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Bar Bulletin

June 13, 2018 • Volume 57, No. 24

Early Spring at Rio Pueblito Canyon, by Michelle Chrisman

www.MichelleChrisman.com

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Meetings

June

13
Children's Law Section Board
Noon, Juvenile Justice Center

13
Tax Section Board
11 a.m., teleconference

14
Business Law Section Board
4 p.m., teleconference

14
Public Law Section Board
Noon, Legislative Finance Committee, Santa Fe

15
Family Law Section Board
9 a.m., teleconference

20
Real Property Division
Noon, teleconference

22
Immigration Law Section Board
Noon, teleconference

Workshops and Legal Clinics

June

20
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

27
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

July

1
Civil Legal Clinic
10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

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

6
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

About Cover Image and Artist: Michelle Chrisman's landscapes are painted "en plein air." She considers herself a contemporary colorist and modernist, but most of all a visual poet. She is drawn to the visual beauty of New Mexico and the West, the desert and the variety of the three cultures. She paints alla prima in direct response to the landscape. Chrisman teaches annual painting workshops for Ghost Ranch in Abiquiu and for the New Mexico Art League and Harwood Art Center in Albuquerque. She can be reached via email at MichelleChrisman78@gmail.com and her website is www.MichelleChrisman.com.

Notices

Court News

New Mexico Supreme Court

The Investiture Ceremony for The Honorable Gary L. Clingman

State Bar members are 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., Supreme Courtroom 237 Don Gaspar Ave., Santa Fe, N.M. A reception will immediately follow the ceremony in the Supreme Court Law Library.

Governor Susana Martinez

Appoints Michael Stone to Fifth Judicial District Court

Gov. Susana Martinez has appointed Michael H. Stone to fill the judgeship vacancy in Lea County, Division VII. Effective June 13, a mass reassignment of cases occurred pursuant to NMSC Rule 1-088.1. Judge Michael H. Stone was assigned all cases previously assigned to Judge Gary L. Clingman and/or Division VII of Lea County. Pursuant to Supreme Court Rule 1-088.1, parties who have not yet exercised a peremptory excusal will have 10 days from July 5, to excuse Judge Michael H. Stone.

Second Judicial District Court

Notice to Attorneys and Public

The New Mexico Supreme Court has authorized the Second Judicial District Court Clerk's Office to change its business hours effective July 1. Business hours for the Second Judicial District Court and the court information desk are Monday-Friday from 8 a.m.-5 p.m. The public service windows for the Court Clerk's Office (Children's Court, Criminal Court, Civil Court and Family Court) will be open Monday-Friday from 8 a.m.-4 p.m. The public service windows for the Domestic Violence Division and the Child Support Enforcement Division will be open Monday-Friday from 8 a.m.- noon and 1p.m.-5 p.m. The public service windows for the Center for Self Help and Dispute Resolution will be open Monday-Friday 9 a.m.-4 p.m.

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

Professionalism Tip

With respect to opposing parties and their counsel:

I will not use litigation, delay tactics, or other courses of conduct to harass the opposing party or their counsel.

Third Judicial District Court

Opening Clerk's Office During Lunch Hour

The Third Judicial District Court is changing the hours of operation of the Court Clerk's office to improve customer service and meet the needs of the community. Beginning July 2, the Court will remain open during the noon hour from noon-1 p.m. This change will provide public access to the Clerk's office, where visitors may obtain court records, file documents and conduct other business. The Jury Division and Self-Help Division also will be open to the public. The Court's Self-Help Center provides general information - not legal advice - for people representing themselves in civil cases and offers assistance with court forms. The business hours of the Doña Ana County Courthouse will remain 8 a.m.-5 p.m. Monday-Friday, except holidays. To accommodate the change in hours, the Clerk's office will close to the public at 4 p.m. to allow court workers to complete daily administrative duties. The court will make arrangements to accept emergency filings after 4 p.m. and will post instructions on its website as the July 2, effective date nears for the new hours of operation.

Third Judicial District Court

Adult Guardianship

On July 1, changes to the Probate Code related to Adult Guardianship and Conservatorship cases will take effect. These changes to the law apply to all adjudicated cases, pending cases and future cases. As a result of these legislative changes, there are new mandatory reporting forms and Supreme Court Rules. For ease of access to these materials visit https://adultguardianship.nmcourts.gov.

Sixth Judicial District

Judicial Notice of Resignation

The Sixth Judicial District Court announces the resignation of the Hon. Timothy L. Aldrich effective Aug. 10. A Judicial Nominating Commission will be convened in Silver City, New Mexico in August/September to interview applicants for these vacancies. Further information on the application process can be found on the Judicial Selection website (http://lawschool.unm.edu/judsel/index.php). Updates regarding the vacancy and the news release will be posted soon.

State Bar News

Animal Law Section

Animal Talk: Audubon Society

2018 is the 100th anniversary of the enactment of the Migratory Bird Treaty Act and the "Year of the Bird" as declared by the Audubon Society. The MBTA prohibits "take" of protected migratory bird species. Until December 2017, the prohibitions on "take" included incidental take. The U.S. Department of Justice prosecuted individuals and businesses for violations of the MBTA take provisions. On Dec. 22, 2017, the U.S. Department of Interior Solicitor issued an opinion redefining "take" to exclude incidental take. What effect will the opinion have on MBTA enforcement? Join Jonathan Hayes, Executive Director New Mexico Audubon Society, at noon on June 29 at the State Bar Center to learn more. R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Board of Bar Commissioners

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 and the Legal profession 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.

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- 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#.
- July 2, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- July 9, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

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

Young Lawyers Division

Homeless Legal Clinics in Albuquerque and Santa Fe

The Homeless Legal Clinic is open in Albuquerque from 9-11 a.m. (orientation at 8:30 a.m.), on the third Thursday of each month, at Albuquerque Healthcare for the Homeless, located at 1220 First Street NW and in Santa Fe from 10 a.m.-noon each Tuesday, at the St. Elizabeth Shelter, located at 804 Alarid Street in Santa Fe. Volunteer attorneys are needed to staff the clinics, serve as an "information referral resource" and join the pro bono referral list. For those staffing the clinic or providing other services, a trained attorney will assist you until you feel comfortable by yourself. Even if you are a new lawyer, you will be surprised at how much you have to offer these clients and how your help can make such a major difference in their lives. Visit www.nmbar.org/HLC to volunteer. Direct questions to YLD Region 2 Director Kaitlyn Luck at luck.kaitlyn@gmail.com.

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.

UNM School of Law

Law Library Hours

Summer 2018 Hours
May 12-Aug. 19

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.

Other Bars

New Mexico Defense Lawyers Association

Save the Date - Women in the Courtroom VII CLE Seminar

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

New Mexico Women's Bar Association

Santa Fe Meet and Greet

The New Mexico Women's Bar Association invites Santa Fe attorneys for a Meet and Greet on Friday, June 15 from 5:30 - 7:30 p.m. in the Buckaroo Room at the Cowgirl BBQ located at 319 S Guadalupe St., Santa Fe. Drinks and appetizers will be provided. Get to know NMWBA board members, greet fellow attorneys and have fun sharing stories and laughs.

Other News

ABA Retirement Funds Program

A Free Webinar on Women and Retirement.

ABA Retirement Funds Program is hosting a free webinar June 20, at 1:00 p.m. on Women and Retirement: Despite many roadblocks and challenges, women are poised to be good savers. In this webinar ABA Retirement Funds will define what it means to "save like a girl" by understanding the challenges women face when it comes to earning, saving and investing, and will discuss the solutions to improving financial outcomes. visit http://www.cdstudiohost.com/ABA/Webinars/2018_0620/ to register.

State Bar of New Mexico
Children's Law Section

16th Annual Art Contest

The pieces that make up our LIVES

Save the Date for the Art Contest Reception! Oct. 24 at the South Broadway Cultural Center

Through the years, the Children's Law Section Art Contest has demonstrated that communicating ideas and emotions through art and writing fosters thought and discussion among youth on how to change their lives for the better. This year's theme is designed to encourage youth from around the state who have come into contact with the juvenile justice system to think about how they will make contributions to the world during their lifetime. Using materials funded by the Section's generous donors, contestants will decorate flip flops to demonstrate their idea.

How can I help? Support the Children's Law Section Art Contest by way of a donation that will enable contest organizers to purchase supplies, display artwork, provide prizes to contestants and host a reception for the participants and their families. Art supplies and contest prize donations are also welcome.

To make a tax deductible donation, visit **www.nmbar.org/ChildrensLaw** or make a check out to the New Mexico State Bar Foundation and note "Children's Law Section Art Contest Fund" in the memo line. Please mail checks to:

State Bar of New Mexico
Attn: Breanna Henley
PO Box 92860
Albuquerque, NM 87199

For more information contact
Alison Pauk at alison.pauk@lopdnm.us.

Albuquerque Bar Association
Celebrates Law Day

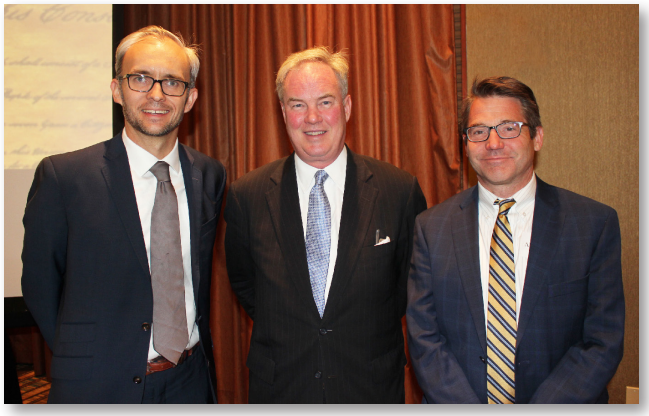
Framework *for* Freedom

Law Day is held annually on May 1 to celebrate the rule of law. It underscores how law and the legal process contribute to the freedoms that all Americans share. This year, the American Bar Association chose to celebrate the 60th anniversary of law day with the theme "Separation of Powers: Framework for Freedom." In that spirit, the Albuquerque Bar Association invited Trevor Potter, founder and president of the Campaign Legal Center and former chairman of the Federal Election Commission. Potter spoke on the history and future of campaign and election law. Potter's appearance was made possible by the Thornburg Foundation of Santa Fe.

During the luncheon, New Mexico Supreme Court Chief Justice Judith K. Nakamura read the list of in memoriam and led the attendees in a moment of silence. The luncheon also recognized the 2018 Gene Franchini New Mexico High School Mock Trial Team from the Albuquerque Academy. The team competed at the national competition in May. Also recognized were the winners of the State Bar High School Essay Contest and Breaking Good Video Contest. Finally, Albuquerque Bar Association Past President Steve Scholl gave an update on the state of the association.

Thanks for attending and supporting the Albuquerque Bar Association!

Trevor Potter and Albuquerque Bar Association President Ed Perea



Ethan Watson, Albuquerque Bar Association vice president; Trevor Potter; and Allan Oliver, executive director of the Thornburg Foundation.

Giddens + Gatton Law, PC, shareholders **Dave Giddens** and **Chris Gatton** were recently recognized on the 2018 *Southwest Super Lawyers* website. Founding shareholder Dave Giddens was named a Super Lawyer for the eighth time while Chris Gatton was named a Rising Star for the fourth straight year.

Nickay B. Manning has joined Giddens + Gatton Law, PC, as Of Counsel, according to George "Dave" Giddens, founding shareholder of the firm. Manning has more than 28 years of experience practicing in N.M. and Colo. She joined Giddens + Gatton Law after practicing in her own law firm for 13 years. She practices in the areas of employment law, commercial, civil and construction litigation, real estate and foreclosures and contract disputes. Manning earned both a Bachelor of Arts degree and a Juris Doctor at the University of New Mexico. She holds bar admissions to the New Mexico Supreme Court, Colorado Supreme Court, U.S. District Court for the District of New Mexico, U.S. District Court for the District of Colorado and U.S. Court of Appeals, Tenth Circuit. She is also an active volunteer for the American Cancer Society.

Rodey Lawyers **Nelson Franse**, **Catherine Goldberg**, **Scott Gordon**, **Bruce Hall**, **W. Mark Mowery**, **Ed Ricco** and **Charles Vigil** have been selected for inclusion in the 2018 list of the Top 25 Lawyers in New Mexico by *Southwest Super Lawyers.*

Nelson Franse is the leader of Rodey's professional liability practice group. He practices in the areas of professional malpractice defense, medical malpractice defense, product liability, personal injury defense, entertainment and sports law.

Catherine Goldberg practices in the areas of real estate, financings, banking, foreclosures, commercial law, leases, contracts and corporate law. She has handled a number of complex purchase and sale, financing, leasing, and other commercial transactions as well as foreclosures.

Scott Gordon is a board-certified specialist in civil trials and in Employment and Labor Law. Since 1986, Gordon has been the first chair trial attorney in numerous jury trials and bench trials including the trials of discrimination, wrongful termination, breach of contract and personal injury claims.

Bruce Hall's current practice focuses primarily on serving as an arbitrator and mediator for complex cases. His professional experience includes complex litigation and appeals in many areas including products liability, commercial, employment, environmental and professional liability.

Mark Mowery's practice concentrates in the areas of personal injury, property damage, product liability, medical malpractice claims and general insurance defense. Mowery also has an active mediation practice.

Ed Ricco is a New Mexico Board of Legal Specialization certified specialist in appellate practice and a fellow of the American Academy of Appellate Lawyers. He concentrates his practice in appellate law. He has handled numerous appeals in the state and federal courts in a wide variety of legal areas. Mr. Ricco's practice also includes complex litigation at the trial court level.

Charles Vigil is president and managing director of the Rodey Law Firm. He practices in the areas of labor and employment law, commercial litigation, insurance coverage/bad faith, products liability and professional liability.

Benchmark Litigation-The Definitive Guide to America's Leading Litigation Firms and Attorneys has named Rodey lawyer **Krystle Thomas** to its list of the nation's most accomplished legal partners age 40 or under. Through a process of peer review and case examination, the list was compiled over a process of many months to honor the achievements of young up-and-coming attorneys. A director in Rodey's Albuquerque office, Thomas focuses her practice on employment law and professional liability defense.

Elizabeth M. Reitzel and **Veronica N. Lewis** have joined **Miller Stratvert P.A**. as associates in the Albuquerque office.

Prior to joining Miller Stratvert, Reitzel worked for the U.S. House of Representatives, Office of Hon. Michelle Lujan Grisham as a field representative and was an intern for the U.S. Fish & Wildlife Service, Division of Water Resources. She received her J.D. from the University of New Mexico School of Law, 2016. While focusing her studies on natural resources law, she earned a Natural Resources and Environmental Law Certificate. Reitzel received her B.A. in Psychology from New Mexico State University, 2012.

Lewis received her J.D., *cum laude*, from the University of New Mexico School of Law, 2017 and served as an evidence & trial practice tutor while in law school. She held an externship with the Hon. James O. Browning, U.S. District for the District of New Mexico, spring 2017. She studied in Spain during the summer of 2016 at the Facultad de Ciencias Jurisdicas y Sociales de Universidad Rey Juan Carlos. She has a Bachelors in Intercultural Communication & Business Ethics, University of New Mexico, 2012.

Publisher *Chambers & Partners* recognized **Eric. R. Burris**, chair of the firm's litigation department, with a ranking in the litigation: general commercial category. Burris has more than 25 years of experience in complex civil litigation, primarily as defense counsel in matters that include commercial litigation issues, economic torts, intellectual property, employment and labor issues, complex/mass torts, products liability and other personal injury disputes.

The 2018 rankings from Chambers USA recognize Modrall Sperling and 16 of its attorneys for excellence in ten Chambers-designated areas. The firm received national accolades for its Native American practice with three attorneys nationally ranked in this area.

Firm Rankings went as following:

- Nationwide Native American Law
- New Mexico Corporate/Commercial
- New Mexico Environment, Natural Resources & Regulated Industries
- New Mexico Labor & Employment
- New Mexico Litigation: General Commercial
- New Mexico Native American Law
- New Mexico Real Estate Individual honors went to the following:
- **Daniel Alsup** Corporate/Commercial
- **Jennifer Anderson** Labor & Employment, Litigation: General Commercial
- **Deana Bennett** Native American Law (New Mexico)
- **Stuart Butzier** Environment, Natural Resources & Regulated Industries
- **John Cooney** Environment, Natural Resources & Regulated Industries
- **Peter Franklin** Corporate/Commercial
- **Karen Kahn** Labor & Employment: Employee Benefits & Compensation
- **Margaret Meister** Real Estate
- **Chris Muirhead** Corporate/Commercial
- **Brian Nichols** Labor & Employment, Nationwide Native American Law, Native American Law (New Mexico)
- **Maria O'Brien** Environment, Natural Resources & Regulated Industries: Water Law
- **James M. Parker** Labor & Employment: Employee Benefits & Compensation, Corporate/Commercial: Tax
- **Marjorie Rogers** Corporate/Commercial: Tax
- **Lynn Slade** Nationwide Native American Law, Native American Law (New Mexico), Environment, Natural Resources & Regulated Industries
- **Walter Stern** Nationwide Native American Law, Native American Law (New Mexico), Environment, Natural Resources & Regulated Industries
- **R. E. Thompson** Litigation: General Commercial

Chambers USA ranked 86 Holland & Hart attorneys and 33 of the firm's Chambers-defined practice areas, by market, reinforcing Holland & Hart's leading presence in our eight-state footprint and in Washington, D.C. The firm ranked nationally in the Environment practice area and was recognized in International Trade: Export Controls & Economic Sanctions.

- **Bradford Berge**, for general commercial litigation
- **Michael Feldewert**, for Environment, Natural Resources & Regulated Industries
- **Jordan Kessler**, for for Environment, Natural Resources & Regulated Industries

Sutin, Thayer & Browne law firm is pleased to announce that the prestigious Chambers and Partners 2018 annual legal guide has recognized the firm and six senior lawyers.

The honors underscore the firm's strength in business and corporate law.

The firm itself was honored for its highly regarded work in real estate law, corporate/commercial law and general commercial litigation.

Individual honors went to the following:

- **Anne P. Browne**, for corporate/commercial law and real estate law
- **Benjamin E. Thomas**, for general commercial litigation
- **Eduardo A. Duffy**, for corporate/commercial law
- **Jay D. Rosenblum**, for corporate/commercial law
- **Robert G. Heyman**, for corporate/commercial law
- **Suzanne Wood Bruckner,** for corporate/commercial tax law

In Memoriam

Stephen Charnas, aged 83, an attorney (retired) with the firm of Sutin, Thayer, and Brown in Albuquerque, died Jan. 30, 2018, at The Retreat in Rio Rancho. His practice included intellectual property law, water law, and Indian law. He loved hiking, cycling, black and white photography on real film, archaeological digs and tours abroad, reading poetry and fiction, school reunions at Andover, and having his hair groomed by Sixtus the cat. Stephen is survived by his wife, Suzy; brother, Jonathan; children, Charlie and Jo; and grandchildren, Juliet and Nate. A family gathering in his memory will take place later this spring. Memorial contributions may be made to the American Indian College Fund.

Gwen Gist, born Gwendolyn Rae Jackson, died Aug. 12, 2017, suddenly at home in Brenham, Texas. She was born Feb. 8, 1955, in Carlsbad, N.M., to Loyd and Shirley Jackson. Gist was a bright and head strong child who early on showed a penchant for rules and law. She was passionate and generous. She had a chronic diagnosis that was challenging but she managed it valiantly. She lived life fully and always seemed to have a sense that she was living on borrowed time. While working and raising her only daughter, Kerri, she commuted 90 miles to obtain her first Bachelor Degree from Eastern New Mexico State University in Accounting. She passed the CPA exam on first attempt and worked as a CPA in Carlsbad. Apparently, she had always wanted to become an attorney. So, in 2002, she uprooted her life and went to Baylor School of Law, graduating with honors in 2004 with a Juris Doctorate. She passed the bar exam on first attempt. She began her law career with Marek and Francis Law in Carlsbad, N.M. She took an opportunity moving to Hobbs, N.M. where she was City Attorney for Hobbs before moving to a position as County Attorney for Lea

County N.M. Her career took her to become an assistant DA for the Fifth Judicial District office in Hobbs, N.M. Recently, she decided to relocate and refocus her life into an area of law she always wanted to practice; wills, trusts, estates, and helping people get access to legal representation. Her firm, Gist Law, PLLC, was growing and she was working hard at it right up to her final day on earth. She was always happy she went to law school without letting age or disease stop her. She loved what she was doing and she was very good at it. She was loved by many people and leaves a large and loving family. She was blessed to have the love and companionship of a man, Mike Stanley, who was her soulmate for 20 years. She leaves a daughter, Kerri Lynn Gist, of Carlsbad, N.M., two grandsons both from Carlsbad, N.M.; Justin Holub (Joy) and Brandon Holub, and one great grandson, Justin Cole Holub of Carlsbad, N.M. She was predeceased by her father Loyd Jackson, of Carlsbad, NM. She leaves her mother, Shirley Jackson, of Carlsbad, N.M., three sisters; Deborah Edington (Bob) of Brenham, Texas; Starla Porterfield (Tom) of Louisville, Kentucky; and Cherene Patty (Kim) of Edmond, Oklahoma, and one Brother, John Jackson (Kim), of Colorado Springs, Colorado. She leaves her beloved dog, Outlaw Josie Wales. Finally she left many nieces and nephews, great nieces and nephews, all of whom she adored. She loved theater, travel, crochet, antiques, family, her dog, puzzles, board games, reading, tradition, and the law. She made it a point to experience everything she saw that she wanted to do, and to always challenge herself to reach for excellence. She spent her life force fully all the time. Above all she loved God. She was a believer in and follower of Jesus Christ. She believed in the power of prayer. She left us an amazing example to follow.

Michael Gonzales died Mar. 9, 2018. Gonzales passed peacefully from all who loved him in the early morning of Friday, March 9, 2018. At 62 years of age, Gonzales leaves his husband of 17 years, Ross K. Henke and his two best dog friends, Sophie and Jake. Also surviving Gonzales is his sister and best friend, Frances V. Gonzales of Albuquerque who has provided immeasurable love and support throughout; sister, Patricia V. Vanderkrabben and brother-in-law, Robert of South Holland, IL; uncle and aunt, Ed and Pauline Rael of Albuquerque; aunt, Irene Rose Rael of Loma Linda, CA; aunt, Tesse Garcia of Santa Fe; as well as numerous cousins. Also surviving are his mother-in-law, Audrey L. Henke of Hannover, ND; siblings-in-law, Valorie Cartwright, Vickie Lambrecht, Randy Henke, and Rick Henke. He also leaves four nieces, five nephews and four great-nephews. Gonzales fought his battle of three years with Parkinson's disease/Multi System Atrophy bravely and without complaint. Fighting alongside Gonzales have been the loving staff of Presbyterian Palliative and Complete Care; Kevin Hoover, friend and massage therapist; Marina Baden, friend and yoga instructor; and his dear caregivers Miguel Ulloa and Fermin Cervantes. Also, Gonzales many friends have provided support, prayers, visits, and food. Included in Gonzales circle of love are Father Bill McNichols and Dawn Wenzl of St. Joseph on the Rio Grande and his friends and neighbors at La Luz Del Sol, with special thanks to Oleta Saunders and Sunshine Hilliard. Gonzales is preceded in death and reunited with his parents, Gonzales B. Gonzales and Cecilia Rael Gonzales; father-in-law, Kenneth E Henke; and numerous dear family and friends who have gone before him. A distinguished attorney, Gonzales dedicated his professional career in labor law to the improvement of conditions for working women and men. After graduating with first honors from St. Pius X High School in 1973, Gonzales attended the University of Denver, graduating *Summa Cum Laude* in 1977 with a degree in Political Science. Gonzales proceeded to study law at Stanford University, earning his Doctor of Jurisprudence in 1980. Gonzales began his law practice at Lillick, McHose and Charles in San Francisco, CA in 1980 and returned to Albuquerque in 1984 where he continued as a labor litigator at Suttin Thayer & Browne. Gonzales Joined PNM in 1992 where he served as the assistant general counsel for litigation and as director of human resources. He retired from PNM as VP of people services in 2010. Following a brief retirement, Gonzales began his tenure at Presbyterian Healthcare Services where he served as director of employee/management relations until his disability in 2015. Throughout his legal career, Gonzales believed it important to give back to his community, thus providing pro bono legal services to many individuals and organizations including the National Institute of Health (Research Grants Allocation Committee), Challenge New Mexico, The American Diabetes Association (National Board Member), and most recently the American Civil Liberties Union. An avid traveler, Gonzales explored the wonders of numerous countries as well as logging many miles in the United States. He was a premier travel planner and guide for both family and friends. Gonzales enthusiastically made two all-important trips to Washington DC for both of President Barack Obama's inaugurations. Gonzales was passionate about family and friends, politics, *New York Times*, dogs and cats, and spending time with family and friends in the "Taos House."

Paul Livingston died Nov. 3, 2017, beloved father, grandfather and attorney succumbed to complications from injuries sustained from a terrible car crash. He was born on Dec. 4, 1942. As a practicing attorney for 33 years, Paul Livingston was a tireless advocate for justice and for the rights of the disempowered. Scrupulously honest, he accepted many cases on a contingency basis and without regard for financial gain. Throughout his adult life, he was active in civil rights causes and as an advocate for constitutional rights. He was born in New York City in 1942 to Jewish parents, Lillian and Jules Livingston, and grew up in Woodmere, Long Island, graduating from Hewlett High School in 1960. In 1964, he earned a BA in English literature from Union College and went on to attend the famed creative writers' workshop at the University of Iowa. Returning to Manhattan in 1965, he became a social worker and then a special education teacher at Junior High School 22 on the Lower East Side. As an activist, he demonstrated for civil rights in the 1965 March on Washington. He and his future wife, Sara Moore, also marched at the Chicago Democratic Convention in 1968. During the 1960s, the two participated in many demonstrations, sit-ins and concerts of the time. Sara brought him to her home in beautiful N.M. for the first time in 1969. In 1970, Livingston obtained a master's degree in special education from City College, N.Y. In 1971, he and Sara began spending summers in N.M. and lived for a time in Taos. In 1974, the couple moved permanently to N.M. and began a business making and selling jewelry and crafts. As a non-indigenous vendor at the portal of the Palace of the Governors in Santa Fe, Livingston was part of a civil rights lawsuit (Livingston vs. Ewing) that was appealed up to the U.S. Supreme Court. Although the Court declined to hear the case, the non-indigenous vendors nevertheless secured spots to sell on the Plaza in 1976. At the recommendation of then-Governor Bruce King, Livingston began

law school at UNM and obtained his J.D. in 1982. As an attorney in Albuquerque, he successfully litigated several cases on behalf of patients in medical malpractice cases and later supported many blue-collar city workers, bus drivers, and labor union causes. He worked diligently and singlehandedly to support transparency in city government and open meetings, including inspection of public records, police oversight, and department of health issues. In 2004 in Bernalillo, N.M., he was instrumental in supporting one of the first county clerks in the nation to grant gay marriage licenses. Livingston is survived by his wife of 48 years, Sara Moore Livingston (a Roswell, N.M. native), sons Paul and Chris, daughter-in-law Elizabeth Amberg Livingston, and two beautiful grandchildren, Audrey and Reed all Albuquerque residents. He has one younger brother, Robert Livingston, and sister-in-law May Lee Livingston of Port Washington, NY.

Jacob I. (Jay) Rosenbaum, a quiet Cleveland civic leader, passed away on May 13. A partner with Cleveland law firms, Burke, Haber & Berick and Arter & Hadden, he retired of counsel of Tucker Ellis in 2007. He was actively involved in several civic organizations. He served as president for three years and board member for over 25 years of the Cleveland National Air Show. He was president of the Judson Retirement Community and served on its board for 25 years. He was president of the Kiwanis Club of Cleveland and later of its charitable foundation and received the 50 year Legion of Honor and prestigious Hixon awards. He was a Life Trustee of the Cleveland Zoological Society and the Golden Age Centers of Cleveland and a trustee of the Cleveland Women's Orchestra and the Judson Foundation. He was a native Clevelander and lived in Cleveland all of his life except for college years when he attended the University of New Mexico. He received his law degree from that institution and was admitted to the State bar of New Mexico in 1951, after which he returned to Cleveland, was admitted to the Ohio bar in 1952 and began the practice of law. He was a 50-year life member of both bar associations. In 1955 he was elected to the board of directors of the original Cleveland-based Ohio Savings Bank, and served as its President for six years and as an officer and director for 53 years. In 1945 Jay enlisted in the U.S. Army and, after the end of World War II, served 18 months in the peacetime army. In 1964 he started training as a pilot and obtained a private pilot's license, with single and multi-engine and instrument ratings. In 1967 he co-founded Mercury Aviation Company at Cuyahoga County Airport and served as its chairman until the company was dissolved in 1987. He became a member of the Lawyer Pilots Bar Association, of which he was elected president in 1980 and for which he edited its Law Journal for 14 years. On May 20, 1977, the 50th anniversary of the Lindberg flight, he established a record flight in a single engine aircraft flying solo 12 hours non-stop from Cleveland to Key West and back to Cleveland for which he holds an award from the Fdration Aeronautique Internationale. He was a member of Temple Emanu El in University Heights and later in Orange Village for over 50 years and served as its president in 1967-68. He co-chaired the fundraising committee for the new temple in Solon, and was twice elected Emanuelite of the Year. Rosenbaum also played trombone in the Hillcrest Concert Band during the later years of his life, and, as a long-time resident of Pepper Pike, served on its Road, Traffic and Safety Committee. Beloved husband for 66 years to his wonderful wife, Marjorie; devoted father of Laura Rosenbaum (Daniel Roebuck), Alexander "Lex" Rosenbaum (Anita Park Rosenbaum) and Judith Bartell Goodman (Steve Goodman); loving grandfather of Daniel Mortenson (Susan Casey), Ari Rosenbaum (Sheena Rosenbaum), James Bartell (Nathalie Bartell), David Bartell, Benjamin Roebuck, Alece Pritchard Pugh (Mathew Pugh) and Christopher Pritchard (Jennifer Potokar); beloved great-grandfather of 12; dear brother of Ernest (Isadora) (both deceased), Arthur (Rona) and Lillian Snyder (MaryAlice Morris).

Carol "Smith" (Bridges) Smith died at hospice on Feb. 15, in Albuquerque, N.M. due to complications following surgery. She was 69. Smith is survived by two daughters, Jordan Cristea (Bill) and Ramona Devine; five grandchildren (Troy, Darion, Scott, Dean, and Alexander); and three step-grandchildren (Ashley, Josh, and Jack). Smith was born on October 6, 1948 to Willie Caroll Bridges and Mary Ella (Williams) Bridges of Sulphur Springs, TX. She was raised in Dallas and moved to New Mexico in the 70's, graduating from UNM with a degree in Psychology, and later obtaining a degree from the University of New Mexico School of Law. Smith was an accomplished and passionate attorney working in commercial litigation, while providing pro bono services to victims of domestic violence. Smith retired as shareholder from the firm Bannerman and Williams in 2009. After retirement, Smith was dedicated to several charities, volunteering her time and services to various hospices, Meals on Wheels, and several ESL and literacy programs. Smith lived a disciplined and peaceful life. She was an avid reader. She had a deep appreciation for music, art, and the beauty of nature. She was hardworking, frugal, honest, and real. She had the most beautiful smile.

Legal Education

June

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
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19 **Ethics and Email**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
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20 **Director and Officer Liability**
1.0 G
Teleseminar
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21 **Holding Business Interests in Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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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
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22 **Basic Guide to Appeals for Busy Trial Lawyers (2018)**
3.0 G
Live Replay, Albuquerque
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22 **Strategies for Well-Being and Ethical Practice (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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22 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
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22 **How to Avoid Potential Malpractice Pitfalls in the Cloud**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
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25 **The Ethics of Bad Facts and Bad Law**
1.0 EP
Teleseminar
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22 **Effective Communications with Clients, Colleagues and Staff**
1.0 EP
Live Webinar
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26 **Ethical Issues and Implications on Lawyers' Use of LinkedIn**
1.0 EP
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26 **Classes of Stock: Structuring Voting and Non-voting Trusts**
1.0 G
Teleseminar
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27 **Roadmap/Basics of Real Estate Finance, Part 1**
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27 **Roadmap/Basics of Real Estate Finance, Part 2**
1.0 G
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28 **Social Media as Investigative Research and Evidence**
1.0 EP
Live Webinar
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29 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
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29 **The Ethics of Social Media Research**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
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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
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29 **New Mexico DWI Cases: From the Initial Stop to Sentencing; Evaluating Your Case (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
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29 **Abuse and Neglect Case in Children's Court (2018)**
3.0 G
Live Replay, Albuquerque
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July

3 **Employment Investigations: Figuring it Out/Avoiding Liability**
1.0 G
Teleseminar
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6 **Baskets and Escrow in Business Transactions**
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10 **Selection and Preparation of Expert Witnesses in Litigation**
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11 **Protecting Subtenant Clients in Leasing**
1.0 G
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17 **Roadmap of VC and Angel, Part 1**
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18 **Roadmap of VC and Angel, Part 2**
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19 **Ethics for Business Lawyers**
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20 **2018 Family and Medical Leave Update**
1.0 G
Teleseminar
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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
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20 **The Duty to Consult with Tribal Governments: Law, Practice and Best Practices (2017)**
2.3 G, 1.0 EP
Live Replay, Albuquerque
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20 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
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20 **Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics (2017)**
3.0 EP
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24 **Due Diligence in Commercial Real Estate Transaction**
1.0 G
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25 **Estate and Gift Tax Audits**
1.0 G
Teleseminar
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26 **Mediating with a Party with a Mental Illness/Disability**
2.0 EP
Live Seminar/ Teleseminar
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27 **Litigation and Argument Writing in the Smartphone Age (2017)**
5.0 G, 1.0 EP
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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
Live Replay, Albuquerque
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27 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
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31 **Lawyer Ethics and Disputes with Clients**
1.0 EP
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Opinions

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

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Effective June 1, 2018

PUBLISHED OPINIONS

No published opinions

UNPUBLISHED OPINIONS

A-1-CA-34350	State v. B Scott	Affirm	05/29/2018
A-1-CA-35597	State v. B Porter	Affirm	05/30/2018
A-1-CA-36697	State v. J Linck	Affirm	05/30/2018
A-1-CA-35418	J Hotle v. State of NM Public Employees Retirement	Affirm	05/31/2018
A-1-CA-35526	State v. F Romero	Reverse/Remand	05/31/2018
A-1-CA-36824	State v. F Munoz	Affirm	05/31/2018
A-1-CA-36981	State v. P Marquez	Affirm	05/31/2018

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

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From the Clerk of the New Mexico Supreme Court

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective June 13, 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 Court of Appeals

Opinion Number: 2018-NMCA-028

No. A-1-CA-34971 (filed January 17, 2018)

JOSÉ MELENDEZ,
Worker-Appellant,
v.
SALLS BROTHERS CONSTRUCTION, INC.,
and BITUMINOUS INSURANCE COMPANY,
Employer/Insurer-Appellee.

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION
Terry Kramer, Worker's Compensation Judge

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Opinion

M. Monica Zamora, Judge

{1} José Melendez (Worker) filed for workers' compensation benefits following a work-related accident while employed with Salls Brothers Construction, Inc. (Employer). The workers' compensation judge (WCJ) denied Worker modifier benefits because he presented false documentation while filling out his I-9 form. We affirm.

BACKGROUND

{2} Worker is an undocumented immigrant from Mexico, first coming to the United States in 1979 and working in various agricultural and construction jobs. At all times material to this matter, Worker was an employee of Employer, having been hired in July 2006. Worker performed construction labor for Employer without the necessary legal authorization. On December 12, 2007, Worker was injured while at work. He was standing on scaffolding, which subsequently collapsed causing him to fall approximately five to six feet to the ground. As a result of his fall he suffered lumbar spondolysis and myofascial pain.

{3} Worker applied for workers' compensation benefits and after a trial on the merits, the WCJ concluded that Worker was entitled to temporary total disability benefits from the date of the accident, December 12, 2007, through the date of his maximum medical improvement, October 23, 2009. Additionally, the WCJ concluded that Worker was further entitled to permanent partial disability benefits for the 500 week benefit period, commencing October 23, 2009. Finally, the WCJ concluded that Worker was not entitled to modifier benefits based on his undocumented status.

{4} Upon being denied modifier benefits, Worker appealed to this Court and in accordance with the mandate from our New Mexico Supreme Court, we remanded with instructions for the WCJ to review the case in light of the Court's ruling in *Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021, 303 P.3d 802. The WCJ was tasked with determining whether Worker was entitled to modifier benefits. This determination turned on whether Employer knew or should have known that Worker was undocumented at the time of his hire.

{5} After a second trial on the merits to examine this narrow question, the WCJ found that Employer followed appropriate hiring procedures in hiring Worker. Worker's personnel file contained two Employment Eligibility Verification forms (I-9 forms), the first dated July 2006 and the second dated May/June 2007. The WCJ further found that Worker knowingly produced false documentation to support his employment application, including a false Social Security card, a false resident alien card, and a false Colorado identification card. Because Employer reasonably relied on Worker's false documentation, the WCJ concluded that "there was no reasonable basis for Employer to have [knowledge that] Worker was undocumented." Consequently, the WCJ concluded that Worker was not entitled to modifier benefits. This appeal followed.

{6} On appeal, Worker contends that the WCJ erred in his interpretation of *Gonzalez* as it applied to Worker. Additionally, Worker argues that Employer is liable for paying modifier benefits to Worker because "fatal substantive flaws" exist in Worker's I-9 forms, and such flaws prohibit Employer from successfully advancing a good faith defense under federal immigration law. Worker admits to providing Employer with false documentation to obtain employment, calling the decision "unfortunate." In response, Employer argues it complied in good faith with the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a(a)(3) (2012), and Employer reasonably relied on the false documentation that Worker deceptively provided to Employer during the hiring process.

DISCUSSION

A. Workers' Compensation Act and IRCA

{7} The Legislature designed the Workers' Compensation Administration Act (the WCAA) as a balance between the rights and interests of the worker and the employer. *See* NMSA 1978, §§ 52-5-1 to -22 (1987, amended through 2013) (stating that the Act is not to be construed in a manner that favors the employee over the employer, nor is it to be construed in a manner that favors the employer over the employee); *Salazar v. Torres*, 2007-NMSC-019, ¶ 10, 141 N.M. 559, 158 P.3d 449 ("One policy factor of great concern is that any judicial analysis under the Act must balance equally the interests of the worker and the employer without showing bias or favoritism toward either.").

{8} The Act generally applies to undocumented workers. *Gonzalez*, 2013-NMSC-021, ¶ 10. This opinion focuses on the circumstances under which undocumented workers qualify for modifier benefits under the Act. Modifier benefits are applicable when a worker has suffered a permanent injury but the benefits are not permanent. NMSA 1978, § 52-1-26(B), (D) (1990, amended 2017).

{9} IRCA places an affirmative duty on employers to verify that their employees are authorized to work in the United States. § 1324a(a)(1)(B)(i). It is on the I-9 form where an employer attests, under penalty of perjury, that they or their representative have examined certain documentation provided by the new employee, and as a result verifies that the new employee is authorized to work in the United States. § 1324a(b)(1). The employee must also attest, under penalty of perjury, to a specific category of eligibility into which he or she fits. § 1324a(b)(2). Where an employer has properly filled out the I-9 form based on false documents provided by an undocumented worker, and where the employer has complied in good faith with IRCA's requirements, the employer is entitled to an affirmative defense to any violation. § 1324a(a)(3).

B. *Gonzalez*

{10} In *Gonzalez*, our Supreme Court held that undocumented workers are not categorically ineligible for modifier benefits based solely on the fact that they are lawfully ineligible to work under federal law. 2013-NMSC-021, ¶¶ 19-26. Categorically denying all undocumented workers modifier benefits based on their immigration status alone would serve to turn "a blind eye to the reality of undocumented workers all across this state." *Id.* ¶ 22. Instead, the appellate courts have held that the determining factor in deciding whether an undocumented worker is entitled to modifier benefits is "[w]hether an employer knew or should have known, before the worker was injured, that a worker was undocumented." *Id.* ¶ 26.

{11} The Court reasoned that such an approach is consistent with both the Act and IRCA, which discourages illegal immigration by making it unlawful for employers to hire undocumented workers. *Id.* ¶ 28. In accordance with IRCA, "employers have an affirmative duty to determine that their employees are authorized." *Id.* (internal quotation marks and citation omitted). This duty is fulfilled by an employer completing an I-9 form and examining specific documents that establish the worker's identity and eligibility to lawfully work in the United States. *See id.*

{12} Therefore, *Gonzalez* declares that "[t]he I-9 [f]orm is how an employer gains knowledge of a newly hired worker's eligibility for employment." *Id.* ¶ 29. "[A]n employer who does not properly fill out an I-9 [f]orm and demand necessary documentation, as is required, either should have known or is deemed to have known that the worker would likely be undocumented[.]" *Id.* If the employer had such knowledge based on the I-9 form, the worker would be "entitled to modifier benefits." *Id.* ¶ 35. In the event that an undocumented worker presents false documents, an employer who has complied in good faith with IRCA's requirements has an affirmative defense to a violation of federal law, and would not be responsible for paying the worker modifier benefits. *Id.* ¶ 30.

{13} The underlying policy purpose behind such an approach is this: "[I]f a worker presents false documents to an employer during the initial hiring and the employer does not otherwise know or should know of the worker's undocumented status, then the worker should not be allowed to benefit from such deception by collecting modifier benefits." *Id.* ¶ 30. In essence, this balancing of the worker's actions against the employer's actions serves to assure that neither party benefits from taking advantage of the other.

{14} In the event that both parties made mistakes throughout the hiring process, our inquiry then focuses on which party is more culpable. *See id.* ¶ 31 ("Whichever party is more culpable, by either failing to perform an affirmative duty or presenting false documents to obtain employment, suffers the most; he is not permitted to benefit from that party's own wrongdoing.").

C. Standard of Review

{15} "We review workers' compensation orders using the whole record standard of review." *Leonard v. Payday Prof'l*, 2007-NMCA-128, ¶ 10, 142 N.M. 605, 168 P.3d 177. We give deference to the fact-finder where findings are supported by substantial evidence. *See DeWitt v. Rent-A-Ctr., Inc.*, 2009-NMSC-032, ¶ 12, 146 N.M. 453, 212 P.3d 341. "Substantial evidence on the record as a whole is evidence demonstrating the reasonableness of an agency's decision[.]" *Id.* We will not "reweigh the evidence [or] replace the fact[-]finder's conclusions with our own." *Id.*

{16} Our analysis is also guided by *Gonzalez*. In light of *Gonzalez*, the narrow focus of our inquiry is therefore, whether the employer knew or should have known of the worker's undocumented status when the worker presented false identification documents to the employer during the hiring process. *See* 2013-NMSC-021, ¶ 30.

D. Employer Properly Confirmed Worker's Eligibility to Work

{17} Worker argues that the I-9 forms were substantively incomplete, because Worker did not attest to citizenry or legal employment, consequently Employer knew or should have known that Worker was undocumented. Worker further argues that because Employer knew or should have known of Worker's undocumented status, it is not entitled to the good faith affirmative defense. Worker contests the WCJ's following findings of fact:

> 19. The Preparer and/or Translator Certification was not filled out on either of the I-9 [form]s nor [were they] necessary to be completed because Worker did not require assistance in completion of Section 1.
>
> . . . .
>
> 22. The [July] 2006 I-9 [form] contains no omissions
>
> . . . .
>
> 29. Employer followed appropriate procedures in hiring employees including Worker.

Worker contests the WCJ's following conclusion of law:

> 4. Under the totality of the evidence Employer reasonably relied upon Worker's representations and there was no reasonable basis for Employer to have known Worker was undocumented.

{18} Employer argues that any errors in completing the I-9 form were technical errors. Employer further contends Worker knowingly presented false documentation in order to obtain employment. The WCJ found that Employer reasonably relied on Worker's false documentation to support his employment paperwork, and there was no reasonable basis for Employer to have knowledge that Worker was undocumented.

{19} Rich Salls, Vice President for Salls Brothers Construction, Inc., testified at trial about the company's structure and general hiring process. He explained that every prospective employee filled out an application at the company's main office and participated in an interview. He further testified that if the company discovered through the hiring process that a prospective employee was not legally authorized to work, Employer would not hire him.

{20} The record contains Worker's two I-9 forms that were in his personnel file. The common issue in both the June 2006 and July 2007 I-9 form is Worker's failure to complete the attestation provision. Both

I-9 forms were signed by Worker and Teri Evans Salls, as employer's representative. The July 2006 I-9 form contains Worker's attestation that he is a lawful permanent resident, but is lacking a lawful permanent resident number under Section 1. At that time, his verification documents included a Colorado driver's license and a social security card for Section 2. It is undisputed that Worker furnished a false Colorado identification card and a false Social Security card that Employer relied on in verifying his employment eligibility with respect to Section 2 of the July 2006 I-9 form.

{21} The June 2007 I-9 form does not contain an attestation by Worker that he is a lawful permanent resident, or his alien card number in Section 1; however, Worker provided a resident alien card with a number for purposes of Section 2, his reported birth date, as well as a social security card with the same name and number submitted eleven months earlier. The resident alien card was presented to Employer's representative by Worker as evidence of his eligibility to work in the United States. By providing his signature in Section 1, Worker was aware of the federal penalties for providing false documentation in connection with the completion of the I-9 forms. Worker also provided his resident alien card and social security card when he sought authorization for medical examination or treatment that was authorized by Norma Ramirez, Employer's representative. Thus, Worker's failure to complete the attestation provision did not give Employer a reason to question Worker's resident alien status.

{22} As we noted previously, Worker challenges finding of fact number 22—"[t]he [July] 2006 I-9 [form] contains no omissions." We assume that Worker's argument is directed at his failure to include a resident alien number in Section 1. Worker does not direct us to any legal authority that the resident alien number is required. *See Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482 ("Where a party cites no authority to support an argument, we may assume no such authority exists."). Nor were we able to find such a requirement in IRCA. *See* § 1324a(b)(1)(B)(ii) ("Documents establishing both employment authorization and identity. A document described in this subparagraph is an individual's resident alien card, alien registration card, or other document designated by the Attorney General[.]"); § 1324a(b)(2) ("Individual attestation of employment authorization[.] The individual must attest, under penalty of perjury on the form designated . . . , that the individual is . . . an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter or by the Attorney General to be hired, recruited, or referred for such employment.").

{23} Worker argues that because he was assisted in completing the July 2006 I-9 form, the "Preparer and/or Translator Certification" should have been filled out. While Worker contests finding of fact number 19—Worker did not need help in completing Section 1—he does not challenge finding of fact number 18, that the "[e]vidence supports that Worker completed Section 1, [I-9 form] at Employer's main office." This finding supports the WCJ's determination that Worker did not require assistance in completing Section 1, therefore the certification did not need to be completed on either I-9 form. *See Seipert v. Johnson*, 2003-NMCA-119, ¶ 26, 134 N.M. 394, 77 P.3d 298 ("An unchallenged finding of the [lower] court is binding on appeal."). Worker does not direct us to anywhere in the record that would explain the assistance he claims to have received in filling out the July 2006 I-9 form, and we decline to presume what any such assistance entailed. *See Chan v. Montoya*, 2011-NMCA-072, ¶ 9, 150 N.M. 44, 256 P.3d 987 ("It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence." (internal quotation marks and citation omitted)).

{24} There was no testimony or evidence presented at trial that suggests Employer had knowledge of Worker's undocumented status when he was initially hired in 2006. Instead, there is evidence to support that Employer was deceived by Worker in the hiring process when Worker knowingly presented false identification documentation that Employer accepted in good faith and believed to be legitimate upon inspection. Although we acknowledge that Employer made mistakes in completing Worker's I-9 forms, we hold that Worker's actions in providing numerous forms of false identification makes him the more culpable party. Therefore, we hold that Worker is unable to benefit from such wrongdoing by receiving modifier benefits.

{25} Worker encourages us to adopt the Ninth Circuit's reasoning in *Ketchikan Drywall Services, Inc. v. Immigration & Customs Enforcement*, 725 F.3d 1103 (9th Cir. 2013), as a basis for rejecting Employer's affirmative defense. Under Worker's proposal, an undocumented worker would be able to benefit from knowingly presenting false identification if the employer failed to strictly comply with IRCA. *Ketchikan* is distinguishable from this case.

{26} As a result of an audit of its I-9 forms, the *Ketchikan* employer received a warning notice from the Immigration and Naturalization Service (INS). 725 F.3d at 1108. Eight years later, the Immigration and Customs Enforcement (ICE) served employer with a notice of inspection and an administrative subpoena requesting original I-9 forms and attached documentation presented for completion of the I-9 forms for a period of three years. *Id.* ICE served an amended "Notice of Intent to Fine (NIF)" charging employer with four counts: (1) for 43 employees' failure to provide an I-9 form at all; (2) for 65 employees, Section 1—the employee information and attestation—was incomplete; (3) for 110 employees, Section 2—the employer or authorized representative review and verification—was incomplete; and (4) for 53 employees there were omissions in both sections. *See id.* at 1108-09. One of employer's arguments was that any deficiencies in the forms were merely technical or procedural in spite of its good faith attempt to comply with its statutory obligations. *See id.* at 1111-12. The *Ketchikan* court relied on the "Virtue Memorandum," which was an INS interim guideline from its "Acting Exec[utive] Comm[issioner] of Programs [for] Section 274A(b)(6) of the Immigration and Nationality Act [a]dded by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [(IIRIRA)]." *Ketchikan*, 725 F.3d at 1112. "The IIRIRA amended several parts of the . . . [INA]." *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084, 1087 (10th Cir. 2007). *Ketchikan* noted that the Virtue Memorandum provided a "detailed, concrete guidance for dealing with omissions that might appear on an I-9 [f]orm, indicating that the agency did indeed consider the issue thoroughly." 725 F.3d at 1112. However, the court also noted that "the agency ha[d] not fully explained the rationale underlying its guidance," but that "it ha[d] drawn the distinction between substantive violations and technical or procedural violations in a common-sense manner." *Id.* (internal quotation marks omitted).

{27} If we were to rely on *Ketchikan*, we would essentially be equating a state administrative workers' compensation proceeding with a federal administrative immigration

proceeding involving the requisite federal enforcement agency, ICE, and all that goes with it. We decline to do so. In the federal proceeding, an employer would have the benefit of at least an audit that would give employer notice that there is a problem with the I-9 form. *See* § 1324a(b)(6)(A) (stating that the presumption is that an employer has in good faith complied with the requirements, notwithstanding a technical or procedural failure to meet a requirement, and, if there is a failure to comply, the employer is provided with an explanation and time to correct any failures). If we relied on *Ketchikan*, Employer would be denied that opportunity to correct any omissions in a workers' compensation proceeding involving an individual worker. Under the circumstances of this case, strict compliance with IRCA is not consistent with the required balancing of interests the Act requires, as articulated by our Supreme Court in *Gonzalez*, and we therefore reject such an approach in this case.

CONCLUSION

{28} For the foregoing reasons, we affirm the WCJ's compensation order.

{29} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

J. MILES HANISEE, Judge

Certiorari Denied, March 28, 2018, No. S-1-SC-36917

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-029

No. A-1-CA-35518 (filed February 6, 2018)

NATIONSTAR MORTGAGE LLC, d/b/a
CHAMPION MORTGAGE COMPANY,
Plaintiff-Appellant,
v.
SHEILA J. O'MALLEY,
Defendant-Appellee,
and
TIMOTHY W. O'MALLEY, IF LIVING;
IF DECEASED THE UNKNOWN HEIRS
OF TIMOTHY W. O'MALLEY, DECEASED;
UNITED STATES OF AMERICA BY AND THROUGH
THE SECRETARY OF HOUSING
AND URBAN DEVELOPMENT; OCCUPANTS
OF THE PROPERTY,
Defendants.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
Sarah C. Backus, District Judge

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MCCARTHY & HOLTHUS, LLP
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Opinion

Henry M. Bohnhoff, Judge

{1} Plaintiff Nationstar Mortgage, LLC, d/b/a Champion Mortgage Co. (Nationstar), appeals the district court's order granting summary judgment in favor of Defendant Sheila J. O'Malley. The district court ruled that, pursuant to NMSA 1978, Section 40-3-13 (1993), a mortgage of residential property that Mrs. O'Malley's husband executed in favor of Nationstar was void because Mrs. O'Malley did not execute it as well. We hold that the mortgage was valid, because Mrs. O'Malley earlier had entered into a sole and separate property agreement that transmuted the couple's community property to her husband's separate property. We therefore reverse the summary judgment.

BACKGROUND

A. Factual History

{2} The salient facts are undisputed. In September 2010, Timothy (Husband) and Sheila (Wife) O'Malley acquired residential property in Taos, New Mexico (the Property); the deed conveyed title to them as joint tenants with right of survivorship. According to Wife's affidavit supporting her motion for summary judgment, Husband was an attorney and handled the couple's assets and finances. In early 2012, the O'Malleys were interested in purchasing an adjoining lot. "At that time, my husband had me sign some documents in order to purchase the adjacent lot and combine it with the Property." One of those papers apparently was a "SOLE AND SEPARATE PROPERTY AGREEMENT AND CONVEYANCE" (SSPAC), which Husband and Wife executed in the presence of a notary on March 7, 2012. The SSPAC provides as follows:

> Pursuant to [NMSA 1978, Section 40-3-8(A)(5) (1990)], Timothy W. O'Malley and Sheila J. O'Malley, husband and wife, agree that the property described as [Property's legal description] is hereby designated as the separate property of Timothy W. O'Malley. Sheila J. O'Malley hereby expressly grants and conveys the above property to Timothy W. O'Malley with special warranty covenants. Sheila J. O'Malley further, expressly waives, relinquishes and releases any and all right, title, claim or interest in and to the above described property heretofore or hereafter acquired.

{3} The contemplated purchase of the adjoining lot did not occur. Instead, on April 16, 2012, Husband executed in favor of MetLife Home Loans, a division of MetLife Bank, N.A. (MetLife), an "Adjustable Rate Note (Home Equity Conversion)" and an "Adjustable Rate Deed of Trust (Home Equity Conversion)." The deed of trust states that, "THIS DEED OF TRUST SECURES A REVERSE MORTGAGE LOAN," and the parties otherwise characterize the transaction as a reverse mortgage loan transaction.[1] Both the SSPAC and the deed of trust (Reverse Mortgage) were recorded with the Taos County Clerk on April 20, 2012. The SSPAC's and Reverse Mortgage's recording information show filing times of 2:08:25 p.m. and 2:08:27 p.m., respectively.

{4} On June 1, 2012, Husband deeded the Property to himself and Wife "as joint tenants with right of survivorship," i.e., the deed returned the Property to its pre-March 7, 2012, ownership status.

[1]With a reverse mortgage loan transaction, the debtor does not make any monthly payments of principal and interest, and instead the interest accumulates. Upon a specified event, e.g., the death of the debtor(s), the debt becomes due. United States Fed. Trade Comm'n, "Reverse Mortgages,"*available at* http://www.consumer.ftc.gov/articles/0192-reverse-mortgages.

{5} On October 22, 2012, MetLife assigned the Reverse Mortgage to Nationstar, which is a business name of Champion Mortgage Company. The assignment was recorded on November 8, 2012.

{6} In the interim, Husband died on June 30, 2014. Wife states in her affidavit that she was not aware of the reverse mortgage transaction until sometime after her husband's passing when she received correspondence from Nationstar.

B. Procedural History

{7} In December 2014, Nationstar filed its complaint with the district court, seeking a judgment foreclosing on its security interest in the Property pursuant to the Reverse Mortgage and authorization to sell the Property to satisfy the underlying debt that Nationstar alleged totaled approximately $375,000. Nationstar did not claim that Wife was personally liable for the debt. In her answer, Wife generally denied or stated her lack of knowledge with respect to the complaint's allegations, but also asserted without elaboration affirmative defenses of "lack and failure of consideration," "mistake," and "fraudulent conduct and bad faith" on the part of Nationstar.

{8} In December 2015, Wife filed a motion (the Motion) to dismiss the complaint for failure to state a claim, or in the alternative, for summary judgment. Based solely on her aforementioned affidavit testimony that "my husband had me sign some documents in order to purchase the adjacent lot and combine it with the Property," Wife asserted in her statement of undisputed material facts that, "Mr. O'Malley had [Mrs.] O'Malley sign a [SSPAC] under the pretense that it was necessary to facilitate the purchase of the adjacent lot and combine it with the Property." However, in her motion Wife did not otherwise claim, or even suggest, fraudulent or other nefarious conduct on the part of Husband, much less MetLife. On the contrary, her argument was strictly legal: the Property was community property; pursuant to Section 40-3-13 and NMSA 1978, Section 47-1-7 (1901), the Reverse Mortgage was void both because Wife did not sign it and because the March 7, 2012, SSPAC was not recorded before the Reverse Mortgage was executed. Similarly, she contended that, because the June 1, 2012, deed reconveyed the Property to Husband and Wife, the subsequent assignment of the Mortgage from MetLife to Nationstar was void as well because both Husband and Wife failed to sign it. On the same day, Wife moved for a protective order excusing her from responding to what she characterized as "voluminous sets of discovery" propounded by Nationstar until after the district court ruled on her Motion.

{9} Nationstar timely responded in opposition to the motion for protective order but not the Motion. However, on January 21, 2016, Nationstar moved for leave to file a response to the Motion with a copy of the proposed substantive response attached. Nationstar argued therein that: pursuant to Section 40-3-8(A)(5), the Property was transmuted to Husband's separate property on March 7, 2012, as a result of Wife's execution of the SSPAC; the SSPAC was effective as against Wife notwithstanding the fact that it was not immediately recorded; Section 40-3-13 and Section 47-1-7 did not invalidate the Reverse Mortgage because as of April 16, 2012, the Property was no longer community property and, among other reasons, the SSPAC was not a power of attorney; because the Reverse Mortgage was not community property, Section 40-3-13 did not invalidate the October 22, 2012, assignment. Nationstar did not dispute Wife's statement of undisputed material facts. However, Nationstar requested that, assuming the district court did not deny the Motion on the basis of these legal arguments pursuant to Rule 1-056(F) NMRA, the district court should postpone ruling on the request for summary judgment until after Nationstar had an opportunity to conduct discovery.

{10} The district court scheduled a motions hearing for February 3, 2016. The morning of the hearing, Nationstar's counsel filed an affidavit pursuant to Rule 1-056(F), asserting that, in order to respond fully to Wife's summary judgment request, Nationstar needed answers to the discovery it already had propounded—and which was the subject of Wife's protective order motion—and might need additional discovery regarding "the facts surrounding . . . Defendant's acquisition of the property at issue, the execution and recording of the [SSPAC], the execution and recording of the [Reverse] Mortgage, . . . and the reconveyance of the property to [Husband and Wife]."

{11} During the hearing, the district court stated that, in view of the affidavit and documents attached and referred to in the Motion, it would treat the Motion as one for summary judgment. The court asked Wife's counsel to address Nationstar's argument that it would need additional time to conduct discovery. Wife's counsel stated that he did not believe there was a disputed issue of fact that was necessary to resolve the case, but also argued that the Rule 1-056(F) affidavit was not sufficiently specific and Nationstar had not disputed Wife's statement of undisputed material facts. The district court characterized Wife's motion as a legal argument, but then indicated its understanding that Wife's position was that she signed the SSPAC under false pretenses, that she thought it was executed for purposes of acquiring the adjoining lot and it was not given for purposes of the reverse mortgage. Wife's counsel responded by stating that those facts were not needed to rule on the motion.

{12} The district court then ruled that it would grant Wife's motion. As grounds for its ruling, the court stated that Wife had made a prima facie showing that she was entitled to summary judgment and that Nationstar had not come forward with any facts to rebut that showing and that it would not be able to proffer any facts even if it was permitted additional discovery. In its written order, the district court deemed Wife's statement of undisputed material facts admitted by Nationstar, and stated that Wife had made a prima facie showing of entitlement to summary judgment based on Section 40-3-13, Nationstar had not rebutted that showing, and additional discovery was not necessary for adjudicating the Motion. Nationstar appeals.

DISCUSSION

{13} We review the district court order granting summary judgment under a de novo standard of review. *Cain v. Champion Window Co.*, 2007-NMCA-085, ¶ 6, 142 N.M. 209, 164 P.3d 90.

A. Relevant Statutes

{14} Section 40-3-8(A)(5), part of the Community Property Act of 1973 (the Act), NMSA 1978, Section 40-3-6 to -17 (1973, as amended through 1997), provides in pertinent part as follows:

> A. "Separate property" means:
>
> . . . .
>
> (5) property designated as separate property by a written agreement between the spouses, including a deed or other written agreement concerning property held by the spouses as joint tenants or tenants in common in which the property is designated as separate property.
>
> B. "community property" means property acquired by either or both spouses during marriage which is not separate

> property. Property acquired by a husband or wife by an instrument in writing whether as tenants in common or as joint tenants or otherwise shall be presumed to be held as community property unless such property is separate property within the meaning of Subsection A of this section.

Section 40-3-8(A)(5), (B). Under Section 40-3-8(B), any property that is acquired by the marital community during marriage is presumptively community property. Section 40-3-12(A); *English v. Sanchez*, 1990-NMSC-064, ¶ 11, 110 N.M. 343, 796 P.2d 236; *Arch, Ltd. v. Yu*, 1988-NMSC-101, ¶ 7, 108 N.M. 67, 766 P.2d 911. Thus, the contours of community property are defined by the exclusions articulated in Section 40-3-8(A), one of which is property that is the subject of a sole and separate property agreement signed by both spouses. *See, e.g.*, *Estate of Fletcher v. Jackson*, 1980-NMCA-054, ¶ 46, 94 N.M. 572, 613 P.2d 714.

{15} Section 40-3-13 provides in pertinent part as follows:

> A. Except for purchase-money mortgages and except as otherwise provided in this subsection, the spouses must join in all transfers, conveyances or mortgages or contracts to transfer, convey or mortgage any interest in community real property and separate real property owned by the spouses. . . in joint tenancy or tenancy in common[.]
>
> Any transfer, conveyance, mortgage. . . or contract to transfer, convey, [or] mortgage . . . any interest in the community real property or in separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common attempted to be made by either spouse alone in violation of the provisions of this section shall be void and of no effect[.]
>
> Except as provided in this section, either spouse may transfer, convey, [or] mortgage . . . separate real property without the other's joinder.
>
> B. Nothing in this section shall affect the right of one of the spouses to transfer, convey, [or] mortgage . . . any community real property or separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common without the joinder of the other spouse, pursuant to a validly executed and recorded power of attorney as provided in Section 47-1-7[.]

Section 40-3-13(A), (B).

{16} Section 40-3-13, while also part of the Act, is derived from predecessor statutes that generally required both spouses to join in the execution of certain real estate transactions. *See* 1915 N.M. Laws, ch. 84, § 1; 1907 N.M. Laws, ch. 37, § 16. The law was prompted by a perceived need to "protect [a] wife's interest in community property from her husband's otherwise almost exclusive control." *English*, 1990-NMSC-064, ¶ 14. Wife urges on the basis of case law precedent that the statute should be broadly construed to void mortgages and conveyances executed by married individuals where their spouses do not also sign the instrument. She overstates the holdings of the cases. New Mexico courts consistently have ruled that an attempted conveyance of community property not joined in by both spouses is void and a nullity as opposed to only voidable. *See, e.g.*, *Jenkins v. Huntsinger*, 1942-NMSC-011, ¶ 14, 46 N.M. 168, 125 P.2d 327. Indeed, in *Hannah v. Tennant*, 1979-NMSC-009, ¶ 10, 92 N.M. 444, 589 P.2d 1035, our Supreme Court held that a buyer on a real estate purchase agreement could raise, as an affirmative defense to the selling spouses' suit to enforce the agreement, the fact that one of the selling spouses had not joined in executing the agreement, notwithstanding the fact that both selling spouses later joined as plaintiffs in the specific performance action. In recent years, however, there has been no further expansion of Section 40-3-13 beyond its plain language. In 1995, the Legislature effectively mooted *Hannah*'s holding by adding the second sentence of Section 40-3-13(B), which permits a non-signing spouse to ratify an otherwise void transfer, conveyance, or mortgage. *See* N.M. Laws 1993, ch. 165, § 1. In *English*, our Supreme Court declined "to expand the application of a nullity or wholly-void doctrine beyond its present limits. . . . [A] sales contract, valid at the time of execution, is valid as to after-acquired separate property, once transmuted by written agreement between the spouses." 1990-NMSC-064, ¶¶ 20, 22. In *Huntington Nat'l Bank v. Sproul*, 1993-NMSC-051, ¶ 31, 116 N.M. 254, 861 P.2d 935, the Court declined to read into Section 40-3-13 "non-existent" language to require joinder of both spouses in creation of community debt that might later be satisfied out of community property when the creditor obtains and records a judgment.

{17} Past judicial construction of Section 40-3-13 has simply applied the statute in accordance with its plain language, in particular, that "void and of no effect" means exactly that. Thus, one lesson of these decisions is that it is important to carefully read the language of the statute. In particular, Section 40-3-13 nullifies transfers, conveyances, and mortgages signed by only one spouse only if the subject property is community property. If at the time of the transaction the property is separate property, Section 40-3-13 is simply inapplicable.

{18} *English* illustrates this point. Donald English entered into a real estate contract to sell a parcel of land to the Sanchezes: upon the Sanchezes' completion of a series of installment payments over time, Donald would deliver a deed for the parcel. At the time the contract was executed, however, title to the parcel was held by a corporation owned by Donald and his wife, Emma. Donald, as president of that corporation, subsequently deeded legal title to the property to another corporation that he and Emma owned. Some years later, the Sanchezes defaulted on their payments under the contract. At that point Donald, as president of the second corporation, conveyed it to himself and then brought suit to enforce the contract against the Sanchezes. The Sanchezes moved for summary judgment, claiming that Section 40-3-13 invalidated Donald's title. At that point, and prior to the district court's consideration of the summary judgment motion, Donald and Emma entered into an agreement designating the parcel as Donald's separate property. *English*, 1990-NMSC-064, ¶ 4.

{19} Our Supreme Court initially noted that, because the doctrine of after-acquired property, *see, e.g.*, *Hays v. King*, 1989-NMSC-078, ¶ 8, 109 N.M. 202, 784 P.2d 21 (adopting the doctrine), permits a person to "enter into a valid contract to sell real estate to which he has no title, provided he is able to carry through with the transaction after the final payment is made or tendered," the fact that Donald originally did not hold title to the parcel personally did not necessarily bar him from enforcing the real estate contract. *English*, 1990-NMSC-064, ¶ 7. The Court next determined that Section 40-3-13 did not

invalidate the original transaction based on Emma's failure to sign the real estate contract, because at that time the parcel was not community property but rather corporate property and a corporation can convey corporate real estate "without the restrictions placed upon the sale of community real property." *English*, 1990-NMSC-064, ¶ 8. "At that time the contract did not attempt to convey an interest in community real property." *Id.* ¶ 20; *cf. Dotson v. Grice*, 1982-NMSC-072, ¶ 10, 98 N.M. 207, 647 P.2d 409 (holding that upon contribution of property owned by a married couple to general partnership, it no longer has community property status and Section 40-3-13 is not applicable; instead, its conveyance is governed by partnership law). The Court then determined that, when Donald took title to the parcel from the corporation, it became community property. At that juncture, "the contract was void as to after-acquired community property[.]" *English*, 1990-NMSC-064, ¶ 13. However, the transmutation of the parcel into separate property changed the result:

> [A] sales contract, valid at the time of execution, is valid as to after-acquired separate property, once transmuted by written agreement between the spouses. The fact that the property was held for an interim as an asset of the community may have rendered the contract void for purposes of selling community property, but the interim holding of the property by the community need not void the contract for the purpose of selling separate property that is acquired through transmutation.

Id. ¶ 22.

{20} Section 47-1-7, incorporated by reference in Section 40-3-13(B), provides as follows:

> All powers of attorney or other writings containing authority to convey real estate, as agent or attorney of the owner of the same, or to execute, as agent for another, any conveyance of real estate, or by which real estate may be affected in law, or equity, shall be acknowledged, certified, filed and recorded, as other writings conveying or affecting real estate are required to be acknowledged. No such power of attorney, or other writing, filed and recorded in the manner prescribed in this section, shall be considered revoked by any act of the party executing the same, until the instrument of writing revoking the same, duly acknowledged and certified to, shall be filed for record and recorded in the office of the county clerk where said power of attorney or other writing is filed and recorded.

D. The SSPAC Was Not Void as a Result of Wife's Non-Joinder or the Delay in Recording It

1. The Property Was Separate Property When the SSPAC Was Executed

{21} Relying on *Hannah*, Wife contends that because she did not join in it and she had not given Husband a power of attorney, pursuant to Section 40-3-13(A) and (B), the Reverse Mortgage was void. Wife's argument assumes, however, that the Property was community property as of April 16, 2012, when the Reverse Mortgage was executed. As our Supreme Court observed in *English*, "The chain of title to this property and its relation to the time the [Reverse Mortgage] was executed are important factors in the resolution of the questions raised in this appeal." 1990-NMSC-064, ¶ 7. The March 7, 2012 SSPAC, which Wife acknowledges she signed, rebuts the presumption that the Property was community property on April 16, 2012. Instead, the SSPAC transmuted the Property into Husband's separate property and he had authority to unilaterally grant a mortgage.

2. Recording Was Not Necessary for the SSPAC To Be Effective Against Wife

{22} As noted above, Wife cannot claim that the Reverse Mortgage was void as a result of being recorded before the SSPAC: the SSPAC was recorded first in time. Instead, and to nullify the otherwise obvious effect of the SSPAC, she finds significance in the fact that Husband must have *executed* and/or *delivered* the Reverse Mortgage to Nationstar at some time prior to the recording of the SSPAC. On that basis, she maintains her position that the Reverse Mortgage was void for lack of her joinder. This argument fails for three reasons.

{23} First, the SSPAC itself does not require that it be recorded to be effective. On the contrary, in the SSPAC Husband and Wife agreed "that . . . [the Property] is *hereby* designated as the separate property of [Husband]." (Emphasis added.) "Hereby" means "by this means; esp[ecially]: by means of this act or document." *Webster's Third New Int'l Dictionary* 1058-59 (Unabridged ed. 2002). In the context of the SSPAC, the word most reasonably connotes Husband's and Wife's understanding that the transmutation of the Property from community property to separate property was effective on the document's execution as opposed to its recording. *Cf. Suchan v. Suchan*, 682 P.2d 607, 613 (Idaho 1984) (holding that married couple's agreement that separate property was "hereby declared to be community property" expressed intention "that the separate property described in the agreement was to be transmuted to community property immediately upon the execution of the agreement." (emphasis and internal quotation marks omitted)).

{24} Second, Section 40-3-8(A)(5) does not require that a sole and separate property agreement must be recorded to be effective. Indeed, we can infer from Section 47-1-7 that if the Legislature intends that a real estate instrument be effective only upon recording, it explicitly will so provide.

{25} Third, and perhaps most fundamentally, Wife was a party to and thus had actual knowledge of the SSPAC. NMSA 1978, Section 14-9-1 (1991), generally requires that deeds, mortgages and "other writings affecting the title to real estate" shall be recorded in the office of the clerk of the county in which the real estate is located. *Id.* But the failure to record an instrument affecting title to real estate generally does not invalidate it, particularly as against a party to the instrument or other person with actual knowledge of it, and instead only negates any constructive notice of it. "Generally, non-compliance with the recording statutes does not affect the validity of the instrument itself, but makes it ineffectual as constructive notice." *Amethyst Land Co. v. Terhune*, 2014-NMSC-015, ¶ 11, 326 P.3d 12. "The general rule is that an unacknowledged deed is binding between the parties thereto, their heirs and representatives, and persons having actual notice of the instrument." *Baker v. Baker*, 1977-NMSC-006, ¶ 4 n.1, 90 N.M. 38, 559 P.2d 415.

3. Section 47-1-7 Does Not Invalidate the SSPAC

{26} Wife, however, invokes Section 47-1-7's recording requirement, because it is incorporated into Section 40-3-13(B). By a fair reading of its terms, Section 47-1-7 requires that, to be effective, a power of attorney or other agreement authorizing one party to convey real property owned by

another must be recorded. Wife contends that the statute applies not only to powers of attorney and "other writings containing authority to convey real estate" but also to "all . . . other writings . . . by which real estate may be affected in law, or equity[.]" She characterizes the SSPAC as falling within both of these descriptions. Based on this legal premise, she insists that, because the Property had not been recorded at the point that the Reverse Mortgage was given, the Property remained as community property and, pursuant to Section 40-3-13, the Reverse Mortgage was void. We are not pursuaded.

{27} First, we reject Wife's broad construction of Section 47-1-7's first sentence to apply to, and require recording as a predicate to effectiveness of, not only all writings containing authority to convey real estate but also other writings "by which real estate may be affected in law, or equity." Doing so would conflict with the generally accepted rule, discussed above, that real estate instruments are effective as to their signatories and their privies and others with actual notice regardless of recording. Further, the second sentence of Section 47-1-7 indicates that "other writings" as used in the first sentence cannot be understood to refer to more than a power of attorney or other writing that is executed by one party and can be revoked. So limited, a sole and separate property agreement executed by two spouses does not fit within the scope of "other writing."

{28} Second, even assuming for the sake of argument that Section 47-1-7's recording requirement applied to more than just powers of attorney, Section 40-3-13(B) incorporates the statute only as it applies to powers of attorney. The scope of Section 47-1-7 is irrelevant to the construction of Section 40-3-13 except to the extent that Section 40-3-13(B)'s power of attorney exception to the both-spouse joinder requirement mandates that the power of attorney be recorded.

{29} Third, we reject Wife's characterization of the SSPAC as a power of attorney or other agreement containing authority to convey real estate that was subject to Section 47-1-7. Wife herself executed the SSPAC and conveyed the Property to Husband as his separate property. As a result, there simply was no need to authorize Husband to do anything on Wife's behalf with respect to her former interest in the Property. Consistent with that reality, the SSPAC states that the parties were entering into it pursuant to Section 40-3-8(A)(5), not Section 47-1-7.

{30} Fourth, and as stated above, the SSPAC was recorded. Therefore, even assuming Section 47-1-7 as incorporated into Section 40-3-13(B) was somehow applicable to the transaction at issue herein, its requirements were satisfied. "There is no requirement that an instrument be recorded within a particular period of time." *Amethyst Land Co.*, 2014-NMSC-015, ¶ 12. In addition, also as stated above, because Wife had actual notice of and in fact joined in the SSPAC, any failure to record it did not invalidate it as to her. *See id.* ¶ 11.

{31} Fifth, we reject the suggestion that the incorporation of Section 47-1-7 into Section 40-3-13(B) somehow changes the meaning of Section 40-3-13(A). Section 40-3-13(B) simply articulates an exception to Section 40-3-13(A)'s requirement that both spouses join in a mortgage, conveyance, or other transfer of community property. It does not alter the fact that one spouse remains free to unilaterally convey property that he or she holds as separate property. Compliance with Section 47-1-7—whatever its scope—as incorporated into Section 40-3-13(B) is necessary only if the transaction otherwise would be invalidated pursuant to Section 40-3-13(A). Thus, a spouse's authorization to convey real property is necessary only if the property is held by the community. Because the Property was Husband's separate property on April 16, 2012, Section 40-3-13 was wholly inapplicable.

{32} To conclude, Wife assumes that Section 40-3-13(A) requires both spouses join in any mortgage or conveyance of *any* property acquired during marriage unless the exception articulated in Section 40-3-13(B)—one spouse holds a power of attorney for the other spouse—is applicable. The flaw in Wife's analysis is that she fails to acknowledge that the scope of Section 40-3-13(A), by its terms, generally is limited to community property or separate property held as joint tenants or tenants in common. Because the SSPAC transmuted the Property from community property to Husband's separate property on March 7, 2012, Section 40-3-13 was simply inapplicable to the April 16, 2012, Reverse Mortgage transaction.

E. The October 22, 2012 Assignment of the Reverse Mortgage Was Not Void as a Result of Husband's and Wife's Non-Joinder

{33} Wife also argues, again on the basis of Section 40-3-13, and because the Property had reacquired its community property status as of June 1, 2012, that MetLife's October 22, 2012, assignment of the Reverse Mortgage to Nationstar was invalid for lack of her joinder. By Wife's logic, Husband's failure to sign the assignment also would operate to void it. While it is unclear whether the district court ruled on this argument in granting summary judgment in favor of Wife, we reject it.

{34} We note that the June 1, 2012, reconveyance of the Property to the marital community was not free and clear, and instead was subject to the Reverse Mortgage. "[T]he lien acquired by the mortgage upon the property . . . [cannot] be divested either by the levying of process upon the mortgaged property, or the sale thereof by the mortgagor, or under execution." *Chavez v. McKnight*, 1857-NMSC-001, ¶ 11, 1 N.M. 147. *See Avondale Shipyards, Inc. v. Tank Barge ETS 2303*, 754 F.2d 1300, 1309 (5th Cir.1985) (It is manifest that, according to settled security principles, the sale of property encumbered by a mortgage does not itself extinguish the lien of the mortgage.").

{35} The point of Section 40-3-13 is to bar one spouse from conveying or encumbering community property—or separate property held in joint tenancy or tenancy in common—without the consent or authorization of the other. Thus, Section 40-3-13(A) voids any such conveyance or mortgage "attempted to be made by [one] spouse alone." The statute does not void transactions such as mortgage assignments that, while they may affect community property, do not require the consent of *either* spouse. Even assuming *arguendo* that Husband and Wife otherwise might have standing as mortgagors to object to assignment of the Reverse Mortgage, *but cf. Flagstar Bank, FSB v. Licha*, 2015-NMCA-086, ¶ 18, 356 P.3d 1102 (stating that mortgagors lacked standing to challenge assignment of mortgage on basis of lack of consideration), *abrogated on other grounds by BOKF, N.A. v. Gonzalez*, No. A-1-CA-35691, 2017 WL 2099830, ¶ 3, ___-NMCA-___, ___ P.3d ___ (June 28, 2017) (non-precedential) (stating that mortgagors lacked standing to challenge assignment of mortgage on basis of lack of consideration), the terms of the Reverse Mortgage provided for its assignment at MetLife's option. Thus, the October 22, 2012, assignment was not subject to invalidation for failure to comply with Section 40-3-13.

F. Wife's "Pretense" Theory

{36} Wife claims on appeal that "MetLife was complicit in trying to circumvent [Section] 40-3-13" and that the SSPAC was "an unrecorded, fraudulently obtained, consideration-less conveyance of real community property[.]" We decline to address these contentions for two reasons.

{37} First, to our understanding, the district court did not base its decision on such an argument. It is true that near the end of the hearing on the summary judgment motion the district court stated its understanding of the import of the "under the pretense" phrase in Wife's statement of undisputed facts: Wife understood that the only purpose of the SSPAC was to facilitate the acquisition of the lot that adjoined her and her husband's residence. But Wife's counsel then added that this fact was not necessary to rule on the motion. Further, in its oral explanation of its ruling, the court stated that Nationstar would not be able to rebut Wife's case for summary judgment even assuming it was permitted its requested additional discovery which included, among other subjects, the facts surrounding Husband's and Wife's signing of the SSPAC. For that reason, the district court denied Nationstar's request that the court postpone ruling on the motion until after it could conduct discovery. We understand from these statements that the district court did not rely on any consideration of possible mistake or fraud in reaching its decision, and instead ruled solely on the basis of Wife's legal arguments regarding the meaning of Sections 40-3-13 and 47-1-7.

{38} Second, while as a general matter this Court will affirm the district court if its decision is right for any reason, even one that it did not consider, *see Hawkins v. McDonald's*, 2014-NMCA-048, ¶ 23, 323 P.3d 932, we will not consider bare assertions that are not developed and supported by legal authority and analysis. *See, e.g.*, *Curry v. Great Nw. Ins. Co.,* 2014-NMCA-031, ¶28, 320 P.3d 482 (declining to address argument where appellee provided no authority); *State ex rel. Office of State Eng'r v. Lewis*, 2007-NMCA-008, ¶ 74, 141 N.M. 1, 150 P.3d 375 (declining to address the issue where appellant provided no supporting "evidence, discussion, or authority"); *Los Alamos Nat'l Bank v. Martinez Surveying Servs., LLC*, 2006-NMCA-081, ¶ 25, 140 N.M. 41, 139 P.3d 201 (declining to address argument where appellee provided no authority, *overruled on other grounds by Miller v . THI of N.M.*, No. A-1-CA-29459, 2009 WL 6575071, ___-NMCA-___, ¶ 1, ___ P.3d ___ (Aug. 28, 2009) (non-precedential). Wife never developed her "pretense" suggestion below. In her answer to Nationstar's complaint, Wife asserted without elaboration affirmative defenses of "lack and failure of consideration," "mistake," and "fraudulent conduct and bad faith" on the part of Nationstar. However, other than perhaps the possible[2] connotation implicit in the word "pretense," she did not discuss or even assert any of these or other claims of improper conduct on the part of Husband much less MetLife as a basis for voiding the SSPAC and thus summary judgment. Wife also has not developed those theories on appeal. In particular, she does not provide any legal authority or otherwise address any fraud- or mistake-based theory for voiding the SSPAC. Instead, she relies solely on her legal arguments about the scope and legal consequences of Section 40-3-13 and Section 47-1-7.

{39} Under these circumstances, we decline to address, as a possible basis for affirming, the unsupported possibility of wrongful conduct on the part of Nationstar or its predecessor-in-interest, MetLife, particularly where neither Wife's affidavit nor even her statement of undisputed material facts implicates MetLife in Husband's "pretense."[3] There are simply too many unanswered questions based on the current state of the record.

CONCLUSION

{40} On the basis of the summary judgment record before the district court, in particular, the SSPAC executed by Husband and Wife, Nationstar had rebutted the presumption that the Property was community property on April 16, 2012, when Husband executed the Reverse Mortgage. As a result, the Reverse Mortgage was not void pursuant to Section 40-3-13. Section 40-3-13 also did not operate to void the October 22, 2012, assignment of the Reverse Mortgage. For these reasons, the district court erred in granting summary judgment in favor of Wife. We therefore reverse the district court's grant of summary judgment and dismissal of Nationstar's complaint, and remand for further proceedings consistent with this opinion.

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

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

[2]"[P]resentation of what is deceptive or hypocritical" is only one of several definitions of "pretense." *Webster's Third Int'l Dictionary* 1797 (Unabridged ed. 2002).

[3]Similarly, because Wife has not raised any claims of breach of fiduciary duty or constructive fraud, it also is unnecessary to consider the discussion regarding adequacy of consideration and independent legal advice found in our recent opinion in *Gabriele v. Gabriele,* ___-NMCA-___, ___ P.3d ___ (No. A-1-CA-34523, Jan. 31, 2018).

Certiorari Denied, April 13, 2018, No. S-1-SC-36939

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-030

No. A-1-CA-34909 (filed February 28, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
PAUL SALAZAR,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
Stephen K. Quinn, District Judge

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for Appellee

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Opinion

Michael E. Vigil, Judge

{1} Defendant Paul Salazar appeals his convictions for one count of trafficking methamphetamine, contrary to NMSA 1978, Section 30-31-20 (2006), one count of distribution of synthetic cannabinoids, contrary to NMSA 1978, Section 30-31-22(A)(1) (2011), and one count of conspiracy to traffic methamphetamine or to distribute synthetic cannabinoids, contrary to NMSA 1978, Section 30-28-2 (1979). For the reasons that follow, we affirm Defendant's convictions.

BACKGROUND

{2} The State alleged that on August 15, 2013, Nicole Ramirez, at Defendant's direction, delivered methamphetamine and the chemicals PB-22 and 5F-PB22 hidden within hygiene products (deodorant sticks) to David Patrick, an inmate confined in the Curry County Detention Center (CCDC) in Clovis, New Mexico. Additional factual and procedural background is provided in our analysis as required.

DISCUSSION

{3} Defendant's appeal raises three issues. First, delay amounted to a violation of Defendant's right to a speedy trial. Second, the State failed to prove that the substances contained in the deodorant container were synthetic cannabinoids as defined under New Mexico law. Third, the State did not present sufficient evidence to sustain Defendant's convictions because it did not call Ms. Ramirez to testify at trial.

{4} Defendant also asserts four additional unpreserved issues, invoking either fundamental or plain error. First, the State should have charged Defendant with bringing contraband into the jail, not trafficking. Second, the district court erred in sentencing Defendant to second-degree conspiracy when the jury's finding was unclear. Third, comments made by the prosecutor during closing argument deprived Defendant of a fair trial. Fourth, the district court erred in admitting the testimony of Probation Officer Edie Barela (Officer Barela).

I. The Delay Did Not Violate Defendant's Speedy Trial Rights

{5} It took nineteen months and ten days to bring Defendant to trial on the counts charged in the State's criminal information. Based on this delay, Defendant contends that the delay violated his constitutional right to a speedy trial.

{6} The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, *see Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend. VI. In determining whether "a defendant has been deprived of his constitutional right to a speedy trial, [New Mexico appellate courts] use the four-factor test set forth in *Barker*[*v. Wingo*, 407 U.S. 514, 530 (1972)] balancing the length of delay, the reason for [the] delay, the defendant's assertion of the right to a speedy trial, and the prejudice to the defendant." *State v. Ochoa*, 2017-NMSC-031, ¶ 4, 406 P.3d 505. The appellate courts "defer to the district court's factual findings in considering a speedy trial claim, but weigh each factor de novo," *id.*, and consider the *Barker* factors on a "case-by-case basis." *Id.* ¶ 5. This analysis is also "not a rigid or mechanical exercise, but rather a difficult and sensitive balancing process." *Id.* (internal quotation marks and citation omitted).

A. Timeline of Delay in Defendant's Case

{7} We begin by setting forth the facts and circumstances surrounding the delays in bringing Defendant's case to trial. Defendant was arrested on September 12, 2013, and on September 30, 2013, the State filed the criminal information.

{8} On December 5, 2013, the first pretrial conference was held, at which time trial was set for February 25, 2014. On January 8, 2014, the State moved for a continuance. The district court granted the continuance on January 24, 2014, in part because the parties still had not received results from the forensic laboratory identifying the substances found in the deodorant sticks left by Ms. Ramirez at CCDC for Mr. Patrick.

{9} On May 29, 2014, the second pretrial conference was held and trial was set for September 9, 2014. The State represented that it had received the forensic laboratory results, updated its witness list, and was ready for trial. Defendant also informed the district court that he was ready for trial. Defendant also communicated to the district court that he wished to be transferred to a prison facility so that he could earn good time credit while the charges in his current case were pending.

{10} On July 9, 2014, new counsel entered an appearance on behalf of Defendant, and filed Defendant's first demand for a speedy trial.

{11} Between July 29, 2014, and September 8, 2014, the district judge was unavailable for medical reasons. On August 18, 2014, the district court filed an

amended notice of jury trial, rescheduling Defendant's trial for September 10, 2014. On August 29, 2014, Defendant moved for a six-month continuance in order to continue his investigation and conduct witness interviews. In this motion, Defendant waived all speedy trial claims for this period of continuance. The district court granted the continuance on September 3, 2014. However, on September 26, 2014, Defendant made his second demand for a speedy trial.

{12} On November 19, 2014, Defendant filed a motion to dismiss on speedy trial grounds due to the fact that fourteen months had passed since the time of his arrest.

{13} On November 24, 2014, a third pretrial conference was held where trial was set for January 22, 2015. The State represented that it was ready for trial. Defendant stated that although he still had investigation and witness interviews to conduct, he would do his best to be ready for trial by January 22, 2015.

{14} On December 17, 2014, a hearing on Defendant's motion to dismiss on speedy trial grounds was held; however, the district court reserved ruling on Defendant's motion until January 20, 2015, at which time Defendant's motion was denied.

{15} On January 20, 2015, at jury selection, Defendant moved for a second continuance of trial on grounds that additional time was needed to set a hearing for remaining motions and to consider the State's plea offer. The motion was granted.

{16} On February 5, 2015, a fourth pretrial conference was held, at which time trial was set for April 22, 2015. The State represented that it was ready for trial. Defendant renewed his motion to dismiss on speedy trial grounds and stated that he would be ready for trial on April 22, 2015.

{17} On March 2, 2015, Defendant filed a motion for reconsideration of the district court's order denying his November 19, 2014 motion to dismiss on speedy trial grounds. The hearing on Defendant's motion for reconsideration was held on March 27, 2015.

{18} On April 17, 2015, the district court denied Defendant's motion for reconsideration. The district court determined: (1) Defendant's case is an intermediate complexity case; (2) the time between the State's January 9, 2014 motion for a continuance and May 29, 2014 (the date on which the State represented that it was prepared for trial) did not count against Defendant; (3) the time during which the district judge was medically unavailable (between July 29, 2014, and September 8, 2014) did not count against either the State or Defendant; (4) the delay between September 8, 2014, and the April 22, 2015 jury trial counted against Defendant based on his August 29, 2014, and January 20, 2015, requested continuances; and (5) because Defendant's probation was revoked in December 2013 and for which he was incarcerated until April 2018, Defendant was not prejudiced by his pretrial incarceration arising in the instant case.

B. Length of Delay

{19} The first *Barker* factor, "length of delay, is both the threshold question in the speedy trial analysis and a factor to be weighed with the other three *Barker* factors." *Ochoa*, 2017-NMSC-031, ¶ 12. Under *Barker*, the states are "free to prescribe a reasonable period consistent with constitutional standards" for bringing a case to trial. 407 U.S. at 523; *Ochoa*, 2017-NMSC-031, ¶ 12. Our Supreme Court established speedy trial guidelines in *State v. Garza*, 2009-NMSC-038, ¶ 2, 146 N.M. 499, 212 P.3d 387. *Garza* holds that "the length of delay necessary to trigger the speedy trial inquiry [is] twelve months for simple cases, fifteen months for cases of intermediate complexity, and eighteen months for complex cases." *Id.* (holding "that these guidelines are merely thresholds that warrant further inquiry into a defendant's claimed speedy trial violation and should not be construed as bright-line tests dispositive of the claim itself").

{20} "When the length of delay exceeds a guideline, it must be weighed as one factor in determining whether there has been a violation of the right to a speedy trial[.]" *Ochoa*, 2017-NMSC-031, ¶ 14. "As the delay lengthens, it weighs increasingly in favor of the accused. In other words, a delay barely crossing the guideline is of little help to the defendant's claim, while a delay of extraordinary length weighs heavily in favor of the defendant." *Id.* (internal quotation marks and citation omitted). Our appellate courts "defer to the district court's finding of complexity" in a given case. *Id.* ¶ 15.

{21} Defendant was arrested on September 12, 2013. Nineteen months and ten days later, on April 22, 2015, Defendant's case was brought to trial. The district court concluded that Defendant's case was of intermediate complexity. *See State v. Montoya*, 2011-NMCA-074, ¶ 16, 150 N.M. 415, 259 P.3d 820 ("Cases of intermediate complexity . . . seem to involve numerous or relatively difficult criminal charges and evidentiary issues, numerous witnesses, expert testimony, and scientific evidence." (internal quotation marks and citation omitted)). Defendant's case was therefore delayed four months and ten days beyond the fifteen-month guideline for cases of intermediate complexity. This delay meets the threshold for further speedy trial analysis. We also conclude that under the circumstances, the first *Barker* factor weighs only slightly against the State. *See id.* ¶ 17 (holding that the delay of six months beyond the fifteen-month guideline for intermediate complexity case "was not so long or protracted as to weigh more than slightly against the [s]tate").

C. Reason for Delay

{22} The second *Barker* factor requires that we evaluate the reasons for delay in the defendant's case. *Ochoa*, 2017-NMSC-031, ¶ 18. *Barker* describes three types of delay: (1) "a deliberate attempt to delay the trial in order to hamper the defense[,]" which "should be weighted heavily against the government"; (2) "negligent or administrative delay[,]" which "weighs less heavily but nevertheless weighs against the [s]tate"; and (3) "neutral delay, or delay justified by a valid reason," which "does not weigh against either party." *Id.* (alteration, internal quotation marks, and citations omitted). Additionally, "delay initiated by defense counsel generally weighs against the defendant." *Id.*; *State v. Grissom*, 1987-NMCA-123, ¶ 34, 106 N.M. 555, 746 P.2d 661 ("Delay arising from hearing defendants' motions, not caused by the prosecution, is weighed against the defendant.").

{23} We agree with the district court's analysis that the time between the State's January 9, 2014 motion for a continuance and May 29, 2014 (the date on which the State stated that it was prepared for trial) was administrative delay that counts against the State. We also agree with the district court that the time during which the district court judge was medically unavailable (between July 29, 2014, and September 8, 2014) was neutral delay that does not count against either the State or Defendant. *See State v. White*, 1994-NMCA-084, ¶ 5, 118 N.M. 225, 880 P.2d 322 (holding that the district court judge's surgery and recovery time did not weigh against either side in speedy trial analysis). Finally, we agree with the district court's finding that the final delay between September 8, 2014, and the April 22, 2015 jury trial weighs against Defendant due to

the August 29, 2014 and January 20, 2015 continuances requested by defense counsel. Because four months and twenty days of delay are attributable to administrative delay by the State, one month and ten days of delay are attributable to neutral delay, but seven months and fourteen days of delay are attributable to Defendant, we conclude that the second *Barker* factor weighs against Defendant.

D. Assertion of the Right

{24} The third *Barker* factor requires that we consider whether the defendant asserted the right to a speedy trial. *Ochoa*, 2017-NMSC-031, ¶ 41. "The frequency and force" of the assertion of the right may be taken into account. *Id.* "On one hand, a single demand for a speedy trial is sufficient to assert the right. On the other hand, a defendant's assertion can be weakened by a defendant's acquiescence to the delay." *Id.* ¶ 42. "[T]he consistency of a defendant's legal positions with respect to the delay" are also considered. *Id*.

{25} From the date of his arrest to trial, Defendant asserted his right to a speedy trial on five occasions. First, upon entering his appearance on July 9, 2014, Defendant's second trial counsel made Defendant's first demand for a speedy trial. On August 29, 2014, however, Defendant moved for a six-month continuance in order to continue his investigation and conduct witness interviews. In this motion, Defendant waived "all speedy trial claims for this period of continuance." Approximately a month later, on September 26, 2014, Defendant made his second demand for a speedy trial. This demand was closely followed by Defendant's third demand for a speedy trial made in the form of a motion to dismiss on speedy trial grounds on November 19, 2014. However, upon the district court's denial of Defendant's motion to dismiss on speedy trial grounds on January 20, 2015, Defendant immediately moved for another continuance of trial, stating that additional time was needed to set a hearing for remaining motions and to consider the State's plea offer. Defendant asserted his right to a speedy trial for the fourth time on February 5, 2015, at the fourth pretrial conference. Defendant's final assertion of his right to a speedy trial came in the form of his March 2, 2015 motion for reconsideration of the district court's order denying his November 19, 2014 motion to dismiss on speedy trial grounds.

{26} Although Defendant's assertions of his right to a speedy trial were frequent, they lacked force and were further mitigated by Defendant's multiple motions for continuances, requests to the court for more time to conduct his investigation and interview witnesses, and requests to set motions hearings once the State had represented that it was ready for trial. *See State v. Flores*, 2015-NMCA-081, ¶ 31, 355 P.3d 81 (holding that "the force of a defendant's assertions [of his speedy trial right] is mitigated where he filed motions that were bound to slow down the proceedings, such as a motion asking for additional time, a motion to appoint new counsel, a motion to reset the trial, or other procedural maneuvers" (alteration, internal quotation marks, and citation omitted)). Accordingly, we conclude that the third *Barker* factor weighs against Defendant.

E. Prejudice

{27} The fourth *Barker* factor requires that we analyze the prejudice to the defendant as a result of the delay in bringing his case to trial. *Ochoa*, 2017-NMSC-031, ¶ 48. We assess prejudice "in the light of the interests of defendants which the speedy trial right was designed to protect. These interests are preventing oppressive pretrial incarceration, minimizing anxiety and concern of the accused, and limiting the possibility that the defense will be impaired." *Id.* (internal quotation marks and citation omitted).

{28} Defendant's sole claim of prejudice arising from his pretrial incarceration is that he "suffered from anxiety and concern" while the charges were pending and "lost the opportunity to earn good time on his probation violation." We reject this claim. Defendant received credit for six hundred and twenty-nine days presentence confinement, which spanned from the date of his arrest on September 12, 2013, through June 2, 2015, as well as credit for his post-sentence confinement from June 2, 2015, until delivery to the New Mexico Department of Corrections. Additionally, although Defendant may have experienced some anxiety and concern as a result of his pretrial incarceration, he has made no showing that such anxiety or concern was undue beyond bare allegations. *See Garza*, 2009-NMSC-038, ¶ 35 (stating that because "some degree of oppression and anxiety is inherent for every defendant who is jailed while awaiting trial[,]" this factor weighs in the defendant's favor "only where the pretrial incarceration or the anxiety suffered is undue."(alterations, internal quotation marks, and citation omitted)); *see also Ochoa*, 2017-NMSC-031, ¶ 61 (stating that where the defendant offered no affidavits, testimony, or documentation with respect to his specific circumstances of anxiety, the Court declined to speculate as to the particularized anxiety or concern he may have suffered); *State v. Spearman*, 2012-NMSC-023, ¶ 39, 283 P.3d 272 (declining to hold that the defendant suffered undue anxiety based on the bare allegations of defense counsel). Accordingly, we conclude that Defendant failed to establish prejudice cognizable under the fourth *Barker* factor.

F. Balancing the Factors

{29} Although Defendant established that his pretrial incarceration exceeded the guideline for intermediate complexity cases under the first *Barker* factor, for the reasons previously stated, we conclude that the remaining three factors (reasons for delay, assertion of the right, and prejudice) weigh against Defendant. Accordingly, we conclude that Defendant was not deprived of his constitutional right to a speedy trial.

II. The State Established That the Substances Found in the Deodorant Sticks Were Synthetic Cannabinoids as Defined Under New Mexico Law

{30} Defendant argues that when he was charged and tried for distribution of synthetic cannabinoids that the particular chemicals (5F-PB22 and PB-22) found in the deodorant sticks were not listed as controlled substances under the New Mexico Controlled Substances Act (CSA). *See* NMSA 1978, § 30-31-6(C)(19)(a)-(k) (2011). Accordingly, Defendant submits, "[t]he State failed to prove that the substance[s] inside the deodorant container w[ere] synthetic cannabinoids as prohibited" by New Mexico law.

{31} Defendant's claim raises a mixed question of law and fact. Whether chemicals identified as "synthetic cannabinoids" that are not specifically enumerated under Section 30-31-6(C)(19)(a)-(k) are excluded from control under the CSA is a question of statutory interpretation, which we review de novo. *See State v. Leong*, 2017-NMCA-070, ¶ 10, 404 P.3d 9 (stating issues of statutory interpretation are reviewed de novo). However, whether the State proved that the particular chemicals collected from the deodorant sticks as evidence in Defendant's case (5F-PB22 and PB-22) were "synthetic cannabinoids" as prohibited by law at the time Defendant was charged and tried in this case is a question of fact that we review for sufficient evidence. *See State v. Ross*, 2007-NMCA-126, ¶ 16,

142 N.M. 597, 168 P.3d 169 ("We review factual questions for sufficiency of the evidence[.]").

{32} We begin by determining whether chemicals identified as "synthetic cannabinoids" that are not specifically enumerated under §§ 30-31-6(C)(19)(a)-(k) are excluded from the CSA. "Our primary goal when interpreting statutory language is to give effect to the intent of the [L]egislature." *State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284. "We do this by giving effect to the plain meaning of the words of [the] statute, unless this leads to an absurd or unreasonable result." *State v. Marshall*, 2004-NMCA-104, ¶ 7, 136 N.M. 240, 96 P.3d 801. "If the language of the statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *State v. McWhorter*, 2005-NMCA-133, ¶ 5, 138 N.M. 580, 124 P.3d 215.

{33} The CSA expressly designates "synthetic cannabinoids" as Schedule I controlled substances, "including" eleven specific synthetic cannabinoids that are then listed. Section 30-31-6(C)(19)(a)-(k). Because the language of Section 30-31-6 is clear and unambiguous, we hold that "synthetic cannabinoids" is not limited to those that are listed in subsections (a) through (k) of Section 30-31-6(C)(19). The word "including" following the term "synthetic cannabinoids" expresses a clear legislative intent that the listing of specific examples of "synthetic cannabinoids" that follows is not exclusive. *See United Rentals N.W., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 13, 148 N.M. 426, 237 P.3d 728 ("Our caselaw . . . recognizes that the use of the word 'includ[ing]' to connect a general clause to a list of enumerated examples demonstrates a legislative intent to provide an incomplete list[.]"); *see also State v. Strauch*, 2015-NMSC-009, ¶ 37, 345 P.3d 317 (quoting the New Mexico Legislative Council Service's Legislative Drafting Manual 31 (2000, amended 2008) for the proposition that in a New Mexico statute "the word 'includes' implies an incomplete listing"); *In re Estate of Corwin*, 1987-NMCA-100, ¶ 3, 106 N.M. 316, 742 P.2d 528 ("A term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning by construction than where the definition declares what a term 'means.' It has been said the word 'includes' is usually a term of enlargement, and not of limitation. It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated." (omission, internal quotation marks, and citation omitted)); *Wilson v. Rowan Drilling Co.*, 1950-NMSC-046, ¶ 90, 55 N.M. 81, 227 P.2d 365 ("A statute which uses the word 'including' (certain things) is not limited in meaning to that included." (citation omitted)). Accordingly, all chemicals that are "synthetic cannabinoids"—not only those enumerated under Section 31-30-6(C)(19)(a)-(k)—are Schedule I substances, the possession, distribution, or trafficking of which is a violation of law. *See* Section 30-31-20; NMSA 1978, § 30-31-21 (1987); NMSA 1978, § 30-31-22 (2011); NMSA 1978, § 30-31-23 (2011)

{34} We therefore proceed to determine whether the State presented sufficient evidence that the chemicals collected from the deodorant sticks (5F-PB22 and PB-22) were "synthetic cannabinoids" under Section 31-30-6(C)(19) when Defendant was charged and tried. *See State v. Ramirez*, 2018-NMSC-003, ¶ 6, 409 P.3d 902 (stating that appellate courts determine "whether substantial evidence, either direct or circumstantial, exists to support every element essential to a conviction beyond a reasonable doubt").

{35} Here, Deputy Sandy Loomis of the Curry County Sheriff's Office, testified that the substances found in the deodorant sticks that Ms. Ramirez attempted to deliver to Mr. Patrick at CCDC were collected as evidence and sent to the State's forensic crime laboratory for analysis. Samuel Tony Titone, the State's expert in forensic chemistry, testified that he reviewed the analysis of the substances collected into evidence in Defendant's case. Based on his independent review of the crime lab's analysis, Mr. Titone concluded that the substances tested by the crime lab were methamphetamine and the chemicals 5F-PB22 and PB-22, which he testified are "synthetic cannabinoids." Mr. Titone testified that 5F-PB22 and PB-22 are categorized as synthetic cannabinoids because while completely synthetic, the chemicals mimic the effects of cannabis. Viewing the evidence in the light most favorable to the guilty verdict and indulging all reasonable inferences in favor of the verdict, we conclude that the State presented sufficient evidence to establish beyond a reasonable doubt that the chemicals collected from the deodorant sticks as evidence in Defendant's case (5F-PB22 and PB-22) were "synthetic cannabinoids" within the meaning of Section 31-30-6(C)(19).

III. The State Presented Sufficient Evidence to Support Defendant's Convictions

{36} Defendant argues that the State's case was founded on the theory that he directed Ms. Ramirez to drop off the hygiene items containing methamphetamine and synthetic cannibinoids at CCDC for Mr. Patrick. However, because the State did not call Ms. Ramirez to testify, Defendant contends there was a "missing link" in the State's case. Specifically, Defendant contends that the jury was asked to "surmise" that the phone calls between him and Mr. Patrick concerning landscaping, storage, and hygiene connected Defendant to the substances found in the deodorant container, "despite no physical evidence whatsoever linking him to these items." Therefore, because "[i]t is entirely possible that Ms. Ramirez decided on her own" to take the substances found in the deodorant container into the jail, Defendant maintains that "[h]er testimony was critical to this case" and the absence of which led to a failure by the State to prove any of the counts beyond a reasonable doubt.

{37} Again, we "view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Carrillo*, 2017-NMSC-023, ¶ 42, 399 P.3d 367 (internal quotation marks and citation omitted). The central consideration in sufficiency of evidence review is whether substantial direct or circumstantial evidence exists to support a verdict beyond a reasonable doubt as to all essential elements of the crimes for which the defendant was convicted. *State v. Suazo*, 2017-NMSC-011, ¶ 32, 390 P.3d 674. In jury trials, "the jury instructions are the law of the case against which the sufficiency of the evidence supporting the jury's verdict is to be measured." *State v. Duttle*, 2017-NMCA-001, ¶ 18, 387 P.3d 885 (internal quotation marks and citation omitted).

A. The Charges Under Counts 1-3 of the Criminal Information and the Evidence Presented at Trial

{38} Under Count 1, the jury was instructed that in order to find Defendant guilty of trafficking methamphetamine, the State was required to prove beyond a reasonable doubt the following elements of the crime:

> [D]efendant transferred methamphetamine or caused the transfer of methamphetamine or attempted to transfer methamphetamine

to another;

[D]efendant knew that it was methamphetamine or believed it to be methamphetamine or believed it to be some drug or other substance the possession of which is regulated or prohibited by law;

This happened in New Mexico on or about the 15th day of August, 2013.

{39} Under Count 2, the jury was instructed that in order to find Defendant guilty of distribution of marijuana or synthetic cannabinoids, the State was required to prove beyond a reasonable doubt the following elements of the crime:

[D]efendant transferred Marijuana or Synthetic Cannabinoids or caused the transfer of Marijuana or Synthetic Cannabinoids or attempted to transfer Marijuana or Synthetic Cannabinoids;

[D]efendant knew that it was Marijuana or Synthetic Cannabinoids or believed it to be Marijuana or Synthetic Cannabinoids or believed it to be some drug or other substance the possession of which is regulated or prohibited by law;

This happened in New Mexico on or about the 15th day of August, 2013.

{40} Finally, under Count 3, the jury was instructed that in order to find Defendant guilty of conspiracy to traffic controlled substances or distribute synthetic cannabinoids, the State was required to prove beyond a reasonable doubt each of the following elements of the crime:

[D]efendant and another person by words or acts agreed together to commit Trafficking of Controlled Substances or Distribution of Marijuana[;]

[D]efendant and another person intended to commit Trafficking of Controlled Substances or Distribution of Marijuana[;]

This happened in New Mexico on or about the 15th day of August, 2013.

{41} At trial, Officer Stephanie Marshall of CCDC, testified that on August 15, 2013, she came in contact with Ms. Ramirez, who was visiting CCDC to drop off hygiene products to Mr. Patrick. These hygiene products included shampoo, toothpaste, a toothbrush, and deodorant. Officer Marshall also testified that it is common practice for items being dropped off for inmates to be inspected by CCDC officers, and that she inspected the hygiene products dropped off by Ms. Ramirez for Mr. Patrick. During this inspection, Officer Marshall testified that she found a green leafy substance and crystal-like substance wrapped in small baggies the size of marbles in the bottom of the deodorant. Officer Marshall turned over the substances to her supervisor.

{42} Deputy Loomis testified that he was put in charge of the investigation of Defendant's case in part because he had access to the CCDC telephone call system and the ability to listen to telephone calls made to and from inmates in the facility. As part of his investigation, Deputy Loomis began listening to the recorded phone calls between Mr. Patrick and Defendant, and in particular the phone calls made between the two men shortly before and shortly after Ms. Ramirez's attempt to deliver the confiscated items to CCDC.

{43} Through his search of the CCDC phone system, Deputy Loomis picked up on four phone calls of interest made between Mr. Patrick, a known drug trafficker, and Defendant. The first call was made on August 13, 2013, at 4:09 p.m. The conversation proceeded as follows:

Defendant: Yesterday, my [inaudible] went to go get that. Didn't happen, bro. It wasn't ready.

Mr. Patrick: Oh, alright.

. . . .

Mr. Patrick: Okay, well, it probably won't be til tomorrow now because its like from 1 to 4 I think and 8 to 12.

. . . .

Mr. Patrick: Just see if she could pay that storage tomorrow or something, you know?

Defendant: Yeah. That's what he had told them, man, when she called up there. And he said no, we didn't receive no paperwork on it. She said she told him that storage was due and that . . . she needed to go . . . pay it. . . . And then she called back in that afternoon and they said that it wasn't done yet. So.

. . . .

Defendant: Now that I got paid though, bro, I'll make sure I get you some hygiene, bro.

Mr. Patrick: Okay, that's cool. I appreciate it.

Defendant: I know how it is, homey, I was in there too. I know what's up, dog.

{44} Deputy Loomis summarized the first telephone call conversation as follows. Mr. Patrick was releasing some money from his account to someone so that his "storage" could be paid—more specifically, it was Mr. Patrick's "storage" and Defendant was going to make sure it got paid. Defendant also stated that he was going to go get Mr. Patrick some "hygeine." From this conversation, Deputy Loomis concluded that Defendant was telling Mr. Patrick that he would obtain some "hygiene" and send something into the jail in the hygiene.

{45} The second call was made on August 14, 2013 at 3:54 p.m.—the day before Ms. Ramirez dropped off the hygiene products at the jail. The call proceeded as follows:

Mr. Patrick: I just talked to the sergeant about that money to get released. She said that they can come pick it up now.

Defendant: Oh, they can pick it up now? Because my sister called earlier, like about at noon bro, and the lady up front said that they had received no request from nobody in weeks to pick up any money or nothing.

. . . .

Mr. Patrick: Tell her to come up here and if they give her any problems, ask for Sergeant Lujan.

. . . .

Defendant: Alright, I'll do that for you and I'll make sure your storage gets paid, bro. Promise.

{46} Deputy Loomis summarized the second telephone call conversation as Mr. Patrick conveying to Defendant that the money was ready to be released to whomever was coming to pick it up, to which Defendant responded that he would send his sister and make sure the "storage" was paid.

{47} The third call was made on August 16, 2013, at 9:07 a.m. The call proceeded as follows:

Mr. Patrick: Whatever happened?

Defendant: Your storage got paid, perro.

Mr. Patrick: Oh, it did?

Defendant: Mmm hmm.

Mr. Patrick: I don't know, right on. I appreciate it. I've got some property. Did you send me some property.

Defendant: Yeah.

Mr. Patrick: Yeah? Cause I got a toothbrush and all that, but, but I thought you was gonna get . . . [inaudible]
Defendant: Oh shit. My bad.
Mr. Patrick: Yeah, cause nada.
Defendant: Hmm?
Mr. Patrick: Nada. Didn't get any.
. . . .
Mr. Patrick: What all did you get me?
Defendant: I sent my cousin to the store, you know what I mean? And I told her to get lotion, toothpaste, toothbrush, body wash, shampoo, and deodorant and deodorant. So I told her.
Mr. Patrick: Yeah, well there wasn't, what I. There was just a toothbrush, toothpaste, lotion, body wash. That was it.
Defendant: Damn. That's not what's up, bro. I'll go get on her ass then.
. . . .
Mr. Patrick: Check it out.

{48} Summarizing this conversation, Deputy Loomis testified that Mr. Patrick told Defendant that he did not get the deodorant that he was supposed to receive, to which Defendant responded that he would "get on" his cousin's "ass" about the problem. Based on this conversation, Deputy Loomis concluded that "the deodorant was the key, having that then been intercepted with the drugs in it and then he [Defendant] had emphasized the deodorant, saying it twice that that was where it was sent in at—that he [Defendant] had to know how it was being sent in."

{48} The fourth call was made on August 22, 2013. The call proceeded as follows.

Mr. Patrick: Did you ever ask your cousin?
Defendant: No.
Mr. Patrick: No?
Defendant: Nuh Uh.
Mr. Patrick: Shit.
Defendant: When I get paid bro, I mean, I didn't have the time to get you no hygiene or nothing, dog. But you know what I'm saying? Like I said I get busy homey. . . . I'll get around to it, dog. . . . I sent that person to go get some hygiene for me, man. I guess they didn't do it, dog. My bad, dog, you know what I'm saying?
Mr. Patrick: Yeah.
Defendant: Do you have enough to hold you up and stuff, dog?
Mr. Patrick: Yeah, til next week. You know what I'm saying?
Defendant: Yeah, I haven't had time to smoke and do shit, dog.
. . . .
Mr. Patrick: I don't need a toothbrush, you know what I'm saying? Just get all the other stuff if you can. You know what I'm saying?
Defendant: Okay, so except for the toothbrush, alright.
Mr. Patrick: Yeah, [inaudible] toothbrush, you know.
Defendant: Alright, I got you dog.
. . . .
Mr. Patrick: But yeah, but if you can try to do that for me this coming week. You know what I'm saying?
Defendant: I will. Hey, you need some of that money on your book dog, or what?
Mr. Patrick: I don't have anything right now, you know what I'm saying? I don't got no money.
. . . .
Defendant: Oh shit.
Mr. Patrick: I was kind of hoping to get some money. But that's cool, man. If you can, just get me some hygiene for next week, and I'll be alright.
Defendant: Alright, homey. I'll see what I can do, dog, okay?
Mr. Patrick: Okay, I appreciate it, dog.

{49} Summarizing this final conversation between Defendant and Mr. Patrick, Deputy Loomis testified that Mr. Patrick asked Defendant again about hygiene products that he wanted. Deputy Loomis testified that Defendant responded that he had not had time to get Mr. Patrick hygiene and that he had sent a person to do it, but guessed that the person had not followed through. Deputy Loomis also testified that in the over one-thousand jailhouse phone calls that he has reviewed in his career as an investigator that individuals arranging to bring contraband into the jail often use code words to describe their illegal activities. They frequently "use other words: delivery, stuff. Things that don't really fit into the conversation, but they don't raise a flag immediately."

{50} Based on all of the evidence available to him, Deputy Loomis testified that he concluded that in the four phone calls between Defendant and Mr. Patrick, the two were discussing that using Mr. Patrick's money from the jail, Defendant "was going to obtain contraband, illegal narcotics, and then send them into the jail through a third person in hygiene products."

B. Notwithstanding the Absence of Ms. Ramirez's Testimony, the Direct and Circumstantial Evidence Presented at Trial Was Sufficient to Support Defendant's Convictions

{51} First, the State presented substantial evidence to establish that Ms. Ramirez dropped off hygiene products containing methamphetamine and synthetic cannabinoids to Mr. Patrick while he was incarcerated at CCDC. The evidence showed that on August 15, 2013, Ms. Ramirez visited CCDC to drop off hygiene products to Mr. Patrick. These hygiene products included shampoo, toothpaste, a toothbrush, and deodorant. The evidence also showed that during an inspection of the hygiene products that Ms. Ramirez dropped off for Mr. Patrick, Officer Marshall found a green leafy substance and crystal-like substance wrapped in small baggies the size of marbles in the bottom of the deodorant sticks, which Officer Marshall turned over to her supervisor and which were later identified by the State's crime lab as methamphetamine and the synthetic cannabinoids: 5F-PB22 and PB-22.

{52} Additionally, viewing the evidence in the light most favorable to the guilty verdicts and indulging all reasonable inferences in favor of the verdicts, we conclude that the State presented substantial evidence to sustain Defendant's convictions beyond a reasonable doubt. The four phone calls between Defendant and Mr. Patrick showed that through the use of code words that the two were discussing, that with Mr. Patrick's money from the jail, Defendant "was going to obtain contraband" in the form of substances (methamphetamine and synthetic cannabinoids) that he knew to be illegal narcotics and then attempt to transfer them into the jail for Mr. Patrick. This was made evident circumstantially by Defendant and Mr. Patrick's telephone conversations discussing the release of money by Mr. Patrick to Defendant to pay his "storage" and purchase "hygiene" for Mr. Patrick, as well as by Defendant's emphasis on and Mr. Patrick's concern over the deodorant sticks that Defendant's "sister" or "cousin" (Ms. Ramirez) attempted to deliver to Mr. Patrick on August 15, 2013, which contained methamphetamine and synthetic cannabinoids.

{53} It was equally apparent circumstantially from the evidence that Defendant intended and agreed with another through words or acts to transfer methamphetamine and synthetic cannabinoids to Mr. Patrick in hygiene products. Through the telephone conversations between Defendant and Mr. Patrick, the State showed that an agreement was made between Defendant and Mr. Patrick and Defendant and Ms. Ramirez that Defendant would provide to his sister or cousin (Ms. Ramirez) methamphetamine and synthetic cannabinoids to transfer or attempt to transfer to Mr. Patrick in hygiene products. These agreements were evident by Defendant's surprise that the hygiene products, containing the methamphetamine and synthetic cannabinoids, which he had directed Ms. Ramirez to deliver to CCDC never actually made it to Mr. Patrick and by Defendant's statement that he would "get on" Ms. Ramirez's "ass" for failing to follow through with their agreement.

{54} Based on all of the direct and circumstantial evidence, we conclude that a reasonable juror could have found Defendant guilty of all counts, notwithstanding the absence of Ms. Ramirez's testimony at trial.

IV. Defendant's Remaining Claims of Fundamental and Plain Error

{55} "To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked." Rule 12-321(A) NMRA. However, "[t]his rule does not preclude a party from raising or the appellate court, in its discretion, from considering . . . issues involving . . . plain error[or] fundamental error[.]" Rule 12-321(B)(2)(b), (c). "The doctrine of fundamental error is applied only under extraordinary circumstances to prevent the miscarriage of justice." *State v. Maestas*, 2007-NMSC-001, ¶ 8, 140 N.M. 836, 149 P.3d 933. Fundamental error power is exercised only to correct injustices that shock the conscience of the court, a term that has been used in our appellate courts' precedents "both to describe cases with defendants who are indisputably innocent, and cases in which a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused." *State v. Barber*, 2004-NMSC-019, ¶ 17, 135 N.M. 621, 92 P.3d 633. Similarly, "[p]lain error applies only where the substantial rights of the accused are affected" and the claimed error "created grave doubts concerning the validity of the verdict." *State v. Miera*, No. A-1-CA-34747, 2017 WL 5794129, ___-NMCA-___, ¶ 13, ___ P.3d ___ (Nov. 27, 2017).

A. The State Properly Charged Defendant with Trafficking Methamphetamine

{56} Claiming fundamental error, Defendant argues that even assuming that the evidence was sufficient to establish that Defendant directed Ms. Ramirez to deliver methamphetamine to Mr. Patrick while he was incarcerated in CCDC, this conduct constituted being an accessory to bringing contraband into the jail, and should have been charged as such. *See* NMSA 1978, § 30-22-14(B), (C)(4) (2013) ("Bringing contraband into a jail consists of knowingly and voluntarily carrying contraband into the confines of a county or municipal jail." "[C]ontraband" includes "a controlled substance, as defined in the Controlled Substances Act[.]"); NMSA 1978, § 30-1-13 (1972) ("A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted[.]").

{57} Assuming without deciding that the State could have charged Defendant as an accessory to bringing contraband into a jail, the facts conceded by Defendant—that Defendant directed Ms. Ramirez to deliver methamphetamine to Mr. Patrick while incarcerated in CCDC—were also sufficient to charge him with trafficking methamphetamine. *See* § 30-31-20(A)(2)(c) (stating that " 'traffic' means the . . . distribution, sale, barter or giving away of . . . methamphetamine, its salts, isomers and salts of isomers"); *State v. Ogden*, 1994-NMSC-029, ¶ 20, 118 N.M. 234, 880 P.2d 845 ("So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his [or her] discretion." (alteration, internal quotation marks, and citation omitted)). Accordingly, we conclude that the prosecutor's decision to charge Defendant under the trafficking statute was well within the limits of its prosecutorial discretion and did not give rise to fundamental error. *See State v. Santillanes*, 2001-NMSC-018, ¶ 21, 130 N.M. 464, 27 P.3d 456 (stating that "the [s]tate has broad discretion in charging" criminal offenses (internal quotation marks and citation omitted)).

B. Defendant's Sentence to a Second Degree Felony for Conspiracy Did Not Give Rise to Fundamental Error

{58} Defendant next claims that the jury's verdict for Count 3 was unclear, and that as a result, his sentence to a second-degree felony was excessive and amounted to fundamental error. Defendant contends that the lack of clarity in the jury's verdict stemmed from the conspiracy instruction, which provided that the jury could convict Defendant of the charge in Count 3 if it found that he either conspired to traffic controlled substances "or" conspired to distribute synthetic cannabinoids. And since the jury was not asked to differentiate between the two allegations on the guilty verdict form for Count 3, that stated "[w]e find [D]efendant GUILTY of Count 3 Trafficking controlled substances (distribution)(narcotic or meth) - conspiracy[,]" Defendant contends that it was uncertain whether he was convicted of conspiracy to traffic controlled substances or conspiracy to distribute synthetic cannabinoids. Defendant therefore concludes that without a specific finding on the conspiracy charge, "he should have only been sentenced to the lesser penalty for conspiracy" to distribute synthetic cannabinoids.

{59} We agree with Defendant that there was a discrepancy in the drafting of the jury instruction and verdict forms for Count 3 in that the jury instruction, but not the verdict forms, distinguished between conspiracy to traffic controlled substances and conspiracy to distribute synthetic cannabinoids as alternative theories of guilt for Count 3. However, the district court's failure to give jury verdict forms for Count 3 that distinguished between conspiracy to traffic controlled substances and conspiracy to distribute synthetic cannabinoids did not invade Defendant's fundamental rights and did not give rise to fundamental error. *See State v. Herrera*, 1922-NMSC-035, ¶¶ 1-3, 28 N.M. 155, 207 P. 1085 (holding that the district court's failure to give verdict forms, under which a verdict of guilty as to one or more of them and not a guilty verdict as to the others might be rendered where the jury was instructed that such a verdict was possible, did not invade the defendant's fundamental rights and did not give rise to fundamental error).

{60} Additionally, as the State writes in its brief, "exactly the same evidence supports both conspiracy crimes, making it inconsistent for the jury to find [Defendant] guilty of" conspiracy to distribute synthetic

cannbinoids, but not conspiracy to traffic controlled substance. Accordingly, "because [first degree felony] trafficking was the highest crime conspired to be committed, [Defendant] was correctly sentenced to a second degree felony." *See* NMSA 1978, § 30-28-2(B)(1) (1979) (providing that "if the highest crime conspired to be committed is a capital or first degree felony, the person committing such conspiracy is guilty of a second degree felony").

C. The Prosecutor's Comments Concerning Ms. Ramirez's Reason for Not Testifying at Trial Did Not Constitute a Fundamental Error

{61} During closing argument, the prosecutor commented that:

> [Defendant is] trying to cast all the blame on Nicole, but what's her motive to do this? She hasn't one. I'm sure she doesn't want to testify. You heard from the officer, she was uncooperative. She's still family. She still has to face these people. She doesn't want to show up and testify. She doesn't want to cooperate with the police. But you know what, all the circumstantial evidence coming together, she doesn't have to. Because we have the conversations. We have Mr. Patrick's testimony where he says: I'm a drug user. I'm a drug dealer.

Defendant argues that fundamental error resulted from this comment because his statement that Ms. Ramirez "still has to face these people" insinuated "that she did not appear because she is afraid of Mr. Salazar." We disagree. *See State v. Sosa*, 2009-NMSC-056, ¶ 35, 147 N.M. 351, 223 P.3d 348 ("Fundamental error occurs when prosecutorial misconduct in closing statements compromises a defendant's right to a fair trial[.]"); *State v. Trujillo*, 2002-NMSC-005, ¶ 52, 131 N.M. 709, 42 P.3d 814 ("Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." (internal quotation marks and citation omitted)); *State v. Fry*, 2006-NMSC-001, ¶ 50, 138 N.M. 700, 126 P.3d 516 (stating that in determining whether a defendant was deprived of a fair trial, the appellate courts "review the [challenged] comment in context with the closing argument as a whole" in order to "gain a full understanding of the comments and their potential effect on the jury." (internal quotation marks and citation omitted)).

{62} Considering the prosecutor's comment that Ms. Ramirez "still has to face these people" in context with the closing argument as a whole, we conclude the prosecutor's statement did not give rise to fundamental error. The State simply argued that the evidence presented in the case was sufficient to convict Defendant notwithstanding the fact that Ms. Ramirez chose not to cooperate with the police or take the stand to testify against her cousin, Defendant. This comment was neither "egregious" nor so "persuasive and prejudicial . . . on the jury's verdict that [D]efendant was deprived of a fair trial." *See Trujillo*, 2002-NMSC-005, ¶ 52; *State v. McDowell*, No. S-1-SC-35245, 2018 WL 286126 , ___-NMSC-___, ¶¶ 18, 23-24, 34-35, ___ P.3d ___ (Jan. 4, 2018) (holding that the admission of prosecutor's unobjected to comments and eliciting of testimony from a witness concerning the defendant's assertion of his fundamental right to remain silent was so prejudicial so as to give rise to fundamental error).

D. Admission of Officer Barela's Testimony Did Not Constitute Plain Error

{63} Deputy Loomis testified on cross-examination that he did not know if Defendant had cousins other than Ms. Ramirez, whether she had any other relatives in CCDC, whether she had ever brought items for other inmates, or whether Ms. Ramirez had ever been in jail or otherwise been involved in a gang.

{64} During a bench conference and in response to Deputy Loomis' testimony, the State argued that Defendant had opened the door to the State calling Defendant's probation officer, Officer Barela, to testify by insinuating that Ms. Ramirez acted alone in bringing controlled substances into CCDC and that Defendant had no knowledge of Ms. Ramirez's plan. The district court ruled that it would permit Officer Barela to testify outside the presence of the jury to determine whether her testimony was admissible. After Officer Barela's testimony outside the presence of the jury, Defendant conceded that if he called Mr. Patrick to testify, then that would "certainly" open the door to Officer Barela's testimony. The district court agreed that Officer Barela should be permitted to testify, but instructed the State that Officer Barela could not testify as to the nature of the offense for which Defendant was on probation. Defendant later called Mr. Patrick to testify.

{65} Defendant now contends that the district court erred in admitting Officer Barela's testimony. However, we conclude that by calling Mr. Patrick to testify, Defendant waived his objection to admission of Officer Barela's testimony. *See State v. Campos*, 1996-NMSC-043, ¶ 47, 122 N.M. 148, 921 P.2d 1266 ("Acquiescence in the admission of evidence, . . . constitutes waiver of the issue on appeal."). Accordingly, we decline to exercise our discretion under Rule 12-321(B)(2) to analyze Defendant's appellate challenge to the admission of Officer Barela's testimony "for the first time on appeal." *See Campos*, 1996-NMSC-043, ¶ 47 ("The doctrine of fundamental error cannot be invoked to remedy the defendant's own invited mistakes.").

CONCLUSION

{66} For the foregoing reasons, we affirm the district court's judgment and sentence.

{67} IT IS SO ORDERED.
MICHAEL E. VIGIL, Judge

WE CONCUR:
JULIE J. VARGAS, Judge
TIMOTHY L. GARCIA, Judge Pro Tempore

SUBMISSION DEADLINE

Holiday Advertising Schedule

Due to a holiday closure, the following advertising submissions for the *Bar Bulletin* will apply:

July 11, 2018 issue:
Advertising submissions due June 22, 2018

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

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Positions

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The Santa Fe office of Hinkle Shanor LLP seeks to hire an associate attorney with at least 5 years of litigation experience for its employment and civil rights defense practice. Candidates should have a strong academic background, excellent research and writing skills, and the ability to work independently. Applicants must live in or be willing to relocate to Santa Fe. Please send resume, law school transcript, and writing sample to Hiring Partner, P.O. Box 2068, Santa Fe, New Mexico 87504-2068 or jmclean@hinklelawfirm.com.

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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

Position Announcement Spanish – English Legal Interpreter - Las Cruces 2018-06

The Federal Public Defender for the District of New Mexico is accepting applications for the position of Spanish-English Legal Interpreter for the Las Cruces office. One position is available with a starting salary range of JSP 9-14, currently yielding $50, 598 - $103,106. The Federal Public Defender operates under the authority of the Criminal Justice Act (CJA), 18 U.S.C. §3006A, to provide defense services for indigent persons in federal criminal cases and related matters in the federal courts. The Spanish Interpreter provides oral and written interpretation and translation services (to and from English) between members of a defender organization defense team and its client(s). State Court Certification required; Federal Court Certification preferred. Primary Job Duties: The Interpreter must be able to interpret/translate legal documents, correspondence, transcripts, treaties, psychological, medical and other forensic reports and records, foreign documents, legal provisions and other case related documents; audio and video tape recordings; attorney-client interviews, witness interviews, telephone conversations and jail visits; official court proceedings, pre-sentence interviews and interviews with other government officials, as permitted by the court. The Interpreter must maintain the confidentiality of all interpreted communications and the fact of such communications, at all times; assists the attorney to understand the cultural background of the client, based on the country of origin, as well as his/her level of comprehension with regard to the judicial process of the United States. Helps the attorney establish a professional relationship with the client or witnesses; remains impartial in all situations, interpreting accurately and completely, without regard to the content of the communication; schedules his/her time to accommodate the needs of staff members who require assistance in and out of the office and performs all other duties as assigned. Some travel may be required. Qualifications: Applicants must have a high school degree or equivalent and the requisite experience. State Court Certification required; Federal Court Certification preferred. Ideal applicant will possess a minimum of five years of interpreter experience. The individual must be able to perform each essential job duty satisfactorily. The job requirements are representative of knowledge, skills and/or abilities necessary to perform the essential functions of the job. This is a full-time position with federal salary and benefits. The position is subject to mandatory Electronic Funds Transfer (direct deposit) participation for payment of net pay. Salary commensurate with qualifications and experience. All résumé information and certifications will be verified during the interview process. Final appointment is subject to a satisfactory background investigation. In one PDF document, please submit a statement of interest and detailed résumé of experience with at least three references to: Melissa Read, Administrative Officer; FDNM-HR@fd.org. Reference 2018-06 in the subject. Applications must be received by June 29, 2018. Positions will remain open until filled and are subject to the availability of funding. No phone calls please. Submissions not following this format will not be considered. Only those selected for interview will be contacted.

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Position will provide legal advice and services to the New Mexico Corrections Department (NMCD) regarding matters of discipline, employment law, personnel law and labor relations law. The position will review and revise proposed disciplinary actions regarding NMCD employees. Position will review and make recommendations regarding revisions to Office of Personal Standards (OPS) investigative reports pertaining to NMCD employees. Incumbent will represent NMCD management in State Personnel Office (SPO) disciplinary appeals involving disciplined NMCD Employees, in arbitration involving NMCD bargaining units who have been disciplined and in prohibited practices complaint hearings in front of the Public Employee Labor Relations Board (PELRB) and provide regular legal advice to NMCD managers regarding American with Disabilities Act (ADA), Family Medical Leave Act (FMLA) and other areas of employment and personnel law in conjunction with SPO Human Resources (HR) staff. This position will ultimately be a SPO position. SPO will supervise and pay the position but there will be a period of training and orientation by NMCD Office of General Counsel. Applicants must apply with State Personnel Office at www.spo.state.nm.us, position #15797.

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2018-05
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Office Space

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.

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.

Office For Rent
Office for rent in established firm. New and beautiful NE Heights office near La Cueva High School. Available May 1. Please contact Tal Young at (505) 247-0007.

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

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.

Co-Working Space Available
Feeling isolated? Home officing but finding too many distractions to be productive? Need a professional office address? We provide high-speed Wi-Fi, conference room, copiers/scanners/printers, desks, whiteboards, gourmet coffee and a relaxing but productive work environment. Work with other professionals and pay based upon your amount of usage. Options available from walk-in, once a week all the way up to a reserved private office. Carlisle and Montgomery area. Easy interstate access. (505) 417-9416 website: lowkicoworking.space

Miscellaneous

Want To Purchase
Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201

-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
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Red Raider Hospitality Lounge

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State Bar of New Mexico

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