprive the employer "of notice or otherwise hamper its ability to defend the claim"). We therefore focus on the gravamen of Plaintiff's complaint, that she was subjected to national origin discrimination because she is not Hispanic.

B. Plaintiff May Claim Discrimination Under the NMHRA as a Non-Hispanic

{16} We turn to HVPS's argument that the Court of Appeals improperly analyzed Plaintiff's *national origin* discrimination claim as a *racial* discrimination claim. Based on our review of the NMHRA, Title VII, and the federal courts' inconsistent interpretations of national origin and racial discrimination under Title VII, we hold that the distinction is immaterial in this case when Plaintiff has consistently claimed that HVPS discriminated against her because she is not Hispanic.

{17} We have not addressed the precise contours of national origin discrimination under the NMHRA and whether it encompasses discrimination against a person who is Hispanic or non-Hispanic. *But cf. Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶¶ 1, 11, 129 N.M. 586, 11 P.3d 550 (noting that the jury had found against the plaintiff on her discrimination claim based on her "Hispanic national origin"). In considering the issue, we look for guidance to interpretations of federal employment discrimination law under Title VII. *See Smith*, 1990-NMSC-020, ¶ 9 (looking to federal interpretation of the Civil Rights Act of 1964 for "guidance for proving a violation of the [NMHRA]"). We emphasize that interpretations of federal law are merely persuasive and that we analyze claims under the NMHRA based upon the statute and our interpretation of the Legislature's intent. *See id.*

{18} Both the NMHRA and Title VII prohibit discrimination based on a number of traits, including national origin. *See* § 28-1-7(A) (prohibiting discrimination on the basis of a person's "race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition," as well as a person's spousal affiliation, sexual orientation, or gender identity in certain circumstances); 42 U.S.C. § 2000e-2(a) (2012) (prohibiting discrimination based upon a person's "race, color, religion, sex, or national origin"). Neither law defines national origin or national origin discrimination. *See generally* NMSA 1978, § 28-1-2 (2007) (defining certain terms as used in the NMHRA); 42 U.S.C. § 2000e (defining certain terms used in Title VII). Similarly, neither law defines the related terms "race," "color," or "ancestry," or discrimination based on those characteristics.[2]

{19} The EEOC, as the executive agency charged with enforcing Title VII, has defined the term "national origin discrimination" for its purposes as discrimination based on (1) the place of origin of a person or a person's ancestors, or (2) the "physical, cultural[,] or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (2017) ("The [Equal Employment Opportunity] Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."). Discrimination against a Hispanic or non-Hispanic person thus would fall squarely under the second prong of the EEOC's definition as unequal treatment based on the person's "national origin group." *See* U.S. Equal Emp't Opportunity Comm'n, No. 915.005, *EEOC Enforcement Guidance on National Origin Discrimination*, § II(B) (2016) ("National origin discrimination also includes discrimination against a person because she does *not* belong to a particular ethnic group, such as less favorable treatment of employees who are *not* Hispanic.").

{20} The EEOC's interpretation of Title VII, however, is merely persuasive. *See Vill. of Freeport v. Barrella*, 814 F.3d 594, 607 n.47 (2d Cir. 2016) ("[T]he EEOC's interpretation is entitled at most to so-called *Skidmore* deference—i.e., 'deference to the extent it has the power to persuade.'" (quoting *Townsend v. Benjamin Enters.*, 679 F.3d 41, 53 (2d Cir. 2012)). The lack of a controlling definition has resulted in divergent views in the federal courts about the boundary between discrimination based on national origin and discrimination based on race. *See, e.g.*, *Salas*, 493 F.3d at 923 ("In the federal courts, there is uncertainty about what constitutes race versus national origin discrimination under Title VII.").

{21} With regard to the specific issue of discrimination against Hispanics and non-Hispanics under Title VII, federal courts agree that such discrimination is prohibited, but they often struggle to identify the source of that prohibition. *See, e.g.*, *Vill. of Freeport*, 814 F.3d at 606 ("Title VII obviously affords a cause of action for discrimination based on Hispanic ethnicity—but why?"). Some have held that discrimination against Hispanics and non-Hispanics is based on race. *See, e.g.*, *id.* at 607 ("[D]iscrimination based on

[2]The NMHRA includes ancestry in its list of protected characteristics. Title VII does not. *But see Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88-89 (1973) (noting that an earlier version of Title VII included the term "ancestry" and that deletion of the term from the final version of Title VII "was not intended as a material change, suggesting that the terms 'national origin' and 'ancestry' were considered synonymous" (citation omitted)).

ethnicity, including Hispanicity or lack thereof, constitutes racial discrimination under Title VII."). Others have held that such discrimination is based on national origin. *See, e.g.*, *Salas*, 493 F.3d at 923 ("[A] plaintiff alleging that he is Hispanic sufficiently identifies his national origin to survive summary judgment."). And others simply avoid the question altogether. *See, e.g.*, *Alonzo v. Chase Manhattan Bank, N.A.*, 25 F. Supp. 2d 455, 459 (S.D.N.Y. 1998) ("Whether being Hispanic constitutes a race or a national origin category is a semantic distinction with historical implications not worthy of consideration here.").

{22} The takeaway from these cases is that terms like race and national origin, as well as related terms like ancestry and ethnicity, often overlap, even to the point of being factually indistinguishable. *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J., concurring) ("[T]he line between discrimination based on 'ancestry or ethnic characteristics' and discrimination based on 'place or nation of . . . origin' is not a bright one. . . . Often, however, the two are identical as a factual matter: one was born in the nation whose primary stock is one's own ethnic group. Moreover, national origin claims have been treated as ancestry or ethnicity claims in some circumstances. For example, in the Title VII context, the terms overlap as a legal matter." (first omission in original) (citations omitted)).

{23} We find this reasoning persuasive and conclude that the precise label that Plaintiff chose to describe her claim is less important than her consistent allegations that she was treated differently than her Hispanic coworkers because she is not Hispanic. As we already have explained, HVPS does not argue that such discrimination is permitted under the NMHRA. Whether denominated as discrimination based on her race, national origin, ancestry, or any combination thereof, HVPS was fully apprised of the basis of her claim, and that is all that we require. *See Zamora*, 2014-NMSC-035, ¶ 14 (holding that a complaint that "highlighted the key facts and actors relevant to [the plaintiff's] cause of action" and that emphasized the main theory of liability "adequately informed [the defendant] of the general nature of [the plaintiff's] claim"); *see also Salas*, 493 F.3d at 923 (holding that the plaintiff's national origin claim based upon being Hispanic did not deprive the employer "of notice or otherwise hamper its ability to defend the claim").

C. The Plain Language of the NMHRA Does Not Place a Heightened Evidentiary Burden on a Plaintiff in a So-Called "Reverse" Discrimination Case

{24} Before we turn to the merits of HVPS's motion for summary judgment, we pause to address the Court of Appeals' significant detour into the issue of so-called "reverse" discrimination under federal law, an issue that was not raised or briefed by the parties in the district court or on appeal. *See Garcia*, 2016-NMCA-034, ¶¶ 16-43. In analyzing Plaintiff's claim of national origin discrimination, the Court took upon itself to answer whether the NMHRA and our caselaw place a higher evidentiary burden on a plaintiff who does not "belong[] to a racial minority." *Id.* ¶¶ 17-18. After a detailed review of the various approaches taken by federal courts, the Court of Appeals concluded that a consistent standard for "both discrimination and reverse discrimination plaintiffs . . . reflects the purpose and philosophy behind Title VII as expressed by the United States Supreme Court." *Id.* ¶¶ 19-43. The Court therefore held that it would "analyze a reverse discrimination claim as [it] would [analyze] any racial discrimination claim." *Id.* ¶ 43.

{25} We expressly disavow any reliance on reverse discrimination cases in analyzing a claim under the NMHRA. The plain language of the NMHRA does not distinguish between particular "race[s], age[s], religion[s], color[s], national origin[s], ancestr[ies], sex[es], physical or mental handicap[s] or serious medical condition[s]." Section 28-1-7(A); *but see Cates v. Regents of the N.M. Inst. of Mining & Tech.*, 1998-NMSC-002, ¶ 18, 124 N.M. 633, 954 P.2d 65 (holding that "40 years old marks the minimum age in the protected age class in cases of employment discrimination under the [NMHRA]"). The NMHRA, simply and clearly, prohibits unlawful discrimination based on the traits declared by the Legislature to be worthy of protection. *Accord McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (1976) (holding that Title VII's "terms are not limited to discrimination against members of any particular race" and thus prohibit "[d]iscriminatory preference for *any* [racial] group, *minority* or *majority*" (alterations in original) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)); *Lind v. City of Battle Creek*, 681 N.W.2d 334, 334-35 (Mich. 2004) (holding that the language of the Michigan Civil Rights Act "draws no distinctions between individual plaintiffs on account of race," and therefore a "majority" plaintiff need not present more evidence than a "minority" plaintiff to prevail on a discrimination claim (internal quotation marks and citation omitted)). Therefore, under the plain language of the NMHRA, its protections and requirements apply equally to all plaintiffs, regardless of their minority or majority status. *See Sims v. Sims*, 1996-NMSC-078, ¶ 22, 122 N.M. 618, 930 P.2d 153 ("[T]he courts will not add to such a statutory enactment, by judicial decision, words which were omitted by the legislature." (quoting *State ex rel. Miera v. Chavez*, 1962-NMSC-097, ¶ 7, 70 N.M. 289, 373 P.2d 533)).

D. Summary Judgment Was Appropriate in this Case

{26} The final question in this appeal is whether Plaintiff came forward with sufficient evidence to survive HVPS's motion for summary judgment. The Court of Appeals reversed the district court's grant of summary judgment in HVPS's favor, citing evidence that one of Plaintiff's coworkers had complained to another HVPS employee—who was not Plaintiff's supervisor—about a Hispanic coworker who had a dirty bus. *See Garcia*, 2016-NMCA-034, ¶¶ 47-48. For reasons that will become clear below, this evidence was insufficient to create a genuine issue of material fact about whether HVPS intentionally discriminated against Plaintiff when it terminated her employment. The question we therefore must answer is whether Plaintiff's other evidence was sufficient to survive HVPS's motion for summary judgment.

{27} The standard for summary judgment is well-established:

> 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. Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment. All reasonable inferences are construed in favor of the non-moving party.

Romero v. Philip Morris, Inc., 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280 (quoting *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971). Before we apply this

standard, we must look to the substantive law governing the dispute because it is the filter through which we must determine whether genuine issues of material fact exist. *See Romero*, 2010-NMSC-035, ¶ 11 (quoting *Farmington Police Officers Ass'n v City of Farmington*, 2006-NMCA-077, ¶ 17, 139 N.M. 750, 137 P.3d 1204).

{28} Plaintiff has not offered direct evidence of intentional discrimination, so we apply the burden-shifting methodology that we approved in *Smith* for analyzing a discrimination claim based upon indirect evidence. *See* 1990-NMSC-020, ¶ 10-11. Under *Smith*, a plaintiff first must establish a prima facie case of discrimination, which creates a presumption that discrimination has occurred. *See id.* ¶¶ 9 n.1, 11. The defendant then may rebut the presumption by producing evidence that "the plaintiff was dismissed based on a nondiscriminatory motivation." *Id.* Once rebutted, the presumption of discrimination "drops from the case." *Bovee v. State Highway & Transp. Dep't*, 2003-NMCA-025, ¶ 14, 133 N.M. 519, 65 P.3d 254 (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)). The plaintiff may then offer evidence that the employer's proffered nondiscriminatory reason was "pretextual or otherwise inadequate." *Juneau*, 2006-NMSC-002, ¶ 9.

1. Plaintiff Did Not Establish a Prima Facie Case of Discrimination

{29} In *Smith*, we stated a formulation of the prima facie case for termination under which the plaintiff must show that (1) she is a member of a protected class, (2) she was qualified to continue in her position, (3) her employment was terminated, and (4) "[her] position was filled by someone not a member of the protected class." *Id.* ¶ 11. *Smith* also clarified that a prima facie case could be established "through other means" when a plaintiff cannot demonstrate that she was replaced by someone not in the protected class. *Id.* In that circumstance, we held that a plaintiff could satisfy the fourth element of the prima facie case with evidence that "[she] was dismissed purportedly for misconduct nearly identical to that engaged in by one outside of the protected class who was nonetheless retained." 1990-NMSC-020, ¶ 11.

{30} *Smith* thus recognized that the prima facie case "was not intended to be an inflexible rule." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575 (1978). "The facts necessarily will vary in Title VII cases, and the specification of the prima facie proof required from [a] respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 575-76 (alterations omitted) (quoting *McDonnell Douglas Corp.*, 411 U.S. at 802 n.13). The purpose of the prima facie case is to permit an inference of discrimination by ruling out "the most common nondiscriminatory reasons for the plaintiff's [discriminatory treatment]." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). The "prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'" *Id.* at 254 (quoting *Furnco*, 438 U.S. at 577).

{31} In a claim alleging discriminatory *termination*, the requirements that we approved in *Smith* were intended to rule out "the most common nondiscriminatory reasons for the plaintiff's [termination]" under the circumstances of a particular case. *Burdine*, 450 U.S. at 253-54. In this case, Plaintiff alleged in her complaint that Brownfield notified her that her contract would not be renewed because of her "performance." Therefore, under the circumstances of this case, the fourth element of the prima facie case must be modified to permit Plaintiff to show that "[she] was dismissed purportedly for [performance] nearly identical to [the performance of] one outside of the protected class who was nonetheless retained." *See Smith*, 1990-NMSC-020, ¶ 11. Without such a showing, an inference of discrimination is not warranted because Plaintiff has not ruled out the most common nondiscriminatory reasons for her termination, namely, that her performance was materially different than the performance of her Hispanic coworkers.

{32} Plaintiff failed to come forward with evidence to establish the fourth element of the prima facie case as modified above. Instead, Plaintiff proffered evidence purporting to show that she was treated less favorably than her Hispanic coworkers in a variety of ways, some of which were unrelated to her performance or termination. Plaintiff's evidence consisted of testimony about isolated instances of asserted unequal treatment with respect to various Hispanic coworkers, including (1) the scheduling and assignment of bus routes, (2) compensation for pre- and post-trip inspection time, (3) maintaining a clean bus, and (4) enforcement of post-accident testing and suspension policies. None of this evidence purported to show that one or more Hispanic employees' performance was "nearly identical" to Plaintiff's performance as a whole. *Smith*, 1990-NMSC-020, ¶ 11. Plaintiff's evidence therefore is insufficient to rule out the most common nondiscriminatory reasons for the termination of her employment.

{33} We do not mean to suggest that Plaintiff had to produce evidence of an employee whose performance was a carbon copy of her own. *Cf. Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015) (noting that the prima facie case does not "require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways"). But without some basis for meaningful comparison of Plaintiff's job performance with the performance of at least one Hispanic employee, Plaintiff's proffered evidence was insufficient to establish a prima facie case of discriminatory termination. Put simply, Plaintiff's evidence does not support an inference that HVPS terminated her employment because she is not Hispanic.

2. HVPS's Asserted Nondiscriminatory Reason

{34} Even if we were to assume that Plaintiff established a prima facie case of discrimination, her claim would not survive HVPS's motion for summary judgment. *See Cates*, 1998-NMSC-002, ¶¶ 21, 25-26 (affirming summary judgment in favor of employer on age discrimination claim when the plaintiff failed to establish a prima facie case of discrimination and failed to show that the employer's reason for laying him off was pretextual). HVPS met its burden to produce evidence of a nondiscriminatory reason for terminating Plaintiff's employment, and Plaintiff's evidence did not tend to show that HVPS's asserted reason for terminating her employment was pretextual or "merely an excuse to cover up illegal conduct." *Juneau*, 2006-NMSC-002, ¶ 23.

{35} HVPS came forward with extensive evidence of its nondiscriminatory reason for terminating Plaintiff's employment. To start, HVPS offered Brownfield's explanation by affidavit that she had been the Transportation Director for HVPS from September 2008 through June 2010, that she had been Plaintiff's direct supervisor, and that she had recommended terminating Plaintiff's employment due to "an unsatisfactory evaluation and ongoing performance issues." HVPS also produced Brownfield's evaluation of Plaintiff for the 2009-2010 school year, which showed that Plaintiff had fully "Met Competency" in only five of the eleven areas that

were evaluated. HVPS also produced documentation showing that Plaintiff was an employee with less than three consecutive years of service and therefore her employment was at-will and could be terminated "for any reason." *See* NMSA 1978, § 22-10A-24(A) (2003) (providing that a local school board may terminate the employment of an employee with fewer than three consecutive years of service "for any reason it deems sufficient"); *see also* § 22-10A-24(D) ("A local school board or governing authority may not terminate an employee who has been employed by a school district or state agency for three consecutive years without just cause.").

{36} HVPS also produced documentation maintained by Brownfield of a number of performance-related incidents involving Plaintiff, dating from January of 2009 through March of 2010. The documentation included (1) a warning for dropping off a student at a different stop without proper authorization; (2) a warning for failing to use her flashers when picking up students, permitting students to get on or off her bus at other than their designated stops, and for failing to know her standards; (3) a notification that her bus had been flagged by an inspector because the emergency windows were not functioning properly and because she had failed to note the problem on her pre/post trip ticket; (4) a warning for backing into another bus at a fueling station; (5) a warning for hitting and uprooting a rail in an elementary school parking lot; (6) two notes alerting Plaintiff that her buses were dirty, one of which stated that her mirrors were a safety hazard; and (7) documentation about a grievance against Plaintiff that had been filed by another bus driver because Plaintiff had told other employees that she had found prescription painkillers in the driver's desk.

3. Plaintiff's Evidence of Pretext

{37} Thus, assuming that Plaintiff established a prima facie case, HVPS clearly met its burden to come forward with evidence of a nondiscriminatory reason for terminating her employment. As a result, the presumption of discrimination created by the prima facie case "drops from the case," *Bovee*, 2003-NMCA-025, ¶ 14 (quoting *Aikens*, 460 U.S. at 715), and Plaintiff may offer evidence that the employer's proffered nondiscriminatory reason was "pretextual or otherwise inadequate." *Juneau*, 2006-NMSC-002, ¶ 9. The question of pretext is "largely a credibility issue and . . . should normally be left exclusively to the province of the jury." *Id.* ¶ 23.

{38} In this case, however, Plaintiff's evidence did not show that HVPS's asserted reason for terminating her employment was pretextual or "merely an excuse to cover up illegal conduct." *Id.* To the contrary, HVPS's proffered evidence further demonstrated that Plaintiff did not identify a single employee whose performance was "nearly identical" so as to permit an inference of a discriminatory motive. *Smith*, 1990-NMSC-020, ¶ 11; *see also Juneau*, 2006-NMSC-002, ¶ 25 (noting that the plaintiff's evidence to show causation in the prima facie case and pretext may be the same). Plaintiff did not identify a single Hispanic employee who was retained despite (1) having a similar history of documented performance issues, (2) receiving a similar evaluation, or (3) being terminable at-will. Thus, the inadequacy of Plaintiff's evidence of other employees' performance was only exacerbated by HVPS's evidence to support its decision to terminate Plaintiff's employment.

{39} Plaintiff's remaining evidence that HVPS's asserted reason was pretextual consisted of (1) the fact that none of Plaintiff's marks on her evaluation were actually "Unsatisfactory"; rather, five were "Meets Competency," four were "Needs Improvement," and two were "Meets Competency/Needs Improvement"; (2) testimony by fellow employees who were surprised when Plaintiff's contract was not renewed; (3) testimony by fellow employees that Plaintiff was doing more activity trips than any other driver, including eighteen trips the month before she received notice that her contract would not be renewed; and (4) testimony by a fellow employee that Plaintiff had been sent for special training. This evidence may support an inference that Plaintiff's termination was unexpected, but it does not support an inference that her employment was terminated because she is not Hispanic.

{40} In our view, the following exchange with Plaintiff during her deposition both sums up her claim and demonstrates why summary judgment was appropriate:

> Q: Did anybody at the Hatch Schools ever say that they were taking away your bus routes because you were not Hispanic?
>
> A: Nobody is going to say that to me. But because I wasn't Hispanic, I was treated way different.
>
> Q: Well, if — why do you think that? Is it just because that you're the only non-Hispanic one there, or did somebody ever actually say something to you because you're non-Hispanic that you're not given a route?
>
> A: I'm the one that's white, I had to go for drug and alcohol tests. Everybody there that's Hispanic that hit the barn or hit the railing or hit a cement mixer or anything, they never went for a drug and alcohol test. Every other bus driver that's Hispanic knew exactly when the trips out of town they were going to take, they could prepare for that. I'm white, huh, I wasn't given that opportunity. It would have been nice to know. At that time we were living in Radium Springs, it would have been really nice to know that I had to go out of town where I could get whatever I needed from my house. There was times that I went to Family Dollar or something so I could get something because I had to go on a trip. I didn't have time to go all the way back to my house to get something to go on a trip because Vickie refused to ask me. She would not ask me, not even when I would sit there and tell her, That trip is in two or three days, go ahead and put my name up there, I'll take it. Oh, I'm not that far yet. I'm not that far yet.

{41} We do not doubt the sincerity of Plaintiff's testimony. But "[t]he NMHRA protects against discriminatory treatment, not against general claims of employer unfairness." *Juneau*, 2006-NMSC-002, ¶ 14. Plaintiff's evidence does not raise a genuine issue of material fact that her non-Hispanic national origin was a motivating factor in HVPS's decision to terminate her employment. *See Smith*, 1990-NMSC-020, ¶ 9 n.1 (explaining that once the employer comes forward with evidence of a nondiscriminatory reason, the plaintiff's burden of establishing pretext "merges with the plaintiff's ultimate burden of proof of intentional discrimination" (citing *Burdine*, 450 U.S. at 256)).

III. CONCLUSION

{42} We reverse the Court of Appeals and remand for further proceedings consistent with this opinion.

{43} IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:

JUDITH K. NAKAMURA, Chief Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-024

No. A-1-CA-35253 (filed December 27, 2017)

COMMUNITIES FOR CLEAN WATER,
Appellant,
v.
NEW MEXICO WATER QUALITY
CONTROL COMMISSION,
Appellee,
and
NEW MEXICO ENVIRONMENT
DEPARTMENT and LOS ALAMOS
NATIONAL SECURITY, LLC.,
Intervenors.

ADMINISTRATIVE APPEAL FROM THE NEW MEXICO WATER QUALITY CONTROL COMMISSION
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Opinion

Julie J. Vargas, Judge

{1} Communities for Clean Water (CCW) describes itself as a growing network of organizations whose mission is to ensure that "community waters which receive adverse impacts from [Los Alamos National Labs], its current operations and its legacy waste, are kept safe for drinking, agriculture, sacred ceremonies, and a sustainable future." CCW appeals from the final order of the Water Quality Control Commission (WQCC) sustaining the decision of the New Mexico Environment Department (NMED) to deny CCW's request for a public hearing on the water discharge permit application of the United States Department of Energy (DOE) and Los Alamos National Security, LLC (LANS) (collectively, DOE/LANS). Specifically, the parties disagree as to whether NMED has discretion to deny its request for a public hearing, and if so, whether CCW established a substantial public interest in the permit application, mandating a public hearing under the Water Quality Act (the Act), NMSA 1978, §§ 74-6-1 to -17 (1967, as amended through 2013), and its corresponding regulations. We hold that while NMED has limited discretion to grant or deny a public hearing, the WQCC lacked substantial evidence to support its decision to sustain NMED's denial of CCW's request for a public hearing. We reverse.

BACKGROUND

{2} In December 2011, DOE/LANS applied for a discharge permit with the Ground Water Quality Bureau (Bureau) of NMED. Following an amendment in January 2014, the application became "administratively complete" under 20.6.2.3108 NMAC in December 2014. NMED issued a draft permit and proposed approval on January 22, 2015. In response to the proposed approval, DOE/LANS submitted comments on the draft permit and requested a hearing, expressing a hope that any concerns could be "resolved in advance of a public hearing" in which case it intended to "immediately withdraw the hearing request."

{3} CCW submitted its comments and requested a public hearing on March 2, 2015. On April 15, 2015, CCW, NMED, and DOE/LANS met to discuss the permit, after which CCW again requested a public hearing and submitted further comments.

{4} In May 2015, the Bureau issued a final draft of the permit. DOE/LANS submitted additional comments on the final draft. In response to the final draft of the permit, CCW again submitted substantive comments to the Bureau and submitted its third request for a public hearing in June 2015.

{5} Upon receipt of CCW's third request, the Bureau sent a memorandum to its Water Protection Division on July 8, 2015, recommending that CCW's requests for a public hearing be denied. The next day, DOE/LANS withdrew its request for public hearing. Two weeks later, NMED informed CCW by letter dated July 24, 2015, that its request for a hearing was denied. NMED explained that the secretary of NMED (secretary) had denied the request for a public hearing because the permit, as drafted, already contemplated community involvement and was in the public interest, stating:

> It is the opinion of the Department that NMED has drafted a Discharge Permit that provides transparency and opportunity

> for community involvement at an unprecedented level. The proposed activity by LANL is intended to address historic impacts to groundwater and protect water resources and communities, and issuance of this Discharge Permit is in the public interest.

Three weeks later, on July 27, 2015, NMED issued the permit.

{6} CCW appealed the denial of its public hearing request and approval of the permit to the WQCC. Following a hearing on CCW's appeal, the WQCC sustained NMED's decision to deny CCW's request for a public hearing in a nine-to-two vote. The WQCC issued a final order pursuant to Section 74-6-5(Q) and 20.1.3.16(F)(3) NMAC, setting out its findings of fact and conclusions of law. It is CCW's appeal of the WQCC's decision that we now consider.

STANDARD OF REVIEW

{7} A decision of the WQCC will not be disturbed by this Court unless it acts in a manner that is: "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." Section 74-6-7(B). "A ruling that is not in accordance with law should be reversed if the agency unreasonably or unlawfully misinterprets or misapplies the law." *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶ 11, 141 N.M. 41, 150 P.3d 991 (internal quotation marks and citation omitted). However, in considering whether the WQCC's actions were in accordance with the law, we note that interpretation of a statute is a matter of law that this Court reviews de novo, and we are not bound by NMED's or WQCC's interpretation of the relevant statutes. *See id.* (citing *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806).

DISCUSSION

{8} Initially, we note that our review does not include a review of the merits of the permit. Instead, we limit our review to the procedures employed by NMED to grant the permit and whether they were implemented in accordance with the applicable statutes and regulations.

{9} The parties' arguments focus on the discretion of the secretary to deny a request for a public hearing on a draft permit under the Act and its promulgated regulations. While Section 74-6-5(G) (the statute) appears on its face to provide for a public hearing, stating, "[n]o ruling shall be made on any application for a permit without opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit evidence, data, views or arguments orally or in writing and to examine witnesses testifying at the hearing," 20.6.2.3108(K) NMAC (the regulation) promulgated to effectuate the statute appears to limit the availability of a hearing to instances where a hearing is requested and the secretary finds a substantial public interest in the permit application. The regulation states,

> Requests for a hearing shall be in writing and shall set forth the reasons why a hearing should be held. A public hearing shall be held if the secretary determines there is substantial public interest.

20.6.2.3108(K) NMAC; *see also* 20.6.2.7(PP) NMAC (identifying the regulation's references to "the secretary" as references to the secretary of NMED).

The Act and WQCC Regulations

{10} In its passage of the Act, the Legislature gave the WQCC, as New Mexico's water pollution control agency, the responsibility of creating and implementing regulations aimed at preventing water pollution. *See* § 74-6-1; § 74-6-3; § 74-6-4. The Act requires the WQCC to adopt regulations governing the application for, public notice of, and the granting of, water quality permits. *See* § 74-6-5(D) ("After regulations have been adopted for a particular industry, permits for facilities in that industry shall be subject to conditions contained in the regulations."); Section 74-6-5(F) ("The commission shall by regulation develop procedures that ensure that the public . . . shall receive notice of each application for issuance, renewal or modification of a permit."); Section 74-6-5(J) (granting the commission authority to impose conditions upon permits by regulation). Utilizing these powers, the WQCC promulgated regulations governing the NMED's duties to provide notice of permit applications to the public and established the circumstances under which members of the public are entitled to a public hearing on a permit application. *See* 20.6.2.3108 NMAC (setting out public notice and participation requirements). Specifically, the regulations promulgated by the WQCC provide for a public hearing on a permit application only after receipt of a written request setting out the reasons a hearing should be held and a determination by the secretary that a substantial public interest exists. *See* 20.6.2.3108(K) NMAC.

{11} The regulations promulgated by the WQCC provide that once the two regulatory prerequisites to a public hearing are satisfied, the hearing on a proposed discharge permit is intended to be conducted as a "fair and impartial adjudication of issues" in front of a hearing officer, who is tasked with assuring that "the facts are fully elicited[.]" 20.6.2.3110(E) NMAC. During a public hearing, the permit applicant presents testimony and undergoes examination in order to "prov[e] the facts relied upon . . . justify the proposed discharge plan, . . . and meet[] the requirements of the regulations[.]" 20.6.2.3110(G)(1) NMAC. All technical witnesses—both supporting or opposing issuance of the permit—then present testimony and are subject to examination, after which the general public may testify, and the permit applicant may present rebuttal testimony. *See* 20.6.2.3110(G)(2)-(4) NMAC. During the hearing, "all persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing." 20.6.2.3110(F) NMAC. "[T]he hearing officer may allow proposed findings of fact and conclusions of law and closing argument." 20.6.2.3110(I) NMAC. The hearing officer must then issue a report, which is available for public inspection, and presented to the secretary, who then issues a decision on the matter. *See* 20.6.2.3110(K), (L) NMAC.

{12} Once those proceedings have concluded, a person who participated in the permitting action and is adversely affected by the grant, denial, termination, or modification of a permit may file a petition for review before the WQCC. *See* § 74-6-5(N), (O). Upon receipt of a timely written petition that details the issues to be raised and relief sought, the WQCC must hold a review proceeding. *See* § 74-6-5(O), (P). The WQCC is required to give public "notice of the date, time and place for the review" proceeding. Section 74-6-5(P). If, prior to the review proceeding, "a party shows to the satisfaction of the [WQCC] that there was no reasonable opportunity to submit comment or evidence on an issue being challenged," the WQCC is required to order that NMED take additional comment or evidence. Section 74-5-6(R). As part of review proceedings, the WQCC reviews the record compiled before NMED, including the transcript of

any public hearing, and must allow "any party to submit arguments." Section 74-6-5(Q). The WQCC then enters findings of fact and conclusions of law sustaining, modifying, or reversing NMED's actions, "[b]ased on [its] review of the evidence, the arguments of the parties and recommendations of the hearing officer[.]" Section 74-6-5(Q).

Opportunity for a Public Hearing

{13} The parties agree that the statute precludes NMED from ruling on a permit application until interested parties are given an "opportunity for a public hearing[.]" Section 74-6-5(G). They disagree, however, on the meaning of the phrase "opportunity for a public hearing." Specifically, the parties disagree as to whether the opportunity for a public hearing mandates a hearing or gives the secretary discretion to deny a request for a public hearing.

{14} When construing a statute, "a reviewing court's central concern is to determine and give effect to the intent of the [L]egislature." *Public Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 18, 128 N.M. 309, 992 P.2d 860 (internal quotation marks and citation omitted). Courts traditionally follow three canons of construction. First, "[t]he plain language of a statute is the primary indicator of legislative intent." *Id.* (internal quotation marks and citation omitted); *DeMichele v. N.M. Taxation & Revenue Dep't*, 2015-NMCA-095, ¶ 14, 356 P.3d 523 ("The plain meaning rule presumes that the words in a statutory provision have been used according to their plain, natural, and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words in order to search for some other conjectured intent." (omission, internal quotation marks, and citation omitted)). Second, words carry their ordinary meaning unless it is clear the Legislature meant otherwise. *See id.* Third, we do not read into a statute language that is not there, "especially when it makes sense as it is written." *Id.* (internal quotation marks and citation omitted). We must construe the entire statute so that all provisions are considered in relation to one another. *See Starko, Inc. v. N.M. Human Servs. Dep't*, 2014-NMSC-033, ¶ 35, 333 P.3d 947; *N.M. Mining Ass'n*, 2007-NMCA-010, ¶ 12. Furthermore, regulations in the New Mexico Administrative Code are interpreted using the same rules applied in statutory interpretation. *Carrillo v. My Way Holdings, LLC*, 2017-NMCA-024, ¶ 22, 389 P.3d 1087. Finally, while rules, regulations, and standards enacted by an agency are presumed valid if they are reasonably consistent with the authorizing statutes, *id.*, "the administrative agency's discretion may not justify altering, modifying, or extending the reach of a law created by the Legislature." *State ex rel. Stapleton v. Skandera*, 2015-NMCA-044, ¶ 8, 346 P.3d 1191 (alterations, internal quotation marks, and citation omitted).

The Secretary Has Discretion to Hold a Hearing Under Section 74-6-5

{15} The provisions of the Act evidence the Legislature's intent to include the public in the permit application, issuance, and implementation process. The Act is replete with opportunities for public participation, evidencing the Legislature's intent that the public actively participate in protecting New Mexico's ground and surface water from pollution. *See* § 74-6-5 (calling for public notice and public participation throughout the permitting process); Section 74-6-6(A) (requiring a public hearing prior to the adoption, amendment, or repeal of regulations and water quality standards); Section 74-6-4(H) (requiring a public hearing prior to granting variance); Section 74-6-15(A) (making records, reports, and information obtained by the WQCC or NMED pursuant to the Act "generally available to the public"); Section 74-6-10(G) (allowing for a public hearing in compliance order context). It is with this legislative intent to provide for robust public participation throughout the permitting process in mind, that we interpret the language of Section 74-6-5(G). *See State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346, 871 P.2d 1352 (stating that statutes should be interpreted to achieve the Legislature's purpose).

{16} The language of the statute provides no clues as to the Legislature's intended meaning of the phrase, "opportunity for a public hearing." Rather than consider the meaning of the term "opportunity for a public hearing," in isolation, however, we consider the statute in its entirety. *See State ex rel. People's Bank & Tr. Co. of Las Vegas v. York*, 1918-NMSC-118, ¶ 6, 24 N.M. 643, 175 P. 769 ("In the construction of a statute, in order to determine the true intention of the Legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts." (internal quotation marks and citation omitted)).

{17} CCW argues that the WQCC and NMED incorrectly interpreted the regulation in such a way that the regulation conflicts with the statute. Specifically, CCW argues that, under the statute, the secretary has no discretion to refuse a request for public hearing on a discharge permit application and NMED's denial of its hearing request was not in accordance with the law. Alternatively, CCW argues that if NMED had discretion to refuse a public hearing request, that discretion is limited to circumstances where there was no substantial public interest, which CCW claims was not the case in this instance. In response, LANS and the WQCC argue that the discretion given to the secretary in 20.6.2.3108(K) NMAC does not conflict with Section 74-6-5(G) because requiring an "opportunity for a public hearing" is not a guarantee that a hearing will take place and that the regulation's substantial public interest standard was properly applied in denying CCW's request.

{18} While CCW contends that a public hearing is mandatory under the plain meaning of the statute, LANS argues that "opportunity" connotes possibility, rather than certainty. Further, the WQCC points out that while other sections of the Act use words like "shall" to evidence the Legislature's clear intent that a public hearing is mandatory, Section 74-6-5(G) contains no such compulsory language. Instead, the WQCC contends Section 74-6-5(G) places the decision of whether to hold a hearing within NMED's discretion. Measuring Section 74-6-5(G)'s language against language used elsewhere in the Act, we agree with the WQCC that the Legislature's plain language indicates an intent to grant some degree of discretion as to whether to hold a public hearing. Indeed, elsewhere in the Act, the Legislature makes absolutely clear that a hearing is required, specifying that the WQCC "*shall* conduct a public hearing" within a certain time frame after receiving a request. *See* § 74-6-10(G); *see also* § 74-6-5(P) (stating the WQCC "shall consider the petition within ninety days after receipt of the petition"). By comparison, the Legislature's election to provide an "opportunity" for a hearing, rather than a mandate, suggests that a hearing is not always required.

{19} LANS points to similar provisions within the Federal Clean Water Act and accompanying Environmental Protection Agency (EPA) regulations and urges us to follow federal law when interpreting our statute and the accompanying regulation.

Just as the Act requires that interested persons be given an "opportunity for a public hearing," Section 74-6-5(G), the Federal Clean Water Act provides that "the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant[.]" 33 U.S.C. §1342(a)(1) (2012). The companion federal regulation provides that the "Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit[.]" 40 C.F.R. §124.12(a)(1) (2012); *see also* 40 C.F.R. 124.2(a) (2012) (defining "Director" as the regional administrator of an EPA regional office, chief administrative officer of a state agency, or tribal director).

{20} The United States Supreme Court interpreted the Federal Clean Water Act's requirement for an "opportunity for public hearing" and its accompanying EPA regulations in *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980). In *Costle*, the Supreme Court considered whether the Federal Clean Water Act required the EPA to conduct a hearing before modifying a permit to extend its expiration date when notice of the proposed modification was given, but no one submitted comments or requested a hearing. *Costle*, 445 U.S. at 213. The EPA issued a final determination extending the expiration date of the permit without holding a hearing, *Costle*, 445 U.S. at 205-209, arguing that it was "entitled to condition the availability of a public hearing . . . on the filing of a proper request." *Id.* at 213. The Court explained that the relevant regulations "were designed to implement the statutory command that permits be issued after *opportunity* for public hearing[,]" *id.* at 214 (internal quotation marks and citation omitted), and noted that it had previously held that "a similar statutory requirement that an 'opportunity' for a hearing be provided may be keyed to a *request* for a hearing." *Id.* (citing *Nat'l Indep. Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 398-99 (1976). Balancing the fact that a rule requiring hearings on all agency permitting actions, "would raise serious questions about the EPA's ability to administer the [permit] program[,]" *Costle*, 445 U.S. at 215, with the clear legislative history of "congressional desire that the public have input in decisions concerning the elimination of water pollution[,]" *id.*, the Court held "that the regulations the EPA has promulgated to implement this congressional policy are fully consistent with the legislative purpose, and are valid." *Costle*, 445 U.S. at 216.

{21} The Court also expressed disagreement with the lower court's interpretation of the statute that, according to the Court, rendered the EPA regulation "essentially meaningless" by requiring the EPA to prove the material facts of the action, notwithstanding that they were not subject to dispute. *Costle*, 445 U.S. at 214. Instead, the Court pointed with approval, to past decisions in which similar agency rules "required an applicant who seeks a hearing to meet a threshold burden of tendering evidence suggesting the need for a hearing." *Id.* (citing *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973)). In *Weinberger*, the United States Supreme Court considered similar language found in the Federal Food, Drug, and Cosmetic Act (FDCA) related to the withdrawal of a new drug application (NDA). The FDCA "requires [the] FDA to give 'due notice *and opportunity for hearing* to the applicant' before it can withdraw its approval of an NDA." *Weinberger*, 412 U.S. at 620 (emphasis added) (internal quotation marks and citation omitted). In furtherance of its obligation to provide notice and an opportunity for hearing on NDAs, the FDA promulgated regulations related to the instances in which an opportunity for a hearing would be provided under the FDCA. *Weinberger*, 412 U.S. at 620-21. To be entitled to a hearing, according to the FDA regulations, applicants must meet a threshold showing that includes evidence that, on its face, meets the statutory standards, as particularized by the regulations. *Weinberger*, 412 U.S. at 620. Noting that applicants have "full and precise notice of the evidence they must present to sustain their NDA's," the Court held that the regulations were "unexceptionable on any statutory or constitutional ground." *Weinberger*, 412 U.S. at 622. The Court, quoting from *Federal Power Commission v. Texaco*, 377 U.S. 33, 39 (1964), noted, "[T]he statutory requirement for a hearing . . . does not preclude the Commission from particularizing statutory standards through the rulemaking process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." *Weinberger*, 412 U.S. at 620.

{22} After examining the plain language of the statute in relationship to the rest of the Act and considering the United States Supreme Court's interpretation of similar language, we are persuaded that the Legislature intended to confer limited discretion on the secretary to determine whether a hearing should be held on a permit application under the Act. We now consider the scope of that discretion.

Scope of Secretary's Discretion

{23} The regulation contains two threshold requirements that must be satisfied before a party is entitled to a public hearing on a permit application. First, a party must submit a request in writing, setting forth the reasons a hearing should be held. 20.6.2.3108(K) NMAC. We note that the parties have voiced no quarrel with the regulatory requirement that a request for hearing must be written and must set out the reason why the hearing should be held, and we hold that the plain language of the statute does not preclude the secretary from requiring that a party submit such a written request. *See Costle*, 445 U.S. at 214 (acknowledging that a party's opportunity for public hearing "may be keyed to a *request* for a hearing").

{24} The regulation further requires that, before a party is entitled to a public hearing, the secretary must determine there is a substantial public interest in the matters that are the subject of the permit application. 20.6.2.3108(K) NMAC. The WQCC issued conclusions of law as part of its final order, concluding that the secretary had properly considered the public interest in denying CCW's request for a hearing on the permit. We now consider whether those conclusions were supported by substantial evidence.

{25} The regulation fails to define "substantial public interest" and fails to set out any particularized standards the secretary should consider in deciding whether a party requesting a hearing has satisfied this requirement. *See Weinberger*, 412 U.S. at 620 (citing *Texaco*, 377 U.S. at 39). Both CCW and NMED argue that a determination of substantial public interest is a substantive, or qualitative, inquiry. CCW argues that the WQCC abused its discretion in upholding the secretary's denial of its hearing request because the secretary's decision that there was no substantial public interest in the permit is not supported by substantial evidence in the record. Pointing to *Republican Party of New Mexico v. New Mexico Taxation & Revenue Department*, 2012-NMSC-026, ¶ 10, 283 P.3d 853 (stating "substantial public interest," as an issue of "public importance"), CCW contends that something is of substantial public interest when the issues raised are substantive, are of considerable size, weight, and importance, address the "essentials of the matter at issue," and are real and tangible. Both LANS

and the WQCC argue that CCW failed to demonstrate a substantial public interest, and the secretary therefore acted within his discretion to deny CCW's request for public hearing. NMED suggests that the reference to "substantial" encompasses the "quality of the concerns that are raised" while "public" refers to anyone "not part of the government." We need not determine the meaning of substantial public interest or define what factors make up a substantial public interest determination under the regulation because we hold the factors cited by the WQCC to uphold the secretary's denial of a hearing have no bearing on any such analysis and that the WQCC's decision to affirm the secretary's denial of CCW's hearing request was not supported by substantial evidence.

WQCC's Decision

{26} In denying CCW's request for a hearing on the permit, the WQCC took note of three factors. First, the WQCC noted that the issues for public hearing were raised by a "sole participant whose concerns had been repeatedly addressed by the Bureau, DOE and LANS throughout the permitting process." Second, the WQCC commented that the permit "will allow DOE to begin to remediate [a] contaminated groundwater plume within the boundaries of LANL [, and d]elaying the remediation of contaminated groundwater could therefore be harmful to both public health and the environment." Finally, the WQCC pointed out that CCW "never challenged the merits of [the permit]." Based on these three factors, WQCC determined that, "[t]he totality of the evidence contained in the record sufficiently supports the conclusion that the [s]ecretary properly determined any remaining concerns of that sole participant failed to rise to the level of substantial public interest." We address each of these factors in turn.

{27} With regard to WQCC's finding that CCW was a sole participant whose concerns were addressed, our concern is two-fold. We initially question the relevance of WQCC's characterization of CCW's request as a challenge by a "sole participant" in light of the parties' agreement that "substantial public interest" is a qualitative analysis, not a quantitative one. However, even if "substantial public interest" were to be a quantitative analysis, the WQCC's characterization of CCW as a "sole participant" seems contrary to its acknowledgment that CCW is a coalition of six organizations, including Concerned Citizens for Nuclear Safety, Amigos Bravos, Honor our Pueblo Existence, the New Mexico Acequia Association, the Partnership for Earth Spirituality, and Tewa Women United. As such, WQCC's finding of a "sole participant" is not supported by the evidence.

{28} Further, the WQCC's rationale that the request for hearing was made by a participant, "whose concerns had been repeatedly addressed by the Bureau, DOE and LANS," lends little support to its conclusion that CCW failed to show a substantial public interest in light of the legislative intent in favor of broad public participation in the permitting process. In its final order, the WQCC reasoned that the Bureau's "substantive responses" to CCW's concerns were effective in diminishing the level of public interest in the permit application. NMED's ability to provide substantive responses to CCW's concerns stands completely separate from a consideration of whether those concerns demonstrated a substantial public interest. Indeed, nothing in the statute or regulations suggests that NMED may ameliorate concerns regarding a permit through private meetings in lieu of a properly requested public hearing, particularly if a party has demonstrated a substantial public interest.

{29} Through its three requests for public hearing, CCW raised procedural and substantive issues involving the permit application, including the calculation and application of discharge limits, the basis for treatment standards, soil sampling requirements, the use and impact of radioactive materials, and the definition and implementation of "work plans." CCW's requests for public hearing, rather than state general objections or concerns, present detailed articulations of reasons that CCW was dissatisfied with specific language and calculations in, and omissions from the permit. The issues raised in CCW's requests were substantial enough to warrant a meeting on April 15, 2015, between CCW, NMED, and DOE/LANS, during which the parties discussed concerns with and alterations to the permit, and after which, the Bureau issued a revised draft permit. There is no recording or transcript of the meeting in the record, and it does not appear that the general public was given notice of this meeting or an opportunity to participate.

{30} The WQCC's conclusion that CCW's concerns were substantial enough to justify a private meeting among the parties and revisions to the draft permit but not enough to require a public hearing, is unpersuasive. A review of the public hearing standards, as set forth in the statute and regulations, quickly reveals that a private meeting is not equivalent to a public hearing. The public hearing is a persuasive proceeding, imposing the burden of persuasion upon the permit applicant. The public hearing provides opponents to a permit application an opportunity to present contrary evidence and testimony, to cross-examine expert witnesses, to present their own expert testimony, to argue their objections to the permit, and to obtain a decision based on the evidence. Public hearings are intended to give the public an opportunity to challenge a permit application and create a record to appeal an adverse decision. *See* § 74-6-5(O)-(Q). As review proceedings are based exclusively on the record and arguments made at the public hearing, a party having shown the existence of a substantial public interest in the permit application is dependent upon the public hearing to make its record in support of any necessary appeal. *See id.*

{31} A private meeting followed by written responses to concerns where an opponent has no opportunity to cross-examine witnesses, present its own experts and make a record for appeal is not a substitute for a public hearing. Such closed-door proceedings are not only insufficient to satisfy established standards for public hearings, but are contrary to the legislative intent behind a statute that favors public participation in the permitting process. In light of the foregoing, the WQCC's reasoning—suggesting that NMED's response expunged the substantial public interest that may have existed prior to the response—is unpersuasive. We conclude the WQCC lacked substantial evidence to support its conclusion that CCW failed to show a substantial public interest because its concerns were addressed elsewhere throughout the permitting process.

{32} The WQCC's second factor in denying CCW's hearing request—that the delay caused by requiring a public hearing could be harmful to public health and the environment—also fails to support its decision to uphold the secretary's denial of CCW's hearing request for lack of substantial public interest. Indeed, to deny a public hearing because the public health and environment issues are so grave and immediate weighs in favor of the existence of a substantial public interest. If anything, this factor supports a conclusion that the

public interest in the permit would be heightened, rather than lessened, mandating the hearing under the regulation.

{33} WQCC's final factor in upholding the secretary's denial of CCW's request for hearing was that CCW's failure to challenge the permit on its merits constituted a waiver of its right to complain that it had wrongfully been denied a public hearing. On appeal, NMED argues that CCW waived its right to challenge the secretary's denial of public hearing for two reasons. First, relying on the WQCC's conclusion, NMED contends CCW waived its right to appeal the hearing denial because it failed to challenge the permit on its merits. We note, however, that CCW did make substantive challenges to the permit in its requests for public hearing. Without the opportunity to present witnesses and cross-examine the applicant's witnesses at a public hearing, however, any attempt to challenge the permit on its merits is of little value, as such a challenge is limited to the review of the record created at the public hearing. *See* § 74-6-5(Q). Absent a public hearing, any challenge to the merits of the permit could not be fully developed and is useless.

{34} Second, NMED claims that CCW forfeited its opportunity to object on the grounds that it was denied the chance to develop a record because it did not avail itself of the "safety valve" built into Section 74-6-5(R) that allows the WQCC to send a permit back to NMED for "additional comment or evidence." *Id.* Nothing in the language of the statute, however, sets forth such a requirement. Absent language to suggest that the Legislature intended such a result, we decline to adopt such a prohibitive approach or to make pursuit of that review mandatory. *See Pub. Serv. Co. of N.M.*, 1999-NMSC-040, ¶ 18 (acknowledging that we do not read into a statute language which is not there, especially if it makes sense as written).

{35} The WQCC's three stated factors for sustaining NMED's denial of CCW's request for a public hearing fail to include an evaluation of factors relevant to a substantial public interest. By contrast, CCW set out detailed explanations about its relevant concerns with the permit, all of which were in the record before the WQCC. We therefore conclude that the WQCC acted contrary to the evidence and thereby acted arbitrarily and capriciously when it sustained the secretary's denial of CCW's request for a public hearing.

{36} The WQCC makes one final argument, contending that its interpretation, and therefore implementation, of the statute and regulations should be entitled to deference. We disagree. The scientific complexities of discharge permits may lie outside this Court's expertise, obligating deference to the agency's expertise in the creation of and justification for those standards. The protection of the adversarial process by which those complexities are presented, challenged, and implemented, however, is well within this Court's charge. *See Rio Grande Chapter of the Sierra Club*, 2003-NMSC-005, ¶ 17 (declining to defer to the commission on matters of law).

CONCLUSION

{37} We reverse the WQCC's decision sustaining NMED's denial of CCW's request for public hearing, and we remand for further proceedings consistent with this opinion.

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

I CONCUR:
JONATHAN B. SUTIN, Judge
HENRY M. BOHNHOFF, Judge
(specially concurring).

BOHNHOFF, Judge
(specially concurring).

{39} I concur in reversing the Commission's decision. However, I reach that result on different grounds than those articulated by the majority.

{40} Section 74-6-5(G), provides: "No ruling shall be made on any application for a permit without opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit evidence, data, views or arguments orally or in writing and to examine witnesses testifying at the hearing." The decisive question is whether, so long as a hearing is requested by an interested person, Section 74-6-5(G) allows the secretary to exercise any discretion in deciding whether to hold one. I conclude that it does not. As used in the statute, "opportunity for a public hearing" means that a hearing request is a predicate or precondition to requiring the secretary to hold a hearing, but it does not authorize the secretary to exercise any discretion to not hold a hearing for any other reason. (While the secretary may have discretion to choose to hold a hearing even in the absence of a request—a question we need not resolve—it would not be accurate to state that he or she has discretion in granting a hearing where one is requested, because he or she has no choice in the matter.).

{41} The primary consideration in construing the statute is the plain meaning of "opportunity for a public hearing." *See Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 44, 121 N.M. 821, 918 P.2d 1321 ("Our understanding of legislative intent is based primarily on the language of the statute, and we will first consider and apply the plain meaning of such language."). *Webster's Third Int'l Dictionary* (3d ed. 1976) defines "opportunity" as "a combination of circumstances, time, and place suitable or favorable for a particular activity or action" or "an advantageous circumstance or combination of circumstances[.]" It distinguishes "opportunity" from "chance" and in that context explains that " 'opportunity' indicates a combination of circumstances facilitating a certain action or inviting a certain decision[.]" *Webster's Third Int'l Dictionary*, *supra.* While Intervenor LANS suggests that "opportunity" means that there is only a chance: i.e., a possibility, of a hearing, this construction misconstrues the word. The more reasonable construction of "opportunity" as used in Section 74-6-5(G) is that a hearing will be held so long as an interested party requests one. That is, the only "favorable circumstance" or predicate to holding a hearing is the interested party's request.

{42} As discussed by the majority, such a construction also is consistent with the overall legislative intent or goal of encouraging public participation in permitting decisions.

{43} "Whenever possible, we must read different legislative enactments as harmonious instead of as contradicting one another. . . . Statutes which relate to the same class of things are considered to be in pari materia[.]" *State v. Tafoya*, 2010-NMSC-019, ¶ 10, 148 N.M. 391, 237 P.3d 693 (alterations, first omission, internal quotation marks, and citations omitted). Carefully read, the other statutes that address public hearings in connection with water quality regulation matters do not suggest that "opportunity for a public hearing" as that term is used in Section 74-6-5(G) grants the secretary discretion to deny a hearing if one is requested. First, Section 74-6-5(P) does not appear to contemplate a "hearing" at all, as opposed to a meeting of the Commission—presumably the only or at least usual way it acts—at

which a petition to review a permitting decision will be considered. *See id.* ("If a timely petition for review is made, the commission shall consider the petition[.] . . . The commission shall notify the petitioner . . . by certified mail of the date, time and place of the review."). Second, Section 74-6-4(H) mandates a hearing on any application for a variance. *See id.* ("[The commission] may grant an individual variance from any regulation[.] . . . The commission shall adopt regulations specifying the procedure under which variances may be sought, which regulations shall provide for the holding of a public hearing before any variance may be granted[.]"). But this can be understood to mean simply that the Legislature deems variances of sufficient importance to require a hearing even absent a request for one. Without more, it does not support the conclusion that the different wording of Section 74-6-5(G) connotes anything more than that the grant of a hearing on a permit application is conditioned on a request. Third, Section 74-6-6(B) provides that "[a]ny person may petition in writing to have the commission adopt, amend or repeal a regulation or water quality standard. The commission shall determine whether to hold a hearing within ninety days of submission of the petition." This language suggests that, if the Legislature intends to give an agency discretion in granting a hearing, it will so state expressly. Fourth, the structure and syntax of Section 74-6-10(G), would appear to be dictated by the need to make clear that a compliance order will always become final unless a request is made, as well as by the intent to afford the subject of the order an opportunity to be heard. *See id.* ("Any compliance order issued by a constituent agency pursuant to this section [regarding compliance orders] shall become final unless, no later than thirty days after the compliance order is served, any person named in the compliance order submits a written request to the commission for a public hearing. The commission shall conduct a public hearing within ninety days after receipt of a request."). A water quality permit is different—a permit is not automatically granted or denied if a hearing request is not made—which explains the different wording of Section 74-6-5(G). Thus, one cannot infer, on the basis of the difference in the language of Section 74-6-5(G) as opposed to that found in these other provisions, an intent to give the secretary discretion to deny a request for a permit hearing.

{44} The remaining argument for construing Section 74-6-5(G) to give the secretary discretion to grant or deny a request for a permit hearing is that such discretion is authorized by federal law. *See Costle*, 445 U.S. at 202-03 (construing federal Clean Water Act); *Weinberger*, 412 U.S. at 620 (construing federal Food, Drug, and Cosmetic Act); *Federal Power Comm'n*, 377 U.S. at 40. That proposition assumes that our Legislature considered these federal models when it enacted Section 74-6-5(G) in 1973; however, we have no information to that effect.

{45} Based on the foregoing, I interpret "opportunity for a public hearing" to mean that one will be held if an interested person requests one. For that reason I concur in reversing the WQCC's decision.

HENRY M. BOHNHOFF, Judge

Classified

Positions

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The Zuni Pueblo is seeking a part-time prosecutor with three years or more trial experience and qualifications sufficient to be admitted to practice before the Zuni Tribal Court in Zuni, New Mexico. Email letter of interest and resume to dfc@catchlaw.com.

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The First Judicial District Attorney's Office has multiple felony and entry level magistrate court attorney positions. Salary is based on experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to: "DA Employment," PO Box 2041, Santa Fe, NM 87504, or via e-mail to 1stDA@da.state.nm.us.

Assistant City Attorney
The City of Rio Rancho seeks an Assistant City Attorney to assist in representing the City in legal proceedings before city, state, federal courts and agencies, including criminal misdemeanor prosecution. This position requires a JD from an accredited, ABA approved college or university law school. Three years' related law experience required. See complete job description/apply at: https://rrnm.gov/196/Employment EOE

Special Assistant US Attorney

CITY OF LAS CRUCES invites applications for the position of Special Assistant US Attorney; SALARY: $55,000.00 - $84,000.00 / Annually; OPENING DATE: 05/16/18; CLOSING DATE: 05/30/18 11:59 PM; NATURE OF WORK: Fulltime, contract position designed to support the national drug control strategy. The primary goal of the New Mexico High Intensity Drug Trafficking Area (HIDTA) strategy is to identify, target, disrupt, and dismantle major drug organizations through a cooperative multi-agency process. The attorney will help task forces develop cases which will significantly impact domestic and international drug organizations operating in the New Mexico HIDTA region, and will prosecute those cases in Federal Court. Work is performed in a standard office environment. Light physical demands; mostly deskwork. Frequent to constant use of a personal computer. Duty station will be in the United States Attorney's Office in Las Cruces, New Mexico. Position involves competing demands, performing multiple tasks, working to deadlines, occasional work beyond normal business hours, and occasional travel within and outside New Mexico. Regular attendance is an essential function of this job to ensure continuity of services. Position is subject to drug testing in accordance with applicable State and Federal regulations and City of Las Cruces policies. DUTIES AND RESPONSIBILITIES: Directs and conducts investigations, working with agents and other witnesses. Considers novel legal theories and investigative techniques, using viable investigative tools; Makes charging decisions and proposes dispositions. Considers potential bases for criminal liability and civil and criminal asset forfeiture; considers applicable statutes. When requested, clearly and concisely documents or explains foundation for charges and basis for pleas; Works with agents and other witness to prepare for trials and other significant court proceedings, while considering novel legal theories. Handles investigations, charging decisions, plea negotiations, trials, sentencings, and appeals. Identifies and addresses significant issues. Communicates pertinent information to and consults with agencies, victims, and others; Researches and applies constitutional, statutory, regulatory, and other sources of authority and applies law to facts to craft persuasive arguments. Responds to defense correspondence and motions; Writes pleadings and other legal documentation based on case requirements; Prepares for and presents oral advocacy for cases for hearings, opening statements, direct- and cross-examinations, summations, rebuttals, sentencings, and appeals. MINIMUM QUALIFICATIONS: Juris Doctor Degree AND one year experience as a law clerk or practicing attorney. A combination of education, experience, and training may be applied in accordance with City of Las Cruces policy. Applicant must be a United States Citizen or national. Initial employment is conditioned upon a satisfactory pre-employment background adjudication. This includes fingerprint, credit, and tax checks. Position is subject to drug testing in accordance with applicable State and Federal regulations and City of Las Cruces policies. In addition, continued employment is subject to a favorable adjudication of a background investigation. If applicant is a male applicant born after December 31, 1959, he must certify that he has registered with the Selective Service System, or is exempt from having to do so under the Selective Service Law. Licenses/Certification(s): Must be an active member of a state bar association and licensed to practice law in at least one state. Must be in good standing with the applicable bar association and be eligible to be licensed to practice law in the Federal District Court in the District of New Mexico and the Tenth Circuit Court of Appeals. Valid driver's license may be required or preferred. If applicable, position requires an acceptable driving record in accordance with City of Las Cruces policy. KNOWLEDGE, SKILLS, AND ABILITIES: Knowledge of: Federal and State criminal statutes, rules, case law; hearings and trial court processes and protocols; legal research methods, techniques, sources, databases and other research tools; legal case management procedures and techniques; principles and protocols for the evidentiary gathering of information, documents, financial records and other data that may be used in court and legal hearings. Ability to: Analyze, appraise and organize facts, evidence and precedents and to present such materials in a clear and logical form, both verbally and in writing; present oral and written information in a clear and concise manner; effectively present cases in court; establish and maintain effective working relationships with law enforcement agents, public officials, outside agencies, and other participants in the justice process. The ideal candidate will possess outstanding litigation skills, legal writing and research skills, courtroom skills, and a demonstrated commitment to professionalism and public service. Skills in: Researching and identifying precedents in statutory and case law; negotiating agreements; litigating cases in legal hearings and trials in a courtroom setting; reviewing and assessing legal issues and documents; effectively assessing, interpreting and applying criminal laws to information, evidence and other data compiled; utilizing and evaluating electronic legal research and on-line systems; assessing and prioritizing multiple tasks, projects and demands; interpreting technical instructions and analyzing complex variables. APPLICATIONS MAY BE OBTAINED AND FILED ONLINE AT: http://www.las-cruces.org. It is policy to provide reasonable accommodations for qualified persons with disabilities who are employees or applicants for employment. If you need assistance or accommodation to interview and/or test because of a disability, please contact the Human Resources Department at 575-528-3100 / Voice or 575-528-3169/TTY.

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.

Senior Trial Attorney

Senior Trial Attorney wanted for immediate employment with the Seventh Judicial District Attorney's Office, which includes Catron, Sierra, Socorro and Torrance counties. Employment will be based primarily in Torrance County (Estancia). Must be admitted to the New Mexico State Bar and be willing to relocate within 6 months of hire. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Seventh District Attorney's Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park Street, Socorro, New Mexico 87801.

Attorney

Respected Albuquerque firm seeks an attorney with at least two years of experience for associate position with prospects of becoming a shareholder. Our firm offers a wide variety of civil practice areas. Applicants should be interested in serving the needs of our world-wide business clientele, including transactions, employment, litigation and commercial legal advice. We offer competitive salaries and benefits. Please visit our website for more information about our practice areas and attorneys. Moses, Dunn, Farmer and Tuthill, P.C. has been an AV Preeminent firm serving New Mexico clients for more than 63 years. Please send your resume to Alicia L. Gutierrez, P.O. Box 27047, Albuquerque, NM, 87125.

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.

Senior Trial Attorney

Senior Trial Attorney wanted for immediate employment with the Seventh Judicial District Attorney's Office, which includes Catron, Sierra, Socorro and Torrance counties. Employment will be based primarily in Sierra County (Truth or Consequences). Must be admitted to the New Mexico State Bar and be willing to relocate within 6 months of hire. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Seventh District Attorney's Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park Street, Socorro, New Mexico 87801.

Prosecutor

If you're looking for a six-figure salary, working countless hours behind a desk, keeping track of your life in 6-mintue increments, and not seeing the inside of a courtroom for the first five years of your legal career, this job isn't for you. But if you're looking for a career that will give you a sense of purpose, a job where you will truly make a difference in your community, where you seek truth and justice, try cases, and hold criminal offenders responsible for their actions, then come join our team. The Twelfth Judicial District Attorney's Office has vacancies for a prosecutor in Lincoln and Otero Counties. We try more jury trials per capita than every other judicial district in the State. As an Assistant District Attorney in the 12th, you'll learn from some the best prosecutors in the State of New Mexico, and you'll get actual courtroom experience starting day one. Email your resume and a cover letter to John Sugg at 12thDA@da.state.nm.us or mail to 12th Judicial District Attorney's Office, 1000 New York Ave, Room 101, Alamogordo, NM 88310.

Domestic Relations Hearing Officer (PT At-Will) Family Court

The Second Judicial District Court is accepting applications for a part-time At-Will Domestic Relations Hearing Officer in Family Court. This position is under the supervision of the Presiding Family Court Judge. Applicant will be assigned caseloads to include domestic violence, domestic relations, and child support matters consistent with Rule 1-053.2. Qualifications: J.D. from an accredited law school, New Mexico licensed attorney in good standing, minimum of (5) years of experience in the practice of law with at least 20% of practice having been in family law or domestic relations matters, ability to establish effective working relationships with judges, the legal community, and staff; and to communicate complex rules clearly and concisely, respond with tact and courtesy both orally and in writing, extensive knowledge of New Mexico and federal case law, constitution and statutes; court rules, policies and procedures; manual and computer legal research and analysis, a work record of dependability and reliability, attention to detail, accuracy, confidentiality, and effective organizational skills and the ability to pass a background check. SALARY: $45.530 hourly, plus benefits. Send application or resume supplemental form with proof of education to the Second Judicial District Court, Human Resource Office, P.O. Box 488 (400 Lomas Blvd. NW), Albuquerque, NM 87102. Applications without copies of information requested on the employment application will be rejected. Application and resume supplemental form may be obtained on the Judicial Branch web page at www.nmcourts.gov. Resumes will not be accepted in lieu of application. CLOSES: May 25, 2018 at 5:00 p.m. EOE

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, regulatory law, procurement, general commercial transaction issues, inspection of public records act ("IPRA"), contract analysis and drafting, civil litigation and traffic arraignment. 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. Two (2)+ years' experience is preferred and must be an active member of the State Bar of New Mexico in good standing. 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.

NM FOG Executive Director

The New Mexico Foundation for Open Government (NMFOG) is a not-for-profit, non-partisan organization committed to helping citizens, students, educators, public officials, members of the media and legal professionals understand and exercise their rights and responsibilities under New Mexico sunshine laws, the federal Freedom of Information Act and the First Amendment. We're seeking a dynamic and diplomatic Executive Director who will be responsible for implementing the organization's mission, policies and objectives as established by the board of directors. As the leader of a small-yet-vibrant organization, our Executive Director must be part CEO, part program director, part fundraiser, part spokesperson, part adviser and part lobbyist, juggling multiple roles in pursuit of the NMFOG mission. To succeed in this role, you must be as organized as you are inventive, as collaborative as you are self-motivated, and as tactful as you are passionate. Interested applicants should send a resume, professional writing sample and a cover letter that tells us about your experience and what strengths you would bring to NMFOG to kmosesnmfog@gmail.com. The salary is $50,000 to $60,000, depending on experience. Deadline for submissions is May 29. Go to NMFOG.org for more information.

Court Of Appeals Staff Attorney

THE NEW MEXICO COURT OF APPEALS is seeking applications for a full-time Associate Staff Attorney position. The position will be located in Albuquerque. Regardless of experience, the beginning salary is limited to $66,000, plus generous fringe benefits. New Mexico Bar admission as well as three years of practice or post-law-school judicial clerkship experience is required. The position entails management of a heavy caseload of appeals covering all areas of law considered by the Court. Extensive legal research and writing is required; the work atmosphere is congenial yet intellectually demanding. Interested applicants should submit a completed New Mexico Judicial Branch Application for Employment, along with a letter of interest, resume, law school transcript, and short writing sample of no more than 5 pages to Paul Fyfe, Chief Staff Attorney, P.O. Box 2008, Santa Fe, New Mexico 87504, no later than 4:00 p.m. on Friday, May 25, 2018. The materials may also be submitted by email to coapgf@nmcourts.gov. To obtain the application please call 827-4875 or visit www.nmcourts.com and click on "Job Opportunities." The New Mexico Judicial Branch is an equal opportunity employer.

Attorney

Team, Talent, Truth, Tenacity, Triumph. These are our values. Parnall Law is seeking an attorney to help advocate and represent the wrongfully injured. You must possess confidence, intelligence, and genuine compassion and empathy. You must care about helping people. You will receive outstanding compensation and benefits, in a busy, growing plaintiffs personal injury law firm. Mission: Fighting Wrongs; Protecting Rights. 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 the attention 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. Keys to success in this position Litigation experience (on plaintiff's side) preferred. Strong negotiation skills. Ability to thrive in a productive and fast-paced work environment. Organized. Independent / Self-directed. Also willing / unafraid to collaborate. Proactive. Detail-oriented. Team player. Willing to tackle challenges with enthusiasm. Frequent contact with your clients, team, opposing counsel and insurance adjusters is of paramount importance in this role. Integrate the 5 values of Parnall Law. Compelled to do outstanding work. Strong work ethic. Interested in results. Barriers to success: Lack of fulfillment in role. Not enjoying people. Lack of empathy. Not being time-effective. Unwillingness to adapt and train. Arrogance. We are an established personal injury firm experiencing steady growth. We offer competitive salary and benefits, including medical, dental, 401k, and performance bonuses or incentives – all in a great team-based work environment. We provide a workplace where great people can do great work. Our employees receive the training and resources to be excellent performers – and are rewarded financially as they grow. We want people to love coming to work, to take pride in delivering our vision, and to feel valued for their contributions. 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.

PT/FT Attorney

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

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.

New Mexico Public Regulation Commission
Chief General Counsel

The NMPRC is accepting applications for a Chief General Counsel. The position advises the Commission on regulatory matters, including rulemakings and adjudicatory proceedings involving the regulation of electric and gas utilities, telecommunications providers, and motor carriers; represents the Commission in federal and state trial and appellate courts. Manages and oversees day to day operations of General Counsel Division Minimum qualifications: JD from an accredited law school; ten years of experience in the practice of law, including at least four years of administrative or regulatory law practice and three years of staff supervision; admission to the New Mexico Bar or commitment to taking and passing Bar Exam within six months of hire. Background in public utilities, telecommunications, transportation, engineering, economics, accounting, litigation, or appellate practice preferred. Salary: $56,239- $139,190 per year (plus benefits). Salary based on qualifications and experience. This is a GOVEX "at will" position. The State of NM is an EOE Employer. Apply: Submit letter of interest, résumé, writing sample and three references to: Human Resources, Attn. Rene Kepler, Renes.Kepler@state.nm.us by May 31, 2018

Paralegal and Legal Assistant

Exciting changes are happening at YLAW, P.C. In anticipation of our impending expansion, we are seeking a paralegal and a legal assistant to join our unparalleled staff. Paralegal must have experience in managing complex case files and be prepared to support all facets of litigation, from discovery up to, and through, trial. Legal assistant should be familiar with electronic filing in state and federal court, coordinating and managing calendars, and electronic case management. Ability to work collegially in a fast-paced litigation practice is essential. Please send resume, references, and cover letter with salary requirements, specifying the position for which you are applying, to jjelson@ylawfirm.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.

FT Administrative Assistant

State Bar of New Mexico seeks a FT Administrative Assistant for its Judges and Lawyers Assistance Program to assist the Director in providing education, outreach, addiction and mental health services to NM lawyers, judges, and law students. Successful applicants will have experience and/or education in clinical social work, mental or behavioral health, with at least three years of clinical experience working with adults in professional occupations. Legal profession experience a plus. Maintaining confidentiality and presenting with professionalism at all times in this position is a must. Proficiency with Microsoft Word, Excel, Powerpoint and Outlook is required. $30,000-$35,000 DOE plus benefits. Email letter of interest and résumé to hr@nmbar.org First review date: 6/1/18; position open until filled. EOE.

P/T Legal Assistant
P/T Legal Assistant needed for busy 2 attorney ABQ civil/family firm (Heights). Must be professional, reliable self-starter. Phones, efiling, basic drafting in Word and timekeeping REQUIRED. Send resume and inquiries to abqlaw5218@gmail.com

Paralegal/Legal Asst./ Legal Secretary
Staff Counsel for Fred Loya Ins., is looking to fill several positions for its new location- candidates must have personal injury experience. 3+ yrs. Preferred, bilingual, Microsoft Word, Medical Benefits. Previous employment references and background check will be done when conditional offer of employment is extended. The resumes can be sent to the following email: zalaniz@fredloya.com

Immediate Opening for Legal Assistant/Paralegal
Civil Litigation & Plaintiff's firm in search of a self-motivated individual interested in employment as a Legal Assistant. The right individual must be skilled in using Microsoft applications including Word, Excel, Outlook and Exchange. Experience is a must. Please email resumes to: AndresRosales@NewMexicoCounsel.com No phone calls, please. All resumes will be kept confidential.

Paralegal
The Pueblo of Sandia offers an opportunity for an experienced, detail-oriented paralegal to join the General Counsel Office. Prior experience with Tribal governments and Indian law is preferred. Under the general supervision and according to established policies and procedures, the successful candidate will perform a variety of paralegal duties to assist the In-House General Counsel in providing a diverse range of legal services to the Pueblo and its commercial enterprises. Please see Sandia Resort & Casino's website for a detailed description of the job duties and qualifications @ sandiacasino.com/careers

State Bar General Referral Program Administrative Intake Clerk
New Mexico State Bar Foundation seeks FT or PT administrative Intake Clerk. Successful applicant must have strong customer service focus, effective verbal and written communication skills as well as multitasking skills. Proficiency in Microsoft Word, Excel and Outlook is required. Prior work in legal field and bilingual a plus. Compensation $12-$14 plus benefits DOE. Email cover letter and resume to hr@nmbar.org, EOE.

Positions Wanted

Seeking 'Of Counsel' Arrangement
Senior lawyer seeking 'of counsel' arrangement: Highly skilled or credentialed in environmental law, civil rights defense, oil & gas and medical. Requires light paralegal assistance; use of conference room; does not need office space. Will continue working on current limited client base; share increased workload. Submit letters of interest to POB 92860, ABQ, NM 87199-2860, Attn: Box A

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

Office for Lease
804 Sq. Ft. ground floor, excellent NE Heights location with close proximity to NE Heights neighborhoods including Tanoan and High Desert. Walking distance to grocery stores, banks, restaurants, pharmacy, bus service and a fitness center. Please call Kelly today at (505) 299-8383 to schedule a viewing and for more information.

Law Office Los Lunas
Law Office space for rent in Los Lunas. Utilities plus copier, internet, landline phone service, telephone receptionist, reception area, and conference room. $700 per month. Contact Dana 865-0688.

Downtown Office For Sale/Lease
Three (3) Blocks from the courthouse in revitalizing downtown near Mountain Road. Great visibility and exposure on 5th Street. Excellent office space boasting off street parking. Surrounded by law offices the property is a natural fit for the legal or other service professionals. Approximately 1230 square feet with two offices/bedrooms, one full bath, full kitchen, refinished hardwood floors, reception/living area with fireplace and conference/dining area. Property features CFA, 150sf basement and a single detached garage. Run your practice from here! Sale price is $265,000. Lease option and owner financing offered. Contact Joe Olmi @ 505-620-8864.

Offices For Lease
Offices for lease on Carlisle at Constitution. Great location for small business. Easy access to I-25/I-40. Rent includes utilities, janitorial service and other amenities. Available suites range in size from approximately 170 sq. ft. to 885 sq. ft. Call Joann at 505-363-8208.

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.

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.

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

Miscellaneous

Search For Will
Decedent: George Powell Caldwell, Jr.; Place of Residence: Tijeras, Bernalillo County, NM; Date of Death: March 16, 2018; Age: 68; If located, please contact Travis Scott, Attorney, (505) 205-1610.

Official Publication of the State Bar of New Mexico
BAR BULLETIN
SUBMISSION DEADLINES

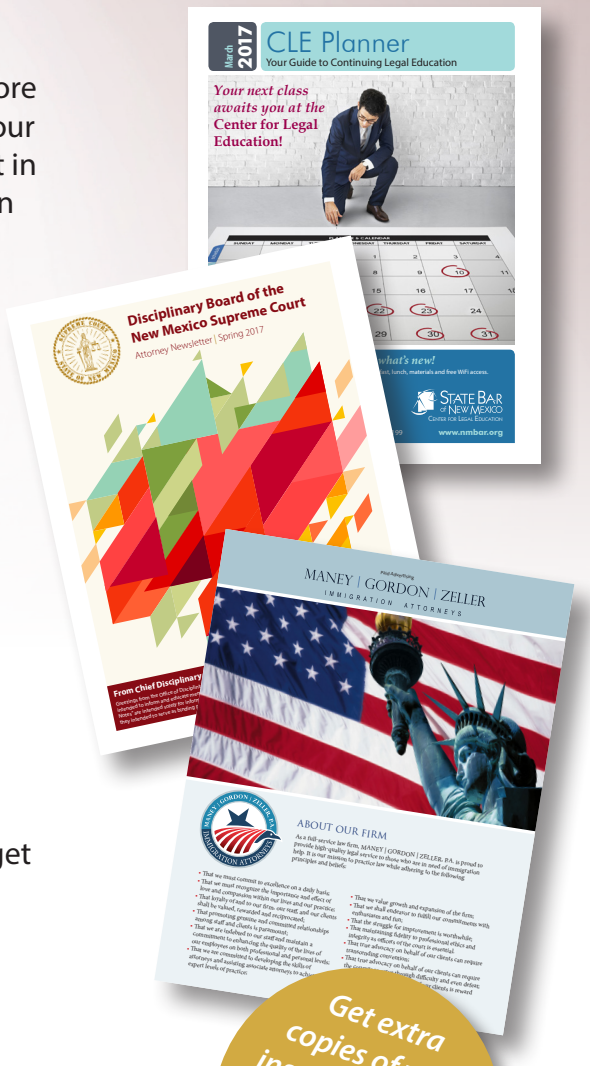
All advertising must be submitted via e-mail by 4 p.m. Wednesday, two weeks prior to publication (*Bulletin* publishes every Wednesday). Advertising will be accepted for publication in the *Bar Bulletin* in accordance with standards and ad rates set by the publisher and subject to the availability of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

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

Stand Out *from the* Crowd

Profile Your Firm or Business in the *Bar Bulletin*!

Upgrade your marketing strategy and expose more than 8,000 members of the legal profession to your products, services, or start-up. Purchase an insert in the *Bar Bulletin*, the State Bar's weekly publication and take advantage of our loyal readership.



Use an insert to

- Announce products and services
- Deliver news to your stakeholders
- Educate the community about your passion
- Promote leadership and accomplishments
- And more – *the possibilities are endless!*

Bar Bulletin Inserts include

- 4-page, full-color design and printing
- Centerfold placement
- Front cover announcement
- Expert marketing and design staff to help you get the most from your purchase

Get extra copies of your insert to use as a promotional piece to give to clients.

STATE BAR of NEW MEXICO

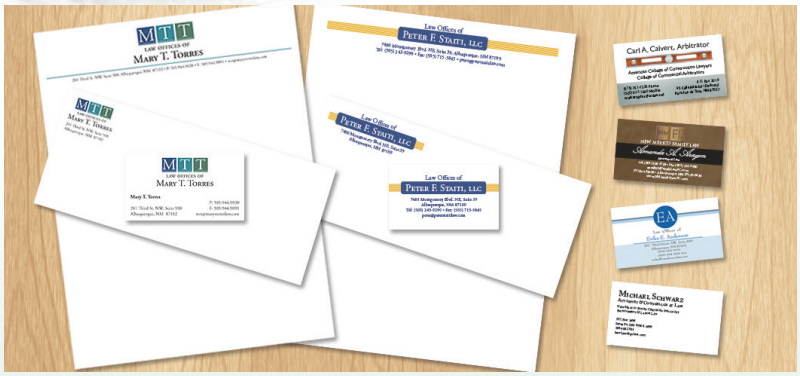
To take advantage of this opportunity, contact Account Executive Marcia Ulibarri at 505-797-6058.

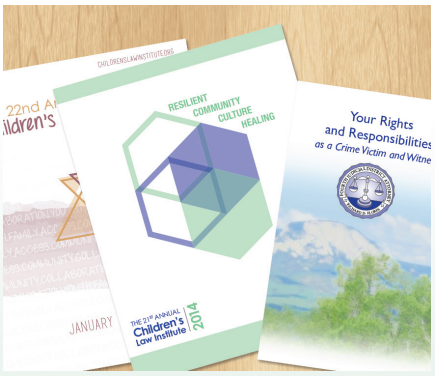
Ask about your member discount!

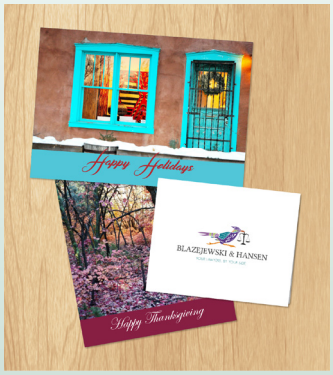
PRINT SERVICES FOR THE LEGAL COMMUNITY

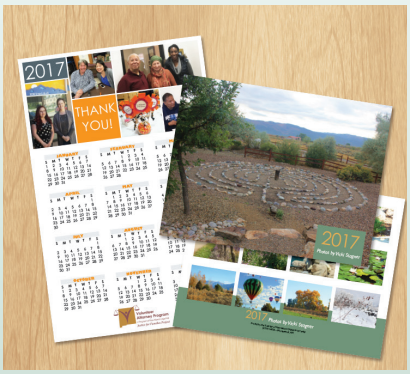
DPC
Digital Print Center

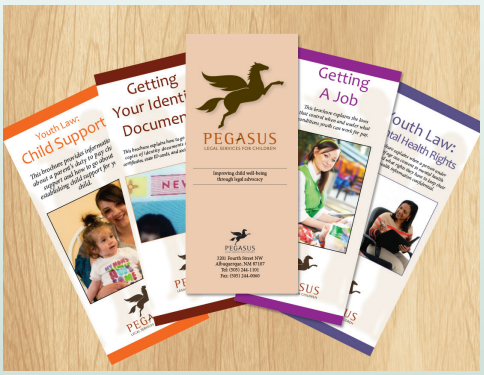
Quality, **full-color** printing.
Local service with fast turnaround.











Business Cards • Letterhead • Envelopes • Booklets
Brochures • Calendars • Greeting Cards • Invitations • and much more!

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

Ask about **YOUR** member discount!

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Digital Print Center