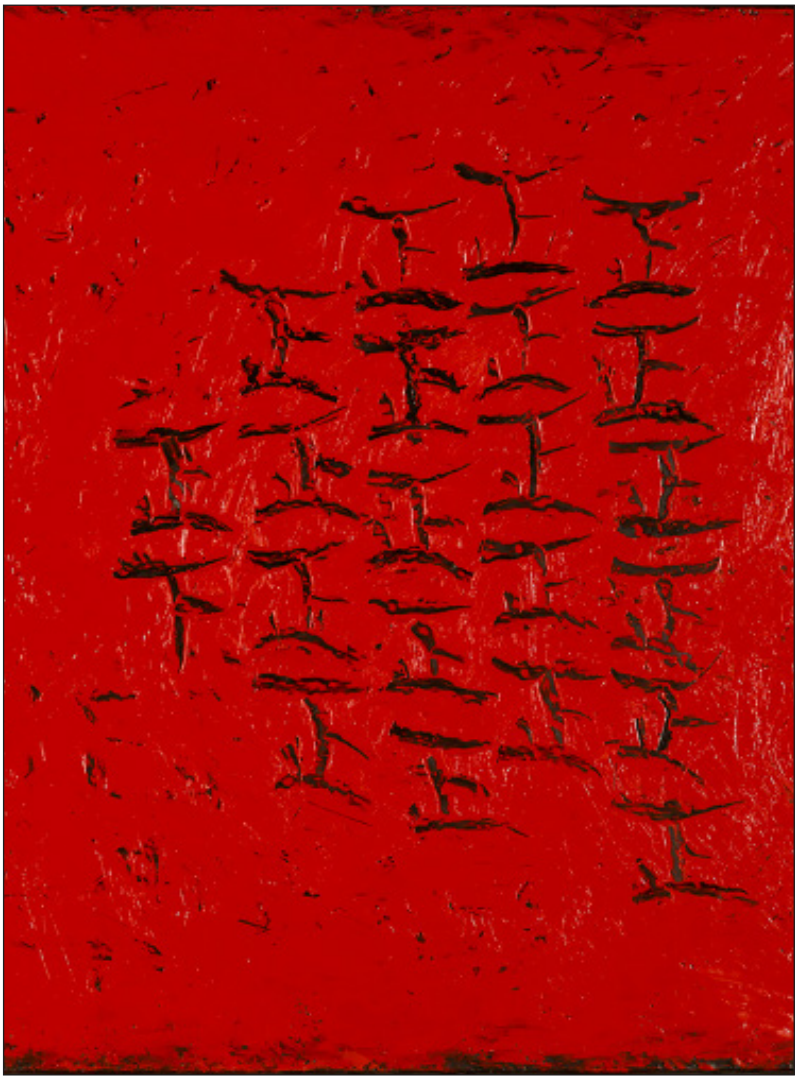
Official Publication of the State Bar of New Mexico

Bar Bulletin

July 18, 2018 • Volume 57, No. 29



Kitsu I, by Catherine Skinner www.ceskinner.com

Inside This Issue

Stand Out *from the* Crowd

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STATE BAR of NEW MEXICO

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The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

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9 a.m., teleconference

20
Indian Law Section Board
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Noon, Lewis Roca Rothgerber Christie LLP

25
NREEL Section Board
Noon, teleconference

26
ADR Committee
11:30, State Bar Center

26
Trial Practice Section Board
Noon, varies

Workshops and Legal Clinics

July

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

18
Common Legal Issues for Senior Citizens Workshop Presentation
10–11:15 a.m., Clayton Senior Citizens Center, Clayton, 1-800-876-6657

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

25
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

About Cover Image and Artist: Catherine Eaton Skinner works out of her Northwest and Santa Fe studios as a multidisciplinary artist, incorporating painting and encaustic, sculpture, printmaking and photography. Growing up east of Seattle, she then received her B.A. in Biology from Stanford University in 1968, while studying art under Nathan Oliveira and Frank Lobdell. The figure, human and animal, is an important element in her work and acts as a source of inspiration and exploration of identity, spirit and the paradoxes of human existence. Her work explores the natural world, its intricacies and energies that require a fine balance. Often using the Eastern philosophical number of 108, Skinner uses repetition of sacred forms, reiterating both the artistic and the spiritual dissolution of the self into the whole. The five elements – earth, fire, water, air and ether, foundations of the universe - also interact significantly in her work.

Notices

Court News

Second Judicial District Court

Abuse and Neglect Brown Bag

The Second Judicial District Court Children's Court Abuse and Neglect Brown Bag will be held on July 20, at noon in the Chama Conference Room at the Juvenile Justice Center, 5100 2nd Street NW, Albuquerque, NM 87107. Attorneys and practitioners working with families involved in child protective custody are welcome to attend. Please call 841-7644 for more information.

State Bar News

Legal Resource for the Elderly Program

Upcoming Legal Workshops

The State Bar of New Mexico's Legal Resources for the Elderly Program (LREP) is offering free legal workshops in Raton July 19, 10 a.m.-1 p.m., at Raton Senior Center and Roswell July 26, 10 a.m.-1 p.m., at Chaves County Joy Center. Call LREP at 800-876-6657 for more information.

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- Aug. 6, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Aug. 13, 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#.
- Aug. 20, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

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

Senior Lawyers Division

Volunteers Needed for Civil Legal Clinic

The Senior Lawyers Division will sponsor the Second Judicial District Court Civil Legal Clinic from 10 a.m.- 1 p.m. on Aug. 1. Volunteers are needed to give brief, free legal advice during the clinic to community members in need. Cases are screened by New Mexico Legal Aid in advance of client consultations and will consist of general civil questions, except for family and immigration law. Attorneys are expected to issue spot and use other attorneys as resources. Contact Bill Burgett at burgettlaw@yahoo.com by July 27 to volunteer. The clinic will take place in the 3rd floor conference room at the Court, located at 400 Lomas NW in Albuquerque.

Young Lawyers Division

Santa Fe Wills for Heroes

The YLD seeks volunteer attorneys and non-attorneys for a Wills for Heroes event for Santa Fe first-responders from 9 a.m.-12:30 p.m., July 21, at the Santa Fe County District Attorney's Office located at 327 Sandoval St. #2 in Santa Fe. Volunteers should arrive at 8:30 a.m. for breakfast and orientation. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Paralegal and law student volunteers are needed to serve at witnesses and notaries. Visit www.nmbar.org/WillsForHeroes to volunteer.

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.

Professionalism Tip

With respect to opposing parties and their counsel:

I will clearly identify, for other counsel or parties, all changes that I have made in all documents.

The UNM School of Law Not For Profit Art Gallery

Call for University of New Mexico Connected Artists

The University of New Mexico School of Law Not for Profit Art Gallery invites all artists connected to UNM to submit their New Mexico images for consideration for our 2019 exhibition. The UNM School of Law Not for Profit Art Gallery provides a space for artists affiliated with UNM as faculty, staff, students, alumni and immediate relatives of this group to display and sell their work. For the 2019 exhibition, the Art Committee is looking for approximately 30 images on canvas, print work or photographs. The selected artists will become 2019 Artists in Residence and must provide art throughout the year. Contact Professor Sherri Burr, chair of the Art Committee, 277-5650, burr@law.unm.edu, or Cheryl Burbank, 277-0609, burbank@law.unm.edu

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.

Nominations for NMDLA Annual Awards

The New Mexico Defense Lawyers Association is now accepting nominations for the 2018 NMDLA Outstanding Civil Defense Lawyer and the 2018 NMDLA Young Lawyer of the Year awards. Nomination forms are available online at www.nmdla.org or by contacting NMDLA at nmdefense@nmdla.org. The deadline for nominations is July 27. The awards will be presented at the NMDLA Annual Meeting Luncheon on Sept. 28, at the Hotel Andaluz, in downtown Albuquerque.

New Mexico Criminal Defense Lawyers Association

Sexual Assault CLE in Las Cruces

This comprehensive seminar will teach attendees how to successfully litigate cases involving sexual assault and related allegations. On the schedule: state and federal law updates on sex offense's, exploitation and human trafficking; dissecting safehouse interviews and sane exams; sex offenders supervision and the first amendment; and trial tips. A special defender wellness presentation will help prepare you for handling trial and these kinds of cases. Membership party to follow. The event will be held Aug. 17, in Las Cruces for 5.5 G, 1.0 E.P., CLE credits. Visit www.nmcdla.org for more info.

Editor's Note:

In response to concerns from readers about the title of the sexual assault CLE seminar by the New Mexico Criminal Defense Lawyers Association published in this issue, we have altered the announcement submitted by NMCDLA with more appropriate language. The State Bar agrees with the concerns of our readers, understanding the sensitivity and seriousness of the issue. We regret that we did not consider the title more carefully during proofreading. We have also advised the NMCDLA of the concerns. We invite readers to contact notices@nmbar.org if they have additional questions or concerns.

Other News

Center for Civic Values

Albuquerque High School Seeks Mock Trial Attorney Coach

The Albuquerque High School is looking for an attorney coach for its Gene Franchini High School Mock Trial Team. Contact Kristen Leeds at mocktrial@civicvalues.org to express interest. To learn more about Mock Trial, visit www.civicvalues.org.

Report by Disciplinary Counsel
Disciplinary Quarterly Report

Reporting Period: April 1, 2018 – June 30, 2018

Final Decisions

Final Decisions of the NM Supreme Court 4

Matter of Jane Rocha de Gandara, Esq., (No. S-1-SC-36983). The New Mexico Supreme Court issued an Order on May 21, 2018 suspending Respondent from the practice of law for one (1) year for violations of her duties of competence, diligence and her failure to comply with a Court order. The Court deferred the suspension upon the following conditions: Respondent must complete 6 hours of continuing legal education in law practice management and/or case management, receive a Formal Reprimand, and pay costs to the Disciplinary Board.

Matter of Louise A. Klaila, Esq. (No. S-1-SC-37049). The New Mexico Supreme Court entered an order on May 25, 2018 granting the petition for reciprocal discipline and suspending Respondent from the practice of law for one (1) year and one (1) day effective April 7, 2018.

Matter of Philip M. Kleinsmith, Esq. (No. S-1-SC-36776). The New Mexico Supreme Court entered an order on June 25, 2018 granting the petition for reciprocal discipline and disbarring Respondent from the practice of law effective October 30, 2017.

Summary Suspensions

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

Administrative and Other Suspensions

Total number of attorneys suspended for administrative or other reasons 2

Matter of James T. Burns, Esq. (No. S-1-SC-36946). The New Mexico Supreme Court entered an order on May 21, 2018 administratively suspending Respondent from the practice of law for the failure to cooperate with Disciplinary Counsel.

Matter of Ron Sanchez, Esq. (No. S-1-SC-37044). The New Mexico Supreme Court entered an order on May 25, 2018 suspending Respondent from the practice of law, pursuant to Rule 17-203(C).

Disability Inactive Status

Total number of attorneys placed on disability inactive status 0

Charges Filed

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to represent the client diligently; failing to expedite litigation; knowingly disobeying Orders by the Court of Appeals; and by engaging in conduct prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly filing frivolous pleadings; making statements with reckless disregard as to the truth of the statements concerning the integrity of a judge; and by engaging in conduct prejudicial to the administration of justice.

Petition for Injunctive Relief Filed

Petitions for injunctive relief filed……...0

Petitions for Reciprocal Discipline Filed

Petitions for reciprocal discipline filed 2
(See Final Decision)

Reinstatement from Probation

Petitions for reinstatement filed 0

Formal Reprimands

Total number of attorneys formally reprimanded 1

Matter of Jason S. Montclare, Esq. (Disciplinary No. 07-2017-761) a Formal Reprimand was issued at the Disciplinary Board meeting of May 18, 2018, for the violation of Rule 16-101, failing to provide competent representation to a client; Rule 16-103, failing to represent a client diligently; Rule 16-106(A), disclosing confidential client information; Rule 16-302, failing to expedite litigation; and Rule 16-804(D), engaging in conduct prejudicial to the administration of justice. The Formal Reprimand was published in the State Bar Bulletin issued May 30, 2018.

Informal Admonitions

Total number of attorneys admonished 6

An attorney was informally admonished for failing to provide competent representation to a client; failing to abide by the client's decisions concerning the objectives of representation; failing to keep the client reasonably informed about the status of the matter; failing to have a written fee agreement when charging fee/costs; and knowingly representing one or more clients creating a conflict of interest in violation of Rules 16-101, 16-102, 16-104, 16-105(B), and 16-107(A)(2) of the Rules of Professional Conduct.

An attorney was informally admonished for failing to abide by the client's decisions concerning the objectives of representation; failing to keep the client reasonably informed about the status of the matter; failing to have a written fee agreement when charging fee/costs; failing to deposit retainer fees into a trust account; and for failing to withdraw representation after the client had discharged the attorney in violation of Rules 16-102, 16-104, 16-105, 16-115, and 16-116 of the Rules of Professional Conduct.

An attorney was informally admonished for knowingly representing one or more clients creating a conflict of interest in violation of Rule 16-107(B)(2) of the Rules of Professional Conduct.

An attorney was informally admonished for knowingly representing one or more clients creating a conflict of interest in violation of Rule 16-107(B)(2) of the Rules of Professional Conduct.

An attorney was informally admonished for knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists in violation of Rule 16-304(C) of the Rules of Professional Conduct.

An attorney was informally admonished for failing to act with reasonable diligence and promptness in representing a client; charging an unreasonable fee; failing to communicate to the client in writing the basis or rate of the fee; failing to hold unearned client funds in a separate trust account; failing to expedite litigation; and

engaging in conduct prejudicial to the administration of justice in violation of Rules 16-103, 16-105(A) and (B), 16-115(A) and (C), 16-302 and 16-804(D) of the Rules of Professional Conduct.

Letters of Caution

Total number of attorneys cautioned 15

Attorneys were cautioned to avoid conduct that could lead to: (1) improper means (two letters of caution issued); (2) failure to communicate (four letters of caution issued); (3) excessive or improper fees; (4) lack of competence (two letters of caution issued); (5) improper solicitation of a client (two letters of caution issued); (6) failure to clarify misconception; (7) trust account violations; (8) meritless claims or defenses; and (9) lack of diligence – failure to expedite.

Complaints Received

Allegations	*No. of Complaints*
Trust Account Violations	5
Conflict of Interest	7
Neglect and/or Incompetence	65
Misrepresentation or Fraud	11
Relationship with Client or Court	25
Fees	7
Improper Communications	1
Criminal Activity	1
Personal Behavior	1
Other	26
Total number of complaints received	149

NEW Free Service

EMPLOYEE ASSISTANCE PROGRAM

Offered by the
New Mexico Judges and Lawyers Assistance Program

State Bar of New Mexico
Judges and Lawyers Assistance Program

The Solutions Group

The New Mexico Judges and Lawyers Assistance Program is thrilled to announce a **NEW, FREE Employee Assistance Program (EAP) service** offered to all judges, lawyers, law students, law firm personnel and immediate family members as of spring 2018. The NMJLAP has contracted with The Solutions Group to bring the New Mexico legal community personalized solutions for life's challenges. As stated by The Solutions Group, "From time to time, professionals in all types of organizations face complex personal challenges that cause intense stress. As your EAP provider, our primary focus is to help professionals find accessible solutions that will ultimately help to improve their overall quality of life."

The Employee Assistance Program is a ***FREE and confidential*** counseling service designed to assist the New Mexico legal community with personal issues that might adversely affect their job performance, overall health and well-being. Some of the areas that the EAP is specially trained to help with are the following: marital conflict, workplace issues, drug/alcohol abuse or assessment, family challenges, anxiety, depression, child/elder care referrals and critical incident stress debriefing.

Watch and Learn More

Check out a short video featuring Rick Vinnay EAP Program Director, and Pam Moore, NMJLAP Director. Learn more about the EAP service from those who know it best!

www.nmbar.org/JLAP

The goal of this EAP service is to help you problem-solve with the **four** sessions/person/issue/year allowed by this benefit. If the issues require additional services, the EAP counselor will help you access your mental health benefits, community resources, self-help groups or other community services quickly and efficiently. If you have EAP benefits from another source (ie. state employee), you are allowed to use the benefits from both.

Here are some typical questions and answers:

- **Are the services confidential?** Meaning, is NMJLAP, the State Bar or my law firm/organization going to know I called the EAP? NO. This is a completely confidential service. NMJLAP knows number of calls only, no names. Nothing is sent to your law firm or employer without your consent. Your insurance company is not contacted as all four sessions are FREE.
- **What If I live in a rural area, how can I access the service?** There are 180 providers statewide, so chances are there is a contracted counselor near you. If not, video counseling is available. You can speak to someone via internet (Zoom) in your office or from the comfort of your home.
- **What is meant by 4 sessions/person/issue/year?** You can see a counselor 4 times for one issue/year. For example, if you have a grief/loss issue, you can call the EAP and see a counselor for 4 sessions for that issue. Then, 6 months later, you feel you might have a substance use issue, you can call the EAP and see a counselor for 4 more sessions for that issue. You may ask to see the same counselor again.
- **What support do you offer for a manager, partner or law practice?** The EAP can help with any type of conflict at work, be it between managers, manager/subordinate or co-workers. TSG has experience in mediating and negotiating for a professional and respectful resolution. TSG also offers a variety of pay-for work related trainings. Visit their website for a full list: www.solutionsbiz.com.
- **Should I call the EAP or NMJLAP?** Both organizations are here to help and support you. The EAP is a service offered by the NMJLAP. By calling the NMJLAP, you have more services and resources available to help you manage whatever struggle or challenge has found you. If you are hesitant about calling the NMJLAP for whatever reason, please call the EAP. At the end of the day, it is important that you get help and support somewhere.

Meet Us!

NMJLAP and The Solutions Group will have a presence at the **2018 Annual Meeting**, Aug. 9-11 at the Hyatt Regency Tamaya Resort & Spa. Stop by and learn more about how we can serve you, your law practice and your family.

The Solutions Group also provides an extensive list of trainings for pay. If your law firm or legal organization is in need of in-house training such as Conflict Management, Developing Work Teams, Effective Meetings, Respectful Workplace I, II, III, and Communication Skills at Work, call The Solutions Group and ask about their full list of available trainings. All trainings are taught by a certified Leadership and Organizational Effectiveness Program professional.

Visit The Solutions Group website for a full list of services and contact information, **solutionsbiz.com**, or call **866-254-3555** for more information or to get help.
You can also call the NMJLAP for further information at **505-797-6003** or **505-228-1948**.

Legal Education

July

18 **Disaster Planning and Network Security for a Law Firm**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

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

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

20 **Changing Minds Inside and Out of the Courtroom**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

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

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

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

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

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

24 **8 Mistakes Experienced Contract Drafters Usually Make**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

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

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

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

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

27 **Bankruptcy Fundamentals for the Non-Bankruptcy Attorney (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Attorney vs. Judicial Discipline (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

Opinions

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

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

Effective July 6, 2018

PUBLISHED OPINIONS

No published opinions

UNPUBLISHED OPINIONS

A-1-CA-34785	P Threadgill v. 6001 Inc.	Affirm	07/02/2018
A-1-CA-35076	State v. A Villalobos	Affirm	07/02/2018
A-1-CA-35536	S Chandler v. S Cowen	Affirm	07/02/2018
A-1-CA-36125	Town of Bern v. B Calderon	Affirm	07/02/2018
A-1-CA-36827	State v. R Egerton	Affirm	07/02/2018
A-1-CA-36918	State v. J Lopez	Affirm	07/02/2018
A-1-CA-36949	T Gandy v. Ameristar Cons.	Dismiss	07/02/2018
A-1-CA-37046	CYFD v. Ericka G	Affirm	07/02/2018
A-1-CA-36428	State v. S Mallory	Affirm	07/03/2018
A-1-CA-37227	CYFD v. Jessica P	Affirm	07/05/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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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 July 18, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

Please see the summary of proposed rule amendments published in the July 11, 2018, issue of the Bar Bulletin. The actual text of the proposed rule amendments can be viewed on the Supreme Court's website at the address noted below. The comment deadline for those proposed rule amendments is August 1, 2018.

Recently Approved Rule Changes Since Release of 2018 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-003.2	Commencement of action; guardianship and conservatorship information sheet	07/01/2018
1-079	Public inspection and sealing of court records	07/01/2018
1-079.1	Public inspection and sealing of court records; guardianship and conservatorship proceedings	07/01/2018
1-088.1	Peremptory excusal of a district judge; recusal; procedure for exercising	03/01/2018
1-104	Courtroom closure	07/01/2018
1-140	Guardianship and conservatorship proceedings; mandatory use forms	07/01/2018
1-141	Guardianship and conservatorship proceedings; determination of persons entitled to notice of proceedings or access to court records	07/01/2018
Civil Forms		
4-992	Guardianship and conservatorship information sheet; petition	07/01/2018
4-993	Order identifying persons entitled to notice and access to court records	07/01/2018
4-994	Order to secure or waive bond	07/01/2018
4-995	Conservator's notice of bonding	07/01/2018
4-995.1	Corporate surety statement	07/01/2018
4-996	Guardian's report	07/01/2018
4-997	Conservator's inventory	07/01/2018
4-998	Conservator's report	07/01/2018
Rules of Criminal Procedure for the District Courts		
5-302A	Grand jury proceedings	04/23/2018

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

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-029
No. S-1-SC-36009 (filed February 12, 2018)

STATE OF NEW MEXICO PUBLIC
EDUCATION DEPARTMENT, and
VERONICA GARCIA, Secretary of Education,
Respondents-Petitioners,
v.
ZUNI PUBLIC SCHOOL DISTRICT, #89,
Petitioner-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Grant L. Foutz, District Judge

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Opinion

Petra Jimenez Maes, Justice

{1} The State of New Mexico (State), through the Public Education Department (Department), provides operational funding to public schools in the form of state equalization guarantee distribution payments (SEG distribution payments). Some school districts also receive federal funding under the Impact Aid Act, for which the Department reduces SEG distribution payments to the district in the amount of seventy-five percent of the impact aid received. *See* Impact Aid Act, 20 U.S.C. §§ 7701-7714 (2017 Supp.); NMSA 1978, § 22-8-25(C)(2), (D)(5), (D)(6) (2017). In this case, we determine when the Department may take into consideration federal impact aid payments a school district receives, or is anticipated to receive, in the Department's allocation of SEG distribution payments to the district during the fiscal year. We hold that the Department may not reduce SEG distribution payments to a district based on anticipated impact aid payments or payments actually received until the State has received certification from the Secretary of the United States Department of Education (DOE Secretary) or the State has obtained permission from the DOE Secretary to consider impact aid prior to certification. Once the State has received its certification from the DOE Secretary, the certification shall apply retroactively to any impact aid payments received by the district during the entire fiscal year.

I. BACKGROUND

A. New Mexico Public School Funding Process

{2} Under the Public School Finance Act, NMSA 1978, §§ 22-8-1 to -48 (1967, as amended through 2017), the Department is obligated to ensure that each public school district is provided with enough operating revenue to meet the cost of the district's program each fiscal year.[1] "A key feature of New Mexico's public school operational funding scheme is the state equalization guarantee distribution, which is a formula through which the [s]tate apportions federal and local revenue for schools equitably among the state's school districts." *Zuni Pub. Sch. Dist., No. 89 v. N.M. Pub. Educ. Dep't*, 2012-NMCA-048, ¶ 3, 277 P.3d 1252, (*Zuni I*) (alteration in original) (internal quotation marks and citation omitted). The purpose of the formula is to "equalize per-pupil expenditures throughout the State," and provide every child with an equal opportunity for education in New Mexico. *Zuni Pub. Sch. Dist., No. 89 v. Dep't of Educ.*, 550 US. 81, 85 (2007).

{3} The state equalization guarantee distribution (SEG distribution) is the amount of money provided by the State to the district to cover the district's program cost. *See* § 22-8-25(A) (defining SEG distribution as "that amount of money distributed to each school district to ensure that its operating revenue, including its local and federal revenues . . . , is at least equal to the school district's program cost"). One hundred percent of a district's program cost is guaranteed by the SEG distribution formula.

{4} A district's program cost is calculated by first establishing an "instructional unit count" for the district. The instructional unit count is based on actual student membership plus consideration of factors related to special categories of needs of the district. Such categories include "early childhood education, grade levels of students, special education students, bilingual students, students considered to be at risk, district size and scarcity, growth factors and . . . instructional staff experience and training." The program cost is calculated by "multiplying the district's instructional units by a set dollar figure per unit . . . ." The unit value is set by the Department Secretary after the New Mexico Legislature appropriates funds for the fiscal year.

{5} School districts provide program cost estimates, including proposed revenues and expenditures, to the Department which in turn submits them to the New Mexico Secretary of Finance and Administration. *See* § 22-8-12.1(C)(2); 6.20.2.7(A) NMAC. The Secretary of Finance and Administration sends an estimate of the total appropriation for school districts for the upcoming fiscal year to the Legislature. Based on the estimate received, the Legislature then appropriates funds for the SEG distributions for the districts. After the legislative session, the Department holds budget workshops to apprise districts of new developments from the session and assist the districts in preparing budgets.

[1]The fiscal year at issue here is July 1, 2009 to June 30, 2010.

Until actual revenue figures are known, the Department uses "budget placeholders" to account for anticipated revenue, including impact aid. An operating budget for each school district must be submitted to the Department by April 15, and each school board must fix its operating budget for the upcoming fiscal year by June 20. *See* §§ 22-8-6(A), -10(A). The Department must approve a school district's operating budget by July 1; the budget may be amended during the fiscal year. *See* § 22-8-11(A)(1), -12.

{6} Prior to June 30 of each fiscal year, the Department is required to disburse the SEG distribution, the calculation of which is based on "local and federal revenues . . . received from June 1 of the previous fiscal year through May 31 of the fiscal year for which the [SEG distribution] is being computed." Section 22-8-25(G). Because school districts must budget for each coming fiscal year, the budget process requires estimating the SEG distribution for each district prior to the start of the fiscal year. According to the Department, school districts receive *preliminary* SEG distribution figures based on estimates obtained through the budget process.

{7} The preliminary SEG distribution figure for each school district is divided into twelve monthly payments that may change based on information obtained from the district throughout the year. Adjustments to a district's preliminary SEG distribution figure may be required due to the addition of a new source of revenue or a change in student counts, for example. Although the Department is not required to distribute SEG funds until the end of the fiscal year (June 30), the Department provides the distribution in monthly payments starting at the beginning of the fiscal year so that school districts may use those funds to operate. The Department refers to these as "progress payments." The Department maintains that the preliminary SEG distribution figure on which the monthly progress payments—that is, SEG distribution payments—are based may not accurately reflect the final SEG distribution amount that the district receives at the end of the year. This, the Department maintains, is because it is not until May 31 that actual local and federal revenues of a district are known and the SEG distribution is calculated. Once the actual revenues are known, the Department provides the district with a final SEG distribution payment that is the difference between the actual SEG distribution to which the district is entitled and the monthly SEG distribution payments that were made to the district over the course of the fiscal year, including any advances.

{8} In addition to state funding, some districts receive supplemental federal money known as "PL 874 funds" or "impact aid" under the Impact Aid Act. *See* 20 U.S.C. §§ 7701-7714; § 22-8-25(C)(2). The federal impact aid program "provides financial assistance to local school districts whose ability to finance public school education is adversely affected by a federal presence." *Zuni*, 550 U.S. at 84. This federal funding is provided for school districts "where a significant amount of federal land is exempt from local property taxes, or where the federal presence is responsible for an increase in school-aged children (say, of armed forces personnel) whom local schools must educate," *id.* at 84-85, such as military bases and Indian reservation lands. *See Zuni I*, 2012-NMCA-048, ¶ 4. Generally, a state receiving impact aid is not allowed to reduce state funding to a district based upon the district's receipt of impact aid. *See Zuni*, 550 U.S. at 85; *see also* 20 U.S.C. § 7709(a)(2) ("[A] State may not make [State funds] available to [school districts] in a manner that results in less State [funds] to [a school district] that is eligible for [impact aid] than such [school district] would receive if such [school district] were not so eligible.").

{9} Congress created an exception, however, that allows a state to reduce the amount of state funding provided to a district receiving impact aid if the DOE Secretary determines and certifies that the state has a program in effect, such as New Mexico's public school funding formula, that "equalizes expenditures for free public education among [school districts] in the State." 20 U.S.C. § 7709(b)(1). States intending to reduce funding to districts receiving impact aid must apply to the federal government for certification every fiscal year. *See* 20 U.S.C. § 7709(c)(1)(A) ("Any State that wishes to consider [impact aid payments] in providing State [funds] to [school districts] shall submit to the [DOE Secretary], not later than 120 days before the beginning of the State's fiscal year, a written notice of such State's intention to do so."). Certification from the DOE Secretary allows New Mexico to reduce state funding to a district in an amount equal to seventy-five percent of the impact aid received by the district. *See* § 22-8-25(C)(2), (D)(5), (D)(6).

{10} The preliminary SEG distribution for an impacted district is the district's estimated program cost, which includes impact aid payments anticipated to be received by the district. The final SEG distribution is the actual program cost calculated at the end of the fiscal year, which includes impact aid payments actually received by the district. Generally, the total SEG distribution payments to which an impacted district is entitled for the fiscal year equals the district's program cost minus a deduction for seventy-five percent of impact aid payments received by the district.

B. Procedural History

{11} Zuni, located within the Zuni Indian Reservation, also known as Zuni Pueblo, receives federal impact aid for which the State reduces funding to the district in the amount of seventy-five percent of impact aid received. For fiscal year 2010, Zuni's preliminary SEG distribution was estimated at approximately $10.5 million, which, divided into twelve monthly payments, equals $875,000 a month. From July 2009 through March 2010, the Department provided Zuni with monthly SEG distribution payments typically ranging from $400,000 to $490,000, reducing each monthly payment by roughly one-half the amount Zuni was entitled under the preliminary SEG distribution figure. The State was not certified by the DOE Secretary as having a properly equalized funding program until April 26, 2010, ten months after the Department's monthly payments for the fiscal year began.

{12} On April 30, 2010, Zuni filed a petition for writ of mandamus with the district court seeking declaratory and injunctive relief alleging that the Department was unlawfully deducting anticipated impact aid payments from Zuni's monthly SEG distribution payments prior to the State receiving certification to do so, resulting in significantly lower monthly payments to Zuni. Zuni requested the district court compel the Department to pay Zuni its proper share of monthly SEG distribution payments, stop making deductions based on anticipated impact aid, pay interest on funds improperly retained, and certify the case as a class action suit for all districts similarly situated. The Department filed a motion to dismiss, alleging that sovereign immunity barred Zuni's complaint, that the district court lacked subject matter jurisdiction, that Zuni's complaint failed to state a claim upon which relief could be granted, that mandamus was not an

appropriate remedy, and that a class action suit was improper. The district court held a hearing and denied the Department's motion to dismiss. The district court certified the issues for immediate review, and the Department filed an application for interlocutory appeal. The Court of Appeals granted interlocutory review and treated the application as a petition for writ of error on the issue of sovereign immunity. *Zuni 1,* 2012-NMCA-048, ¶ 2. The Department argued two points: (1) "Zuni's claim is based on a federal statute and that, therefore, the State retains constitutional sovereign immunity from suit in its own state courts" and (2) "Zuni's action for money {softlinedamages is barred by the State's common law sovereign immunity." *Zuni 1*, 2012-NMCA-048, ¶ 7. The Court of Appeals rejected both arguments finding Zuni's arguments were based in state law, stating, "[I]t is the State's adherence to the Legislature's directives and the formula set out in Section 22-8-25 that provides the fulcrum for deciding this issue." *Zuni 1*, 2012-NMCA-048, ¶16. The Court of Appeals also found no basis in case law or statute to bar Zuni's suit for money damages. *Id.* ¶ 21. Though the Court of Appeals discussed the impact aid program in its decision to provide context to its decision on sovereign immunity, it did not make a ruling on the underlying issue of whether the Department could offset payments before receiving certification. The case was remanded to the district court May 16, 2012.

{13} The Department filed a petition for writ of certiorari which this Court denied. This Court also denied the Department's motion for rehearing. The case was remanded to the district court on mandate from the Court of Appeals. On November 5, 2013, the Department moved for summary judgment; Zuni filed a cross-motion for partial summary judgment on March 31, 2014. On July 28, 2014, the district court granted the Department's motion and denied Zuni's motion. The district court found that the Department's deduction of anticipated impact aid payments from Zuni's SEG distribution payments prior to certification was authorized under state law because certification was ultimately issued before the end of the fiscal year and concluded that the Department could make deductions for the entire fiscal year including *retroactive* deductions for impact aid payments received prior to the DOE Secretary's certificate.

{14} Zuni appealed the district court's decision to the Court of Appeals. The Court of Appeals reversed the district court, holding that the deductions made by the Department were not authorized under state or federal law. *Zuni Pub. Sch. Dist., No. 89 v. N.M. Pub. Educ. Dep't*, 2017-NMCA-003, ¶¶ 17-21, 386 P.3d 1020 (*Zuni II*). Specifically, the Court of Appeals held that the Department improperly deducted anticipated impact aid payments prior to the State's certification from the DOE Secretary. *Id.* ¶ 19. The Court of Appeals also held that once certified, the Department could only deduct for those payments received in the months after certification was obtained, noting that "nothing . . . allows for a 'retroactive' deduction after the DOE Secretary issues its certificate." *Id.*

{15} The Department filed a petition for writ of certiorari with this Court raising three issues: (1) whether the claims brought by Zuni for money damages are barred by state constitutional sovereign immunity, (2) whether the Court of Appeals erred in concluding that the offset taken by the Department for impact aid payments received by Zuni in fiscal year 2010 was not authorized by the Public School Finance Act, §§ 22-8-1 to -48, and (3) whether the Court of Appeals erred in concluding that the offset taken by the Department for impact aid payments received by Zuni in fiscal year 2010 was not authorized by Section 7709 of the federal Impact Aid Act. We granted certiorari on questions two and three pursuant to Rule 12-502 NMRA. In this opinion, we do not revisit the Department's sovereign immunity claims because they were properly resolved by the Court of Appeals in *Zuni I*, 2012-NMCA-048. We address only the issues pertaining to the Department's deduction of impact aid payments from Zuni's SEG distribution payments in fiscal year 2010.

II. DISCUSSION

A. Standard of Review

{16} We review the district court's grant of the Department's motion for summary judgment de novo. *See Tafoya v. Rael*, 2008-NMSC-057, ¶ 11, 145 N.M. 4, 193 P.3d 551. We are presented with a question of law, as the material facts of the case are not in dispute. *See Zuni II*, 2017-NMCA-003, ¶ 8. "Under this standard of review, we step into the shoes of the district court . . . as if we were ruling on the motion in the first instance." *Farmington Police Officers Ass'n v. City of Farmington*, 2006-NMCA-077, ¶ 13, 139 N.M. 750, 137 P.3d 1204.

{17} We are also called upon to interpret the Public School Finance Act and the federal Impact Aid Act. Like the review of a grant of summary judgment, questions of statutory interpretation are reviewed de novo. *See Moongate Water Co., Inc. v. City of Las Cruces*, 2013-NMSC-018, ¶ 6, 302 P.3d 405.

{18} "When construing statutes, our guiding principle is to determine and give effect to legislative intent." *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11, 309 P.3d 1047 (internal quotation marks and citation omitted). *See State v. Johnson*, 2001-NMSC-001, ¶ 6, 130 N.M. 6, 15 P.3d 1233 ("The starting point in every case involving the construction of a statute is an examination of the language utilized by the Legislature in drafting the pertinent statutory provisions.") (alteration, internal quotation marks, and citation omitted). "We use the plain language of the statute as the primary indicator of legislative intent." *Baker*, 2013-NMSC-043, ¶ 11 (alteration, internal quotation marks, and citation omitted). "We will not read into a statute language which is not there, especially when it makes sense as it is written." *State v. Hubble*, 2009-NMSC-014, ¶ 10, 146 N.M. 70, 206 P.3d 579 (citation omitted).

B. The Department, in Violation of the Public School Finance Act and the Federal Impact Aid Act, Unlawfully Deducted Federal Impact Aid Payments Anticipated to be Received by Zuni from SEG Distribution Payments Owed to Zuni Before the DOE Secretary Certified that a Deduction was Permissible

{19} The Public School Finance Act defines SEG distribution as "that amount of money distributed to each school district to ensure that its operating revenue, *including its local and federal revenues* as defined in this section, is at least equal to the school district's program cost." Section 22-8-25(A) (emphasis added). As applied here, the Public School Finance Act defines "federal revenue" as

> seventy-five percent of grants from the federal government as assistance to those areas affected by federal activity authorized *in accordance with* Title 20 of the United States Code, commonly known as "PL 874 funds" or "impact aid[."]

Section 22-8-25(C)(2) (emphasis added). In calculating the SEG distribution for a district, the Department is required to calculate and deduct from the distribution

seventy-five percent of federal revenues (impact aid payments) authorized "in accordance with Title 20 of the United States Code." *Id.*; *see also* § 22-8-25(D)(5), (6) (providing for the calculation and deduction of local and federal revenues as defined by the Public School Finance Act).

{20} Here, "Title 20" means Section 7709 of the federal Impact Aid Act. Section 7709 forms the backdrop for how we interpret Section 22-8-25(C) of our Public School Finance Act. Section 7709 does not allow a state to take into consideration impact aid payments in allocating funds to a district unless the DOE Secretary "determines, and certifies . . . that the State has in effect a program of State aid that equalizes expenditures for free public education among [school districts] in the State." 20 U.S.C. § 7709(b)(1). Section 7709 further addresses treatment of state aid as follows:

> If a State has in effect a program of State aid for free public education for any fiscal year, which is designed to equalize expenditures for free public education among the [school districts] of that State, [impact aid] payments . . . for any fiscal year may be taken into consideration by such State in determining the relative . . . (A) financial resources available to [school districts] in that State; and (B) financial need of such [school districts] for the provision of free public education for children served by such [school district] . . . .

20 U.S.C. § 7709(d)(1). Section 7709 contains a clear prohibition: "A State may not take into consideration [impact aid] payments . . . *before* such State's program of State aid has been certified by the [DOE] Secretary . . . ." 20 U.S.C. § 7709(d)(2) (emphasis added).

{21} Accordingly, the plain language of Section 7709 prohibits the State from taking into consideration "federal revenue"—that is, a district's impact aid payments—and deducting seventy-five percent of that amount from the district's SEG distribution until the State receives certification from the DOE Secretary. Section 22-8-25(C) of the Public School Finance Act clearly and unambiguously incorporates this federal requirement. *See* § 22-8-25(C)(2) (defining "federal revenue" as "seventy-five percent of grants . . . authorized in accordance with Title 20 of the United States Code"). *See also State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022 ("A statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter." (alteration, internal quotation marks, and citation omitted)).

{22} While the language is clear that certification must be issued before a state may consider impact aid payments, Section 7709 is arguably ambiguous as to the meaning of "payments." *See* § 7713, "Definitions" (providing no definition of "payments" under the Impact Aid Act); § 7709(a)(1) ("[A] State may not . . . consider *payments* under this subchapter in determining . . . (A) the eligibility of a [school district] for State aid for free public education; or (B) the amount of such aid . . . ." (emphasis added)); § 7709(b)(1) ("A State may reduce State aid to a [school district] that *receives a payment* . . . ." (emphasis added)). In fact, this ambiguity is the crux of the Department's argument. The Department argues that the word "payments" in Section 7709 does not contemplate funds *anticipated* to be received, but only funds *actually* received, thereby excluding anticipated impact aid payments from the purview of the Public School Finance Act and Impact Aid Act.

{23} In furtherance of this argument, the Department refers to preliminary SEG distributions as mere "estimates" because the true SEG distribution is not calculated until the end of the fiscal year when actual revenues are known. *See* § 22-8-25(G) (providing that the SEG distribution calculation is based on "local and federal revenues . . . received from June 1 of the previous fiscal year through May 31 of the fiscal year for which the [SEG] distribution is being computed"). Thus, the Department asserts that Zuni's impact aid payments could not have been *considered*, or a final calculation done, prior to May 31, after Zuni's impact aid was received and certification was issued.

{24} The Department also suggests that the reduction of monthly SEG distribution payments to Zuni is a result of factors pertaining to the budget process itself, not necessarily a premature deduction of impact aid funds. To this end, the Department reminds us that budgets are modified throughout the year because of changes in costs, revenues, student counts, and other factors. The Department further notes that a decrease in funding was mandated by the Legislature in the special session held in fiscal year 2010, resulting in a reduction in funding to all districts that year. As explained below, we find the Department's arguments unavailing.

{25} For fiscal year 2010, Zuni's preliminary SEG distribution was estimated at approximately $10.5 million. Divided by twelve, Zuni should have received monthly SEG distribution payments of $875,000 a month. Instead, the Department took into consideration $6.2 million in impact aid it anticipated Zuni would receive and deducted seventy-five percent, approximately $4.6 million, from Zuni's preliminary SEG distribution, prior to the State receiving its certification. From July 2009 through March 2010, the Department provided Zuni with monthly SEG distribution payments ranging from $400,000 to $490,000. To make matters worse, Zuni did not actually receive any federal impact aid payments until very late in the fiscal year, January and March 2010. This left Zuni sorely underfunded during the vast majority of the school year. In fact, Zuni requested and received emergency funding from the Department in the amount of $500,000 in December of 2009 because it could not meet its program cost. Furthermore, the State was not certified by the DOE Secretary as having a properly equalized funding program until April 26, 2010, ten months after the Department began its monthly pro-rata reduction of funds to Zuni.

{26} While we understand that the budget process calls for inclusion of anticipated impact aid in the preliminary SEG distribution calculation, we simply cannot agree that these monthly SEG distribution payments are just "estimates," and not within the purview of the plain language of the Section 22-8-25 of the Public School Finance Act and Section 7709 of the Impact Aid Act. While the word "payments" may be ambiguous, the intent of Section 7709 is clear. The State may not take into consideration impact aid payments, whether anticipated or actually received, prior to obtaining certification from the DOE Secretary. This means that the Department may not reduce SEG distribution payments to an impacted district prior to certification. "[I]f the plain meaning of the statute is doubtful, ambiguous, or if an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, we will construe the statute according to its obvious spirit or reason." *Baker*, 2013-NMSC-043, ¶ 11 (alteration, internal quotation marks, and citation omitted). "We will not construe a statute

to defeat its intended purpose." *Id.* ¶ 21 (alteration, internal quotation marks, and citation omitted).

{27} The monthly SEG distribution payments are the State's primary source of funding for the districts. They are not merely "estimates," but actual, tangible funds paid to the districts throughout the year to enable the districts to operate. As noted above, Zuni was deprived of the use of approximately $4.6 million over ten months because the Department took into consideration anticipated impact aid prior to the State obtaining certification.

{28} Allowing the Department to take into consideration impact aid is an exception to the rule and a process that must be adhered to precisely. It cannot be reasoned that in restricting reductions of state funding to districts receiving impact aid, the federal government intended for states to circumvent the restrictions by calling their deductions "estimates." The Department may not take into consideration federal impact aid payments, anticipated or actually received, until the State has received its certification from the DOE Secretary. *See Zuni II*, 2017-NMCA-003, ¶ 18.

{29} We note, however, that under new federal regulations, a state may consider impact aid prior to certification if a state has received special permission from the DOE Secretary. *See* 34 C.F.R. § 222.161(a)(6)(i) (2016) ("If the [DOE] Secretary has not made a determination [under Section 7709] for a fiscal year, the State may request permission from the Secretary to make estimated or preliminary State aid payments for that fiscal year, that consider a portion of Impact Aid payments . . . in accordance with this section."). Although these regulations were not in effect during the 2010 fiscal year, we acknowledge that the State shall have this option going forward.

{30} We do recognize that if certification is issued late in the fiscal year, as occurred here, Zuni and other impact aid districts may have to refund potentially large sums of money to the state general fund, rather than to the Department for use in other districts. *See* § 22-8-25(G) (providing that a school district that receives more SEG distribution funds than it is entitled must refund the overpayment to the state general fund). The Department has indicated this may be problematic for the budgeting process because these overpaid funds will not be available for redistribution to non-impacted districts. Although we recognize the Department's concern, we are compelled to follow the plain language of the law. Under the Public School Finance Act, the Department shall take a deduction for seventy-five percent of federal impact aid funds "*authorized in accordance with* Title 20." Section 22-8-25(C)(2) (emphasis added) (referring to Section 7709). Funds are not authorized under Section 7709 until there is certification. That any overpayment of funds is to be directed to the general fund is a result dictated by current law and is one that we leave to the discretion of our Legislature.

C. Once Certified by the DOE Secretary, the Department was Authorized to Make Deductions for Federal Impact Aid Payments Zuni Received for the Entire 2010 Fiscal Year

{31} Zuni contends that Section 7709 allows a deduction only for those impact aid payments received after certification, not for payments received earlier in the fiscal year. *See Zuni II*, 2017-NMCA-003, ¶ 19 ("There is nothing in the SEG or Title 20 of the United States Code that allows for a 'retroactive' deduction after the DOE Secretary issues its certificate."). Zuni argues that the prohibition contained in Section 7709(d)(2), that a "State may not take into consideration payments under this subchapter before such State's program of State aid has been certified by the [DOE] Secretary," dictates that the Department may not take a deduction for impact aid payments received by Zuni in the months preceding certification, even after certification is obtained. This means the Department, although certified for the entire fiscal year, would not have been able to consider impact aid payments received by Zuni in January and March 2010, as the State did not receive its certification until April 26, 2010. We disagree. The prohibition contained in Section 7709(d)(2) must be read in conjunction with Section 7709(d)(1):

> If a State has in effect a program of State aid for free public education for *any fiscal year*, which is designed to equalize expenditures for free public education among the [school districts] of that State, payments under this subchapter for *any fiscal year* may be taken into consideration by such State . . . .

(emphasis added). "[W]e must construe each part of the [statute] in connection with every other part so as to produce a harmonious whole." *Sundance Mechanical & Util. Corp. v. Armijo*, 1987-NMSC-078, ¶ 5, 106 N.M. 249, 741 P.2d 1370 (citation omitted). Section 7709(d)(1) is clear that impact aid payments made "for any fiscal year" may be considered by the Department. Nothing in Section 7709(d)(1) limits consideration to payments made in the months following certification.

{32} The DOE Secretary certified that New Mexico was "eligible to take into consideration Impact Aid payments in determining State aid to [school districts]" for the period of July 1, 2009 to June 30, 2010. The certification period was for the entire fiscal year 2010. When the State was issued this certification on April 26, 2010, the Department was authorized to take into consideration impact aid payments made to Zuni in January and March 2010.

D. Zuni Received Its Full SEG Distribution for Fiscal Year 2010

{33} Exhibits submitted to the Court indicate that Zuni's final SEG distribution was approximately $9.9 million, about $600,000 less than the preliminary SEG distribution figure. Neither party contests the final distribution amount, as both acknowledge that a difference like this is not unusual. In fact, many factors contribute to the need for an adjustment to the SEG distribution at the end of the fiscal year. For example, the $500,000 emergency aid granted to Zuni in December of 2009 was properly deducted from the preliminary SEG distribution figure and accounts for a majority of the difference here. This Court takes no position on the preliminary or final SEG distribution figures, as the funding formula itself is not at issue in this case.

{34} After the Department's deduction of approximately $4.8 million[1] for impact aid payments from the final SEG distribution of $9.9 million, Zuni received a total of approximately $5.3 million in SEG distribution payments during fiscal year 2010. Although Zuni was entitled to the use of its full SEG distribution payments prior to the State's certification by the DOE Secretary, Zuni actually received approximately $217,000 more from the Department in SEG distribution payments in fiscal year 2010 than it was entitled.[2] Under Section 22-8-25(G), Zuni is required to refund this overpaid sum to the state general fund.

[1]Zuni was anticipated to receive $6.2 million in impact aid, but actually received $6.4 million. Seventy-five percent of $6.4 million equals $4.8 million.

[2]See Appendix for SEG distribution payment calculation.

III. CONCLUSION

{35} The Department erred in deducting anticipated impact aid payments from its monthly SEG distribution payments to Zuni prior to certification. Once the Department was certified, however, the Department was authorized to make deductions for impact aid payments received by Zuni for the entire fiscal year. Exhibits submitted to the Court indicate that Zuni received its full SEG distribution for fiscal year 2010. Therefore, Zuni's request for additional SEG distribution funds and retention of full impact aid payments is hereby denied. The district court's grant of summary judgment to the Department is affirmed.

{36} Going forward, the Department's monthly SEG distribution payments to a district shall be based upon the preliminary SEG distribution figure without taking into consideration a district's impact aid (anticipated or received), until federal certification has been issued to the State by the DOE Secretary or the DOE Secretary has granted the State permission to consider impact aid prior to certification. Only then shall the Department take into consideration impact aid in its calculation of monthly SEG distribution payments to a district.

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

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

APPENDIX

ZUNI SEG DISTRIBUTION PAYMENT CALCULATION

FISCAL YEAR 2009-2010

Final SEG distribution =	**$ 9,911,814.80**
SEG distribution payments received =	**$ 5,322,038.59**
Impact aid received =	**$ 6,409,522.80**
75% of impact aid received =	**$ 4,807,142.10**
Final SEG distribution minus 75% of impact aid received =	**$ 5,104,672.70**
	(Zuni's entitlement under the SEG formula)
SEG distribution payments received minus Zuni's entitlement under the SEG formula =	**$ 217,365.89**
	(Department's overpayment to Zuni)

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-030
No. S-1-SC-36395 (filed April 23, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MUHAMMAD AMEER,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Christina P. Argyres and Charles W. Brown, District Judges

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Opinion

Charles W. Daniels, Justice

{1} Since New Mexico became a state over a hundred years ago, Article II, Section 13 of the New Mexico Constitution has contained a clause providing that "[a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great . . . ."

{2} In 2009, the legislative and executive branches statutorily abolished the penalty of capital punishment for first-degree murder, the only remaining New Mexico crime carrying a potential death sentence, for all offenses committed after July 1, 2009. *See* NMSA 1978, § 31-18-14 (2009); NMSA 1978 § 31-18-23 (2009); NMSA 1978, § 31-20A-2 (2009).

{3} Defendant Muhammad Ameer is charged with first-degree murder committed on or after July 1, 2009. In this appeal from a district court order applying the capital offense exception to the constitutional right to bail and denying Defendant any form of pretrial release, we hold that first-degree murder is not currently a constitutionally defined capital offense in New Mexico that would authorize a judge to categorically deny release pending trial.

{4} Following briefing and oral argument, we issued a bench ruling and written order reversing the district court's detention order that had been based solely on the capital offense exception. *See* Order, *State v. Ameer*, S-1-SC-36395 (May 8, 2017). In the same order we remanded with instructions to the district court to consider the State's unaddressed request for detention under the 2016 amendment to Article II, Section 13 of the New Mexico Constitution, allowing courts a new and broader evidence-based authority to deny pretrial release for any felony defendant "if the prosecuting authority . . . proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community." N.M. Const. art. II, § 13. We also advised that this precedential opinion would follow.

I. BACKGROUND

{5} Defendant was indicted for, among other offenses, first-degree murder in violation of NMSA 1978, Section 30-2-1(A) (1994), an offense that had been statutorily defined as a "capital felony" before capital punishment was abolished in July 2009 and which is still statutorily referred to by that term, although it now carries a maximum penalty of life imprisonment instead of a death sentence for offenses committed on or after July 1, 2009. *See* § 31-20A-2. The date of Defendant's alleged offense was March 19, 2017, and his alleged crime therefore cannot result in capital punishment.

{6} The State moved to detain Defendant pending trial under the new detention authority provided by the November 2016 amendment to Article II, Section 13 in felony cases where "no release conditions will reasonably protect the safety" of others. N.M. Const. art. II, § 13 (amendment effective Nov. 8, 2016). But instead of relying on that new authority, the district court ordered Defendant detained on the basis of the older capital offense exception to the constitutional right to pretrial release.

{7} Defendant appealed the pretrial detention order to this Court.

II. DISCUSSION

A. Jurisdiction and Standard of Review

{8} The New Mexico Supreme Court is vested with exclusive jurisdiction over interlocutory appeals in criminal cases where a defendant faces possible life imprisonment or execution. *State v. Brown*, 2014-NMSC-038, ¶ 10, 338 P.3d 1276 (citing *State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821); *see also* N.M. Const. art. VI, § 2 (granting this Court exclusive jurisdiction over appeals from final district court judgments "imposing a sentence of death or life imprisonment"); NMSA 1978, § 39-3-3(A)(2) (1972) (permitting an appeal from a district court "order denying relief on a petition to review conditions of release"); Rule 12-204 NMRA (providing procedures for interlocutory appeals from orders denying release, effective for all cases pending or filed on or after July 1, 2017).

{9} The final responsibility for interpreting the New Mexico Constitution also rests with this Court, "the ultimate arbiter[] of the law of New Mexico." *State ex rel. Serna v. Hodges*, 1976-NMSC-033, ¶ 22, 89 N.M. 351, 552 P.2d 787, *overruled on other grounds by State v. Rondeau*, 1976-NMSC-044, ¶ 9, 89 N.M. 408, 553 P.2d 688. In fulfilling that responsibility, we review all questions of constitutional and statutory interpretation de novo. *State v. Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d 830. "[O]ur primary goal is to give effect to the intent of the Legislature which proposed [the constitutional provision] and the voters of New Mexico who approved it." *Block v. Vigil-Giron*, 2004-NMSC-003, ¶ 4, 135 N.M. 24, 84 P.3d 72. And we are guided by the principle that "[t]erms used in a [c]onstitution must be taken to mean what they meant to the minds of the voters of the state when the provision was adopted."

Flaska v. State, 1946-NMSC-035, ¶ 12, 51 N.M. 13, 177 P.2d 174 (internal quotation marks and citation omitted).

B. Historical Meaning of "Capital Offense" as a Crime That Is Punishable by Capital Punishment

{10} Since at least the late 1400s, the term "capital" has meant "[a]ffecting, or involving loss of, the head or life," or "[p]unishable by death." *See The Oxford English Dictionary* vol. II (2d ed. 1989) at 862; *see also Black's Law Dictionary* (10th ed. 2014) at 250 (defining "capital" as "[p]unishable by execution; involving the death penalty"). The term derives from the Latin word "caput," meaning head. *Merriam-Webster's Third New International Dictionary of the English Language, Unabridged* (1961) at 332. *See Commonwealth ex rel. Castanaro v. Manley*, 60 Pa. D. & C. 194, 196 (Lackawanna Cty. 1947) ("The words, []'capital offenses', as used in the [Pennsylvania] Constitution clearly mean offenses for which the death penalty may be imposed.").

{11} This was the common understanding of capital punishment at the time New Mexico became part of the United States and drafted its constitution to follow the lead of Pennsylvania and most other states, where the capital offense exception to the right of bail had become part of "almost every state constitution adopted after 1776." June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 531-32 (1983); *Brown*, 2014-NMSC-038, ¶¶ 19, 26.

{12} A substantial majority of jurisdictions across the country addressing the same constitutional interpretation issue accordingly have held that an offense is a nonbailable capital offense only if it may be punished by imposition of the death penalty. *See Martin v. State*, 517 P.2d 1389, 1394, 1397 (Alaska 1974) (noting that where the constitution authorizes pretrial detention only for capital offenses, "a legislative enactment expressly permitting the detention of persons [charged with noncapital offenses] without right to bail would be unconstitutional unless a constitutional amendment were adopted"); *In re Tarr*, 508 P.2d 728, 729 (Ariz. 1973) ("The United States Supreme Court has abolished the death penalty in statutes like Arizona's . . . and has therefore abolished 'capital offenses' in Arizona."); *Kendrick v. State*, 24 S.W.2d 859, 860 (Ark. 1930) ("[T]he offense charged was a felony, punishable only by imprisonment in the penitentiary, and the accused had the legal right to give bond for his appearance."); *State v. Menillo*, 268 A.2d 667, 668 (Conn. 1970) ("But since the penalty for murder in the first degree could be death, a first-degree murder indictment constitutes an indictment for an offense punishable by death, that is, a capital offense."); *Adams v. State*, 48 So. 219, 224 (Fla. 1908) (in banc) ("A 'capital crime' is one for which the punishment of death is inflicted. The crime of murder in the second degree is punished by imprisonment in the state prison for life, and is not a capital crime."); *Caesar v. State*, 57 S.E. 66, 67 (Ga. 1907) ("If under any circumstances the penalty of death can be inflicted, the offense is capital . . . . If under no circumstances the death penalty can be inflicted, the offense is not capital."); *State v. Jiminez*, 456 P.2d 784, 788 (Idaho 1969) ("[Because] murder in the second degree [is] a crime not punishable by death . . . , [the statute], which provides that capital offenses are not bailable, could not operate automatically to prevent the admission of appellant to bail." (footnote omitted)); *People ex rel. Hemingway v. Elrod*, 322 N.E.2d 837, 840 (Ill. 1975) ("[A] capital case is one in which the death penalty may, but need not necessarily, be inflicted."); *State v. Christensen*, 195 P.2d 592, 596 (Kan. 1948) ("'Capital crime, felony or offense' . . . do[es] not include an offense in which death in no event can be inflicted."); *Duke v. Smith*, 253 S.W.2d 242, 243 (Ky. Ct. App. 1952) ("The accused is entitled to bail as a matter of unqualified right when charged with any criminal offense except one that may be punished by death[, and i]n a capital offense he has such right unless the Commonwealth shall produce . . . evidence sufficient to create great presumption of guilt."); *Fredette v. State*, 428 A.2d 395, 403 (Me. 1981) ("[A] n offense is 'capital' only if it is currently punishable by death; it does not remain 'capital' because at some previous time it had been punishable by death."); *McLaughlin v. Warden of Baltimore City Jail*, 298 A.2d 201, 201 (Md. Ct. Spec. App. 1973) ("As Maryland law presently exists, there is no capital crime because the death penalty is not mandatory."); *Commonwealth v. Ibrahim*, 68 N.E. 231, 232 (Mass. 1903) ("A capital crime is one punishable with the death of the offender."); *State v. Pett*, 92 N.W.2d 205, 207 (Minn. 1958) ("Murder in the first degree is not a capital offense when it cannot be punished by death."); *Ex parte Welsh*, 162 S.W.2d 358, 359 (Mo. Ct. App. 1942) ("A capital offense is one which is punishable—that is to say, liable to punishment—with death."); *Edinger v. Metzger*, 290 N.E.2d 577, 578 (Ohio Ct. App. 1972) ("A 'capital offense' has been uniformly defined as one where death may be imposed."); *Commmonwealth v. Truesdale*, 296 A.2d 829, 832 (Pa. 1972) ("[T]he constitutional phrase 'capital offense' is a definition of a penalty, i.e., the death penalty, rather than a definition of the crime."), *superseded by constitutional amendment*, Pa. Const. art. 1, § 14 (amended 1998); *City of Sioux Falls v. Marshall*, 204 N.W. 999, 1001 (S.D. 1925) ("By virtue of our constitutional provision . . . , and since the abolition of capital punishment, bail before conviction is a matter of absolute right in all cases."); *Butt v. State*, 175 S.W. 529, 530 (Tenn. 1915) ("[I]n this state, it is competent for . . . this court on appeal, to disregard the finding of mitigating circumstances by the trial jury and to order the infliction of the death penalty. Hence there continues to be involved a 'capital offense' within the meaning of the constitutional provision now under consideration."); *Ex parte Contella*, 485 S.W.2d 910, 912 (Tex. Crim. App. 1972) ("[M]urder, when committed by a person under seventeen years of age, is not a capital offense because the death penalty cannot be imposed in such cases."); *In re Perry*, 19 Wis. 676, 676 (1865) ("[S]ince the abolition of capital punishment in this state, persons charged with murder are in all cases bailable [under the Wisconsin constitutional provision, 'All persons shall, before conviction, be bailable . . . except for capital offenses when the proof is evident or the presumption great.']"); *State v. Crocker*, 40 P. 681, 685 (Wyo. 1895) ("[Because 'a]ll persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great,' [t]he right to furnish bail with sufficient sureties . . . arises in favor of any person accused of crime, and before conviction, absolutely and without exception in cases of all crimes not punishable with death.").

{13} This view, that crimes are nonbailable capital offenses only when they carry the possibility of imposition of the death penalty on conviction, has been referred to as the *penalty theory*. *See Roll v. Larson*, 516 P.2d 1392, 1393 (Utah 1973). The penalty theory rests on the reasoning that no amount of bail is likely to secure a defendant's voluntary appearance at a trial that may result in a death sentence. *See State v. Johnson*, 294 A.2d 245, 250 (N.J. 1972) ("In a choice between hazarding his

life before a jury and forfeiting his or his sureties' property, the framers of the many State Constitutions felt that an accused would probably prefer the latter. But when life was not at stake and consequently the strong flight-urge was not present, the framers obviously regarded the right to bail as imperatively present."); *Ex parte Dennis*, 334 So. 2d 369, 371 (Miss. 1976) ("The prevailing reason for denying bail in capital cases was that pretrial incarceration was necessary for the accused's appearance at trial since it was thought that an accused would forfeit his bond by flight rather than risk death by a jury verdict.").

C. The Post-*Furman* Classification Theory

{14} In its opposition to Defendant's appeal in this case, the State argues that a capital offense is not necessarily one punishable by death but is instead a crime so categorically severe that the Legislature may statutorily designate an offense as "capital" and place it in a nonbailable constitutional capital offense category even if capital punishment for the offense has been statutorily abolished. In support, the State asks us to join a minority of jurisdictions that purportedly now follow what has been called a *classification theory*, citing *United States v. Martinez*, 505 F. Supp. 2d 1024, 1027-29, 1033 (D.N.M. 2007); *Tribe v. District Court in & for County of Larimer*, 593 P.2d 1369, 1370-71 (Colo. 1979) (en banc); and *Hudson v. McAdory*, 268 So. 2d 916, 920-22 (Miss. 1972). The State argues that courts in California, Colorado, Nevada, Mississippi, Louisiana, Washington, Utah, Alabama, Oklahoma, and West Virginia have adopted a classification theory and relies on a brief summary statement to that effect in *Tribe*, 593 P.2d at 1370-71.

{15} But none of those cited cases addressed the issue before us, whether a legislature can abolish capital punishment while still calling penitentiary-only crimes "capital" for the purpose of denying bail under a capital offense exception to a constitutional guarantee of pretrial release. In fact, neither *Tribe* nor *Martinez* involved a pretrial detention issue or any constitutional interpretation at all.

{16} *Martinez* was a federal prosecution for a murder occurring in what is defined in 18 U.S.C. § 1151 (2006, 2012) as "Indian country," and the nonconstitutional issue in the opinion concerned the applicability of a federal statute, 18 U.S.C. § 3281 (1994), providing that no statute of limitations would bar prosecution of "any offense punishable by death." *See Martinez*, 505 F. Supp. 2d at 1025-26. The defendant was indicted for first-degree murder, which is statutorily punishable "by death or by imprisonment for life" under 18 U.S.C. § 1111(b) (1994). *See Martinez*, 505 F. Supp. 2d at 1025-26. The issue in *Martinez* was whether an Indian tribe's exercising its right under 18 U.S.C. § 3598 (1994) to opt out of the federal death penalty made the federal first-degree murder statute no longer an offense "punishable by death" for statute of limitations purposes. *See Martinez*, 505 F. Supp. 2d at 1026-27. *Martinez* cited with approval a line of federal authority holding that whether a crime is considered punishable by death or is a capital offense "depends on whether the death penalty may be imposed for the crime under the enabling statute, not on whether the death penalty is in fact available for defendants in a particular case." *Id.* at 1029 (internal quotation marks and citation omitted). Because Congress had authorized death as a potential sentence for first-degree murder, it had statutorily made the offense a capital offense punishable by death for purposes of statutes of limitations. *See id.* at 1034.

{17} *Tribe* addressed the applicability of a provision of the Colorado Rules of Criminal Procedure requiring that juries be sequestered during trial in a capital case, following judicial invalidation of capital punishment statutorily prescribed for the first-degree murder crime with which the defendant was charged. *See* 593 P.2d at 1370. The Colorado Supreme Court clarified that the question of whether the crime was a capital case depended on whether "the pertinent [s]tatute itself provided that [the] death penalty could be administered under the facts alleged." *Id.* at 1371. Because the Colorado statute still classified first-degree murder as an offense for which capital punishment could be imposed, *see* Colo. Rev. Stat. § 18-1-105(1)(a) (1979 Colo. Sess. Laws at 669), the court held that a prosecution for first-degree murder was a capital case in which jurors had to be sequestered, *see Tribe*, 593 P.2d at 1370-71.

{18} Our research reveals that no case in any jurisdiction, including those referenced in either *Martinez* or *Tribe*, has held that a constitutional provision guaranteeing bail in all but "capital offenses" will permit bail to be denied after a *legislative* abolition of capital punishment for an offense, as has occurred in New Mexico. The cases referenced in *Tribe* dealt with defendants charged under statutes continuing to prescribe capital punishment on their face after the actual imposition of capital punishment had been *judicially* barred in 1972 when the Eighth Amendment holding in *Furman v. Georgia*, 408 U.S. 238, 239 (1972), effectively precluded imposition of the death penalty under all then-existing state capital punishment statutes. Because the State's position relies so heavily on the purported adoption of a classification theory by ten states, we closely examine the law in each of those jurisdictions.

1. California

{19} *People v. Anderson*, 493 P.2d 880, 899 n.45 (Cal. 1972), *superseded by constitutional amendment*, Cal. Const. art. I, § 27 (amended 1972, *see* 1972 Cal. Stat. at A-17), was cited by *Tribe*, 593 P.2d at 1371, in support of the capital-offense classification theory. The first expression in American jurisprudence of the theory appeared in a footnote in *Anderson*, 493 P.2d at 899 n.45. After holding that California's death penalty statutes violated the cruel and unusual punishment clause of the California Constitution, the California Supreme Court added a brief footnote, without the citation of any precedent in California or any other jurisdiction and without any further explanation:

> The issue of the right to bail in cases in which the law has heretofore provided for the death penalty has been raised for the first time by the People and amici curiae on petition for rehearing. Although this question was never an issue in this case, we deem it appropriate to note that article I, section 6, of the California Constitution and section 1270 of the Penal Code, dealing with the subject of bail, refer to a category of offenses for which the punishment of death could be imposed and bail should be denied under certain circumstances. The law thus determined the gravity of such offenses both for the purpose of fixing bail before trial and for imposing punishment after conviction. Those offenses, of course, remain the same but under the decision in this case punishment by death cannot constitutionally be exacted. The underlying gravity of those offenses endures and the determination of their gravity for the purpose of bail continues unaffected by this decision. Accordingly, to subserve

> such purpose and subject to our future consideration of this issue in an appropriate proceeding, we hold that they remain as offenses for which bail should be denied in conformity with article I, section 6, of the Constitution and Penal Code section 1270 when the proof of guilt is evident or the presumption thereof great.

Anderson, 493 P.2d at 899 & n.45.

{20} Subsequent developments explained the import of this cryptic footnote. Within months after the decision in *Anderson*, the voters of California approved a constitutional amendment to reinstate capital punishment and effectively supersede *Anderson*. *See Strauss v. Horton*, 207 P.3d 48, 90 (Cal. 2009) (observing that the 1972 constitutional amendment restored capital punishment, "subject to legislative amendment or repeal by statute, initiative, or referendum" (internal quotation marks and citation omitted)), *abrogated on other grounds*, *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584 (2015). In the forty-five years since that state constitutional amendment reinstating the death penalty, California courts have consistently interpreted the "capital crimes" provisions of the California Constitution—*see* Cal. Const. art. I, § 12 (amended 1974, 1982, 1994); Cal. Const. art. I, § 28 (amended 1982, 2008)—to mean crimes which the legislature has considered so serious as to permit imposition of capital punishment. Less than two years after *Anderson* was decided, and after the California legislature reclassified offenses eligible for the death penalty under the authority of the 1972 constitutional amendment, *see* Cal. Penal Code § 190.2 (1973 Cal. Stat. at 1297, 1299-1300), the California Supreme Court clarified its *Anderson* footnote to explain that what makes an offense capital is statutory authorization of the death penalty for its commission, *see In re Boyle*, 520 P.2d 723, 725 (Cal. 1974) (explaining that "[n]othing we said in footnote 45 was intended to govern a situation in which the Legislature acts to declare a new and different class of 'capital offenses'").

{21} Because the murder crimes with which the defendants in *Boyle* were charged were statutorily punishable only by life imprisonment and not punishable by capital punishment in the absence of a killing for hire or other statutory "special circumstances" of Cal. Penal Code Section 190.2 (1973), the California Supreme Court held that the charged crimes could not be considered "capital offenses" in the constitutional sense. *Boyle*, 520 P.2d at 724. As the court noted, "[t]he constitutional provision does not itself define the term; it simply withholds in such cases a constitutional right to bail, and impliedly grants to the Legislature the power to implement that exception," which the legislature did when it "delineated the class of such cases by substantive provisions imposing the death penalty for specified offenses." *Id.* at 725.

{22} No California case has ever taken the position that the legislature may classify a non-capital-punishment crime as capital in the constitutional sense and thereby justify denial of pretrial release. In fact, post-*Anderson* cases have repeatedly emphasized that the reference to capital crimes in the California Constitution applies to crimes which the legislature has considered so serious as to permit imposition of capital punishment. *See, e.g.*, *People v. Superior Court*, 25 Cal. Rptr. 2d 38, 39 (Cal. Ct. App. 1993) ("It is well established a capital offense is one which carries the maximum possible penalty of death."); *In re Bright*, 17 Cal. Rptr. 2d 105, 108 (Cal. Ct. App.1993) ("It is the statutory availability of the ultimate penalty which renders the crime charged a capital offense.").

{23} California lawmakers have demonstrated their awareness that the legislature is not free to create constitutional capital offenses simply by statutorily categorizing non-capital-punishment crimes as capital. In 1982, the legislature proposed and the voters adopted amendments to the California Constitution to add categories of felonies other than capital offenses for which bail could be denied, including violent crimes when a court finds that the defendant's release would create a likelihood of great bodily harm to others. Cal. Const. art. 1, § 12 (amended 1982). In 1994, Article 1, Section 12 was amended again to add sexual assaults to the list of offenses which could result in pretrial detention. Cal. Const. art. 1, § 12 (amended 1994). If California law had permitted the legislature to categorize any crime as constitutionally eligible for pretrial detention simply by attaching a statutory capital label to the crime, neither of those constitutional amendments would have been necessary.

{24} Despite the California Supreme Court's repeated clarifications of its *Anderson* dictum, footnote 45 took on a life of its own. It was replicated without further analysis in judicial opinions elsewhere that were dealing with the consequences of judicial, and not legislative, determinations that statutory provisions for capital punishment could not be enforced. But an analysis of the law in those states confirms that those jurisdictions also never permitted the legislature to abolish capital punishment for an offense while calling the crime capital for purposes of denying an express constitutional guarantee of pretrial release in noncapital cases.

2. Colorado

{25} Within months of the decision in *Anderson*, the Colorado Supreme Court adopted *Anderson*'s footnote 45 in a brief opinion following the court's determination that the Colorado capital punishment statute could not be constitutionally applied as a result of the United States Supreme Court's *Furman* opinion, rendering capital punishment statutes unenforceable throughout the United States. *People ex rel. Dunbar v. Dist. Court*, 500 P.2d 358, 359 (Colo. 1972) (per curiam). At the time of the *Dunbar* opinion, the Colorado statutes provided that murder could be punished by death. *See* Colo. Rev Stat. § 40-1-105 (1971 Colo. Sess. Laws at 390, 490) (prescribing death as the maximum penalty for a class 1 felony); Colo. Rev. Stat. § 40-3-102(3) (1971 Colo. Sess. Laws at 418, 490) (specifying first-degree murder as a class 1 felony). *Dunbar* merely recited that murder remained a capital offense for which bail could be denied under the Colorado Constitution. *Dunbar*, 500 P.2d at 359; *see* Colo. Rev. Stat § 40-1-105(3)-(4) (1974 Colo. Sess. Laws at 251-52, 254) (adding Subsection (4), which substituted life imprisonment for death as the maximum penalty for a class 1 felony if the Colorado death penalty is held unconstitutional). *Dunbar* did not address the issue before us. In fact, Colorado has never statutorily abolished capital punishment in the years since *Furman* and *Dunbar*. *See* Colo. Rev. Stat. § 18-3-102(3) (2000) ("Murder in the first degree is a class 1 felony."); Colo. Rev. Stat. § 18-1.3-1201(1)(a) (2014) ("Upon conviction . . . of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment.").

{26} Following the judicial invalidation of Colorado's capital punishment statute that led to the *Dunbar* decision, Colorado amended its murder statute to continue imposition of capital punishment. Colo. Rev. Stat § 39-11-103(5) (1974 Colo. Sess. Laws at 252-54). Both before and after

that amendment the legislature did not explicitly label the crime of murder as a capital crime; instead, it made murder a capital offense by statutorily providing the possibility of capital punishment for class 1 felonies. *See* Colo. Rev. Stat. § 40-2-3(a)-(c) (1965 Colo. Sess. Laws at 502-04) (allowing the death penalty under the murder statute then-existing); Colo. Rev. Stat. §§ 40-1-105 and 40-3-102(3) (1971 Colo. Sess. Laws at 390, 418, 490) (promulgating a new Colorado Criminal Code that allowed for the death penalty for class 1 felonies and designated first-degree murder as a class 1 felony); Colo. Rev Stat. § 18-3-102(3) (2000) (providing, currently, that "[m]urder in the first degree is a class 1 felony"); Colo. Rev. Stat. § 18-1.3-104(1)(c) (2016) (continuing, under this current penalty statute, to allow the death penalty for class 1 felonies).

{27} No case in Colorado has ever held that the legislature could statutorily abolish the possibility of capital punishment for an offense and still classify the offense as "capital" for the purpose of denying the constitutional right to pretrial releases. When the legislature acted to permit denial of bail for crimes other than offenses that statutorily authorized imposition of the death penalty, it did not simply statutorily label those additional non-capital-punishment offenses as some category of capital felony. Instead, the legislature submitted to Colorado voters a constitutional amendment adding to the historical capital offenses exception a list of other offenses for which bail could be denied.

{28} Prior to 1983, Article II, Section 19 of the Colorado Constitution provided that, pending disposition of charges, "'all persons shall be bailable by sufficient sureties except for capital offenses, when the proof is evident or the presumption great.'" *Corbett v. Patterson*, 272 F. Supp. 602, 608 (D. Colo. 1967) (quoting the Colorado Constitution). In 1982, that constitutional provision was repealed and reenacted, retaining the original bail exception for capital offenses and adding exceptions for dangerousness and noncapital violent crimes. *See* 1982 Colo. Sess. Laws 685-86. A 1994 constitutional amendment deleted an exception not at issue here, left the rest of the 1982 changes intact, and added new exceptions for postconviction bail. *See* 1994 Colo. Sess. Laws 2853-55.

{29} As was the case in California, if a simple statutory classification could make a non-death-penalty-eligible crime a capital offense in the constitutional sense, no constitutional amendment would ever have been necessary.

3. Nevada

{30} In initially dealing with the aftermath of *Furman*, the Nevada Supreme Court adopted the *Anderson* footnote in another brief opinion with no analysis, stating only, "We adopt the California view and affirm the order of the trial court [denying release]." *Jones v. Sheriff, Washoe Cty.*, 509 P.2d 824, 824 (Nev. 1973) (per curiam). As in California and Colorado, the Nevada statutes still facially authorized imposition of capital punishment for murder. More important to our analysis, the Nevada Supreme Court explicitly reconsidered its reliance on the *Anderson* footnote just a year later in *St. Pierre v. Sheriff, Washoe Cty.*, 524 P.2d 1278 (Nev. 1974):

> The California Supreme Court recently reevaluated the *Anderson* rationale in [*Boyle*], after the California legislature (1) enacted a procedural statute "forbidding bail in capital cases in which the proof is evident or the presumption great . . . and (2) delineated the class of such cases by substantive provisions imposing the death penalty for specified offenses."
>
> . . . .
>
> The legislative prerogative to implement the bail provisions of [the Nevada] Constitution does not encompass inclusion of a non-capital offense as non-bailable; accordingly, we hold [the corresponding Nevada statute] unconstitutional. Only those persons charged with the newly designated capital offenses may now be denied bail, "when the proof is evident, or the presumption great." Nev. Const. Art. 1, § 7.

St. Pierre, 524 P.2d at 1279-80 (first omission in original).

{31} Nevada, like California and Colorado, realized the need to amend its state constitution to permit pretrial detention of defendants other than those charged with death-penalty offenses. In 1980, Nevada voters approved a legislative proposal to amend the Nevada Constitution, adding the category of "murders punishable by life imprisonment without possibility of parole" as nonbailable. Nev. Const. art. 1, § 7.

4. Mississippi

{32} *Hudson*, 268 So. 2d 916, does not support the characterization of Mississippi as a classification-theory jurisdiction. In *Hudson*, another post-*Furman* case that quickly followed the short-lived 1972 *Anderson* footnote, the Mississippi Supreme Court held that so long as the legislature prescribed the death penalty for an offense, it would be considered a capital offense for bail purposes. *See Hudson*, 268 So. 2d at 921-23 ("In order to retain the constitutional plan for the designation of capital offenses, we hold that a capital case is any case where the permissible punishment prescribed by the Legislature is death, even though such penalty may not be inflicted since the decision of *Furman*.").

{33} Four years later in *Dennis*, 334 So. 2d at 370, the Mississippi Supreme Court addressed a situation strikingly similar to the one before us, involving an offense that was once punishable by death but which as a result of a statutory change no longer could result in capital punishment. *Dennis* explicitly held "that the legislature had no authority to amend the constitution by redefining the term 'capital offenses' found in" the bail provisions of the Mississippi Constitution, which had always been construed as crimes "which permitted the death penalty." *Dennis*, 334 So. 2d at 372-73 (holding that "the constitution can only be modified by constitutional amendment").

{34} The post-*Furman* statutory abolition of capital punishment for armed robbery meant that armed robbery was no longer a capital offense within the meaning of the Mississippi Constitution despite the fact the legislature still labeled it as a capital offense for statutory classification purposes. *See Dennis*, 334 So. 2d at 373. Accordingly, *Dennis* held that a defendant charged with armed robbery after statutory abolition of capital punishment for the offense was constitutionally entitled to bail. *See id.*

{35} Mississippi subsequently amended its constitution to supplement the capital offense exception to the right to bail by authorizing pretrial detention in a number of non-capital-punishment offenses. Miss. Const. art. 3, § 29 (amended 1987, 1995).

5. Louisiana

{36} *Tribe* cited three Louisiana opinions in support of its statement that Louisiana had adopted a classification theory for interpreting the constitutional meaning of capital offense. *See Tribe*, 593 P.2d at 1371 n.3 (citing *State v. Hunter*, 306 So. 2d 710 (La. 1975); *State v. Flood*, 269 So. 2d 212 (La. 1972), *superseded by statute*, La. Stat. Ann. §§ 14:30 and 14:30.1 (1973 La. Acts at 218-21); and *State v. Holmes*, 269 So. 2d 207 (La. 1972), *superseded by statute*, La. Stat. Ann. §§ 14:30 and 14:30.1 (1973 La.

Acts at 218-21)). *Holmes* and *Flood* were companion cases that were issued on the same day addressing the statutory and constitutional meaning of capital offenses following the *Furman* decision. *Holmes* dealt with the term "capital offenses" in the context of a state constitutional right to a unanimous twelve-person jury in capital cases, *see* 269 So. 2d at 209, and *Flood* focused on excluding those charged with "capital offenses" from the constitutional right to bail, *see* 269 So. 2d at 214.

{37} Relying on the California *Anderson* footnote and the Colorado *Dunbar* opinion that itself had relied on *Anderson*, a majority of the divided Louisiana Supreme Court stated that it also agreed with a classification theory. Important to what the Louisiana court meant by "classification of crimes" is its explanation that "when [the] legislature last acted with respect to it, murder was, as it has ever been, a capital crime." *Flood*, 269 So. 2d at 214 (observing that "the penalty is what made murder a capital offense"); *see also Holmes*, 269 So. 2d at 208 (explaining that "[t]he word 'capital' in criminal law has to do with the death penalty"). The court emphasized the difference between a case where the "legislature eliminated capital punishment" and cases like *Flood* and *Holmes*, where a judicial decision had barred implementation of the statutory punishment. *See Holmes*, 269 So. 2d at 209; *see also Flood*, 269 So. 2d at 214 ("Furman . . . does not destroy the system of classification of crimes in Louisiana."). The court therefore held that it would continue to treat offenses statutorily prescribing capital punishment as capital offenses, "at least until the legislative process has reorganized the criminal law and procedure in view of *Furman*." *Holmes*, 269 So. 2d at 209.

{38} Following the decisions in *Flood* and *Holmes*, the Louisiana Legislature acted quickly to amend some of its capital punishment statutes, dividing murder into two classifications, first-degree with a mandatory death sentence and second-degree with a sentence of life imprisonment. *State v. Washington*, 294 So. 2d 793, 793 (La. 1974). In *Washington*, a trial judge had denied bail to a second-degree murder defendant on the basis of the decisions in *Flood* and *Holmes*. *See Washington*, 294 So. 2d at 793. The Louisiana Supreme Court reversed, observing that at the time of those two earlier decisions the single offense of murder had still been statutorily a capital offense but that as a result of the amended statutes providing "no death penalty for [second-degree murder], bail must be granted." *Id.* at 794; *cf. Hunter*, 306 So. 2d at 712 (holding that a statutorily defined death penalty offense committed during the period before the amended capital punishment statutes were enacted should be treated as a capital offense for all purposes other than punishment).

{39} Several years later, the Louisiana Supreme Court decided another significant case on the constitutional meaning of capital offense, *State v. Polk*, 376 So. 2d 151, 152 (La. 1979). In *Polk* the defendant was denied bail based on the capital offense exception in a prosecution for aggravated kidnapping, an offense which statutorily was subject to capital punishment but which, because of judicial decisions, could not result in imposition of the death penalty. *See id.* The Louisiana Legislature had not acted to revise its kidnapping statutes to bring them into compliance with constitutional requirement over the course of three sessions that had been convened since the statutes were judicially held to be unconstitutional. *See id.* at 153. The Louisiana Supreme Court made it clear that its temporary classification-theory resolutions in *Flood* and *Holmes* had never been intended to be a permanent state of affairs:

> We did not intend by our holdings to permit the constitutional right of bail in non-capital crimes to be indefinitely curtailed by legislative inaction in re-classification or re-regulation in instances where the death penalty provided by a statute is judicially held to be unconstitutional, whether the inaction be through oversight or otherwise; nor did we intend to hold that the constitutional provision requiring bailability could be evaded by arbitrary legislative classification as capital of a crime for which constitutionally no death penalty may be imposed.

Polk, 376 So. 2d at 153 (footnote omitted). *Polk* held that because the legislature had not promptly reformed its statutes to classify which crimes were constitutionally punishable by death, the defendant was entitled to be released on bail for an offense that was statutorily eligible but judicially ineligible for imposition of capital punishment. *See id.*

{40} More recently, in *State v. Serigne*, 232 So. 3d 1227 (La. 2017), the Louisiana Supreme Court engaged in a retrospective review of its case law in this area:

> In cases that followed *Furman*, this court grappled with the implications of a constitutionally unenforceable death penalty that had not yet been repealed or replaced by the legislature. For example, in [*Flood*], the court found that murder remained classified as a capital offense for purpose of determining whether an accused is entitled to bail.

Serigne, 232 So. 3d at 1229 (emphasis omitted). The court noted that "*Flood* and *Holmes* arose in a particularly unusual and volatile era of developing death penalty jurisprudence and associated legislative responses" but that Louisiana now has "broadly rejected the prior 'capital classification' jurisprudence," making it clear that a case where a defendant does not face the prospect of the death penalty is simply not a capital case. *Serigne*, 232 So. 3d at 1230-31.

6. Washington

{41} *State v. Haga*, 504 P.2d 787 (Wash.1972) (en banc), *clarified by State v. Anderson*, 736 P.2d 661 (Wash. 1987) (en banc), has also been offered as support for the classification theory. *See Tribe*, 593 P.2d at 1371 & n.5. The opposite appears to be true.

{42} Long before *Haga* was decided, the Washington Supreme Court interpreted its constitution's reference to "capital offense" to mean "not whether the death penalty must necessarily be imposed, but whether it may be imposed" for a particular crime. *Ex parte Berry*, 88 P.2d 427, 428 (Wash. 1939). *Haga* was a post-*Furman* case addressing the right of a first-degree murder defendant to bail on appeal following judicial recognition in *State v. Baker*, 501 P.2d 284, 284-85 (Wash. 1972) (en banc), that the *Furman* holding made Washington's statutory death penalty unenforceable. *See Haga*, 504 P.2d at 788.

{43} Citing the California Supreme Court *Anderson* opinion, 493 P.2d at 899 n.45, as support, the Washington Supreme Court held that first-degree murder remained a capital offense as that term was used in the bail provisions of Article 1, Section 20 of the Washington Constitution. *Haga*, 504 P.2d at 788-89. But more illuminating than the brief reference to the California *Anderson* case was the Washington Supreme Court's approval of the reasoning in its own precedent in *Berry* that what makes an offense capital is not determined by whether capital punishment is to be imposed in a particular case but instead "'by the statutory penalty prescribed

against its commission.'" *Haga*, 504 P.2d at 789 (quoting *Berry*, 88 P.2d at 433).

{44} If there remained any doubt about the Washington Supreme Court's stance that the legislative penalty, instead of the legislative label, is the determining factor in what makes an offense capital in the constitutional sense, it was resolved in the Washington Supreme Court's subsequent clarification of *Haga* in its *Anderson* holding that whether a defendant is charged with a capital offense in the constitutional sense "depends upon whether the defendant committed a crime which *could* be punished with the death penalty." *Anderson*, 736 P.2d 662-63.

{45} In 2010, Washington also amended its 1889 constitution to add to capital offenses a second exception to the right to pretrial release: "Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature." Wash. Const. art. I, § 20.

7. Utah

{46} Both *State v. James*, 512 P.2d 1031 (Utah 1973), and *Roll*, 516 P.2d 1392, addressed the constitutional definition of capital offenses after judicial invalidation of the Utah death penalty in the wake of *Furman*. *See Tribe*, 593 P.2d at 1371 & n.2.

{47} *James* focused on the Utah Constitution's guarantee that a jury could consist of only eight jurors "'except in capital cases.'" *James*, 512 P.2d at 1032. Relying specifically on the California *Anderson* decision, *James* stated that the theory related to "a category of offenses for which the punishment of death might be imposed," even where "punishment by death cannot constitutionally be exacted" as a result of judicial decisions. 512 P.2d at 1033 & n.8 (citing cases from Colorado, Louisiana, and Washington). Accordingly, because the defendant in *James* was charged with first-degree murder, an offense that had "been classified as a capital crime by the legislature," he was entitled to be tried before a twelve-person jury. *Id.* at 1034.

{48} *Roll*, decided a few months after *James*, dealt with the meaning of the capital offense exception to the right to bail in the Utah Constitution. *See Roll*, 516 P.2d at 1392. While *Roll* endorsed a classification theory, it made clear that its understanding of that theory depended on the legislature's classifying an offense as capital by prescribing the possibility of capital punishment:

> The "classification" theory proceeds on the concept that the constitution and statutes refer to a category of offenses for which the punishment of death might be imposed. The legislature determines the proper classification of a crime according to its gravity, and this classification endures, although punishment by death may not constitutionally be imposed.

Roll, 516 P.2d at 1393.

{49} In 1973, Utah amended the capital offense exception to the right to bail in Article I, Section 8 of the Utah Constitution by adding additional circumstances in which bail could be denied, in cases where a defendant is accused of committing any felony while released on probation, parole, or bail for a previous felony offense. *Scott v. Ryan*, 548 P.2d 235, 236 (Utah 1976).

{50} In 1988, Article I, Section 8 was amended again to add the current provision, denying bail for

> persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any person or to the community or is likely to flee the jurisdiction of the court if released on bail.

Utah Const. art. I, § 8(1)(c); *see State v. Kastanis*, 848 P.2d 673, 674 (Utah 1993) (per curiam). The 1988 amendment thereby explicitly granted the legislature new constitutional authority to statutorily designate non-capital-punishment crimes as nonbailable.

8. Alabama

{51} *Ex parte Bynum*, 312 So. 2d 52 (Ala. 1975), was another interpretation of a capital offense exception to the state constitutional right to bail decided as a result of *Furman's* invalidation of statutory capital punishment provisions. *Bynum* adopted the classification theory expressed in several other jurisdictions' post-*Furman* decisions and held that "[t]he only effect of *Furman* was to eliminate the imposition of the death penalty as it was then enforced, and not to eliminate the classification whereby crimes are categorized as capital for purposes other than punishment." *Bynum*, 312 So. 2d at 55.

{52} *Bynum* acknowledged established Alabama case law "interpret[ing] the term 'capital offense' to mean offenses for which the death penalty may be imposed." *Id.* (citing *Lee v. State*, 13 So. 2d 583 (Ala. 1943), and *Ex parte McCrary*, 22 Ala. 65 (1853)). But *Bynum* noted, "these opinions were not written in the context of *Furman* (which deals solely with the matter of constitutionally permissible punishment), and their application to the classification of capital offenses for the purposes of bail is not . . . decisive." *Bynum*, 312 So. 2d at 55.

{53} After *Furman* was decided, the Alabama legislature amended its criminal statutes, which continue to classify as capital offenses aggravated murders that are "punish[able] by a sentence of death or life imprisonment without parole." Ala. Code § 13A-5-39(1) (2016); Ala. Code § 13A-5-40 (1981). No Alabama case has yet addressed the extent to which the legislature may constitutionally classify a non-capital-punishment offense as a capital offense, as that term is used in the Alabama Constitution.

9. Oklahoma

{54} *In re Kennedy*, 512 P.2d 201, 203 (Okla. Crim. App. 1973), was also a post-*Furman* case relying on California's *Anderson* opinion to hold that the *Furman* decision "d[id] not give rise to a right to bail previously excluded as a capital offense." The court held that the framers of the constitution and the legislature "did not intend bail to be denied on the basis of the punishment to be imposed alone, but used the punishment, the death penalty, as a method of characterizing those offenses in which the gravity was so great that bail should be denied." *Kennedy*, 512 P.2d at 203. The court then provided guidance on how the legislature could constitutionally classify a crime as a capital offense ineligible for bail:

> Any new categorization of offenses invoking the possibility of the assessment of the death penalty in a particular case will be deemed to be a restatement by the legislature and reclassification of offenses of such a gravity to allow denial of bail when the probability is the accused will receive a life or death sentence.

Id. at 203-04.

{55} As had occurred in a number of other states, Oklahoma supplemented its constitution's capital offenses exception in 1988 by adding categories of offenses where bail could be denied to persons

charged with "violent offenses, . . . offenses where the maximum sentence may be life imprisonment or life imprisonment without parole, . . . felony offenses where the person charged . . . has been convicted of two or more felony offenses," and drug crimes with potential sentences of at least ten years imprisonment. Okla. Const. art. II, § 8. The Oklahoma bail statutes were amended to provide that all defendants are entitled to be released on bail "in criminal cases where the offense is not punishable by death" and where those new constitutional bail exception categories do not apply. *See* Okla. Stat. tit. 22, § 1101 (2006) (including Subsections (A), providing that "bail . . . shall be admitted upon all arrests," and (C), specifying the constitutional bail exception categories); *see also* Okla. Stat. tit. 22, § 1101 (2004 Okla. Sess. Laws at 316-17) (including Subsection (A) but not (C)).

10. West Virginia

{56} West Virginia law provides no support for a classification theory to interpret the constitutional meaning of capital offenses. The West Virginia constitutional right to bail contains no reference at all to capital offenses and instead, like the Eighth Amendment to the United States Constitution, guarantees only that where bail is granted it may not be excessive. *See* W. Va. Const. art. III, § 5 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."); *United States v. Salerno*, 481 U.S. 739, 752 (1987) ("The Eighth Amendment addresses pretrial release by providing merely that '[e]xcessive bail shall not be required.' This Clause, of course, says nothing about whether bail shall be available at all." (quoting the United States Constitution) (alteration in original)).

{57} The West Virginia case cited in *Tribe* was neither a bail case nor a case involving the relationship between a constitutional term and a statutory term; instead it dealt with the application of a statute authorizing transfer of cases, which addressed statutorily categorized capital offenses that were not statutorily subject to capital punishment, from juvenile court to adult court. *See Lycans v. Bordenkircher*, 222 S.E.2d 14, 17-18 (W. Va. 1975), *overruled on other grounds*, *Thomas v. Leverette*, 273 S.E.2d 264 (W. Va. 1980). West Virginia law therefore provides no assistance in determining whether a legislature may statutorily expand the scope of a constitutional term on a classification theory or any other theory.

11. Overview of the classification-theory cases

{58} The preceding state-by-state analysis of the law in each of the purported classification-theory states leads to several global conclusions. First, to the extent a classification theory in any of those jurisdictions constituted a departure from the historical interpretation of the constitutional term "capital offenses" in the context of bail rights, it was a short-lived response to the jurisprudential uncertainty in the brief period between the *Furman* decision and the subsequent legislative designation of death penalty offenses in reformed capital punishment statutes.

{59} Second, the classification-theory cases dealt only with the consequences of judicial determinations that capital punishment statutes could not be enforced, not with legislative abolition of capital punishment for an offense.

{60} And third, the manner in which legislatures were able to classify crimes as "capital offenses" that would be subject to denial of bail was not simply by labeling crimes with the word "capital" but by prescribing the possibility of imposing capital punishment, which means the death penalty, for their commission.

{61} The crime with which Defendant is charged would not be a capital offense as defined in the constitutions of any of the purported classification-theory jurisdictions because the New Mexico Legislature itself has statutorily classified murder as a noncapital offense by abolishing the possibility of capital punishment for its commission.

D. As a Result of the 2009 Legislative Abolition of Capital Punishment, There Are Currently No New Mexico Capital Offenses for Which Bail May Be Categorically Denied Under Article II, Section 13

{62} Unlike some states, New Mexico never adopted a classification theory to respond temporarily to judicial invalidation of the death penalty, and we are not called upon to consider that kind of issue here. Instead, we are asked by the State to do something much more unprecedented: to adopt an alternative classification theory by holding that the Legislature itself can statutorily abolish any possibility of capital punishment for a crime while still labeling the crime as a capital offense for which the constitutional right to bail may be denied. We now address the considerations of principle and practicality that are necessarily raised by this novel classification theory.

{63} We have been offered no standard by which a reviewing court could determine whether a legislature has exceeded its constitutional limitations if the legislature were deemed to have authority to label non-death-penalty crimes as capital offenses for which the constitutional right to bail would not apply. Could the legislature label any offense a capital offense simply because it thought the crime serious enough to justify denial of bail? How many categories of capital offenses could a legislature create? Could it, for example, legislate that all first- and second-degree felonies are categories of capital offenses? All felonies? DWI or other misdemeanors? Could such a classification power depend on whether and when the statutes provide that a non-death-eligible defendant would be eligible for parole consideration? If the term were to apply to offenses for which statutes once authorized the death penalty, would it apply to all former capital punishment crimes or just those that existed at some particular point in history between adoption of the New Mexico Constitution and repeal of the death penalty? *See, e.g.*, Section 1151 (1887), C.L. 1897 at 356 (codifying the territorial statute prescribing the death penalty for nonhomicidal train robbery, recompiled after statehood as NMSA 1915, § 1642 (1887), C.L. 1915 at 536, and repealed by 1963 N.M. Laws, ch. 303 at 827); *see also* Arie W. Poldervaart, *Black-Robed Justice* 179, 181-83 (Arno Press ed. 1976) (1948) (describing the trial and hanging of train robber Thomas "Black Jack" Ketchum); *Territory v. Ketchum*, 1901-NMSC-006, ¶¶ 2, 15, 10 N.M. 718, 65 P. 169 (affirming Ketchum's sentence of death for an attempted train robbery in which no one was killed).

{64} Any attempt to tie such a theoretical legislative classification authority to any guiding standard other than a statutory capital punishment penalty would not only be ungrounded in principle, it would be unworkable in practice. Without a firm defining reference like the only obvious one—a textual statutory provision legislating the possibility of capital punishment—there would be no articulable standard to guide either a legislature or a reviewing court in interpreting the application of the constitutional right to bail in noncapital cases.

{65} The lack of any law-based principled or practical standard for determining the bounds of the "capital offenses" term in Article II, Section 13 of the New Mexico

Constitution, at least if we abandon the clear historical standard of the possible imposition of the death penalty, is the fatal flaw in the proposed classification theory in this case. If the Legislature were to be given the sweeping power to attach a capital label to any offense and thereby justify denial of bail under the Bill of Rights to our Constitution, the Constitution would itself no longer have any more meaning than the language of Lewis Carroll's Wonderland character, Humpty-Dumpty. Lewis Carroll, *Through The Looking Glass* 57 (Susan L. Rattner ed., Dover Publ'ns., Inc. 1999) (1872) ("'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'").

{66} We recognize that the continued statutory use of the capital felony categorization after New Mexico's statutory abolition of capital punishment has resulted in confusing alternative uses of the "capital" adjective in New Mexico statutes and judicial opinions. The State correctly cites a number of opinions filed after New Mexico abolished capital punishment in which this Court has "continued to refer to first-degree murder as a capital crime in cases where the defendant has been sentenced to life imprisonment." *See, e.g.*, *State v. Serna*, 2013-NMSC-033, ¶ 33, 305 P.3d 936 (stating that "murder" is "a capital felony"); *State v. Dowling*, 2011-NMSC-016, ¶ 8, 150 N.M. 110, 257 P.3d 930 ("First degree murder is a capital felony."). While those cases did not involve any interpretation of the constitutional term "capital offenses," we acknowledge that all concerned, including this Court, should try to lessen any confusion in addressing the differing statutory and constitutional uses of the word "capital."

{67} The indiscriminate use of that term leads to confusion in applying the law. For example, the Court of Appeals stated in *State v. Segura*, 2014-NMCA-037, ¶ 7, 321 P.3d 140, that "[u]nder Article II, Section 13 of the New Mexico Constitution, every accused, except a person accused of first degree murder where the proof is evident or the presumption great, is entitled to bail." But that statement was based on neither New Mexico precedent nor the wording of the New Mexico Constitution. The Constitution does not say that bail may be categorically denied in cases of first-degree murder; it says bail may be denied for persons charged with capital offenses. Unlike some other states which have expanded the categorical detention authority in their constitutions to include persons charged with crimes subject to life sentence and other categories of crimes, New Mexico has never done so.

{68} This Court has never explicitly or implicitly held that nonbailable capital offenses in Article II, Section 13 include crimes not statutorily punishable by capital punishment. To permit any branch of government to redefine constitutional terms would violate the exclusive power of the people to amend the Constitution. *See Ferguson v. N.M. State Highway Comm'n*, 1982-NMCA-180, ¶ 6, 99 N.M. 194, 656 P.2d 244 ("The legislature's plenary authority is limited only by the state and federal constitutions." (citing *Daniels v. Watson*, 1966-NMSC-011, 75 N.M. 661, 410 P.2d 193)); N.M. Const. art. XIX, § 1 ("An amendment that is ratified by a majority of the electors . . . shall become part of this constitution."). We have no authority to preclude the Legislature's use of the term "capital felony" or any other form of words in classifying crimes for nonconstitutional purposes, but no branch of government has the lawful authority to transform the intended meaning of constitutional terms.

{69} As a result of this Court's research conducted after initial briefing and oral argument, we are unanimous in holding that the term "capital offenses" in Article II, Section 13 of the current New Mexico Constitution means, as it always has, offenses for which a statute authorizes imposition of the death penalty. To the extent that *Segura* or any other cases may be read to increase the offenses for which bail may be categorically denied under the capital offenses provision of Article II, Section 13 of the New Mexico Constitution, those cases are overruled.

{70} There being no death penalty statutorily authorized for any crimes committed on or after July 1, 2009, following legislative repeal of the last vestiges of capital punishment for offenses committed on or after that date, and Defendant having been charged with committing his offense after that date, the detention order based on the capital offenses exception must be reversed. Because Defendant is not detainable under the capital offenses provision, there is no need to reach any further issues related to procedures for that provision's implementation.

E. Pretrial Detention May Be Ordered in Compliance with the New Detention-for-Dangerousness Authority in Article II, Section 13

{71} Our holding does not mean the district court lacks authority to deny pretrial release of a defendant charged with a crime that is no longer a capital offense. In fact, our district courts now have a much broader evidence-based detention authority applicable in both capital and noncapital felony offenses. In 2016, the Legislature proposed and the voters of New Mexico approved an amendment to the bail rights in Article II, Section 13 of the New Mexico Constitution, authorizing pretrial detention of dangerous defendants where "no release conditions will reasonably protect the safety of any other person or the community." N.M. Const. art. II, § 13 (amendment effective November 8, 2016); *see Torrez v. Whitaker*, 2018-NMSC-005, ¶ 72, 410 P.3d 201.

{72} The State's motion to detain Defendant in this case was based on the new constitutional authority instead of the older capital offenses provision relied on sua sponte by the district court. Following oral argument in this case, we remanded this matter for consideration of the State's unaddressed request. Because we have no ruling or evidentiary record on which to review whether Defendant should have been detained under the new authority, nothing in this opinion is intended to prejudge those issues.

III. CONCLUSION

{73} For the reasons stated herein, we confirm our previous order holding that first-degree murder is not currently a constitutionally defined capital offense in New Mexico that would authorize a judge to categorically deny release pending trial, and we also hold that any outright denial of pretrial release for a defendant charged with a noncapital offense must be based on the new evidence-based provisions of Article II, Section 13 of the New Mexico Constitution.

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

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

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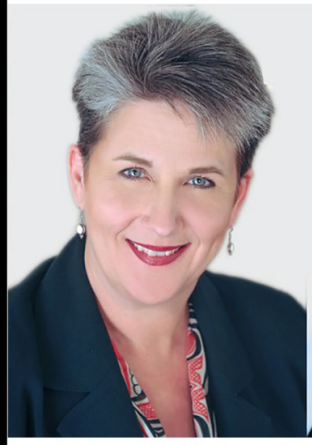

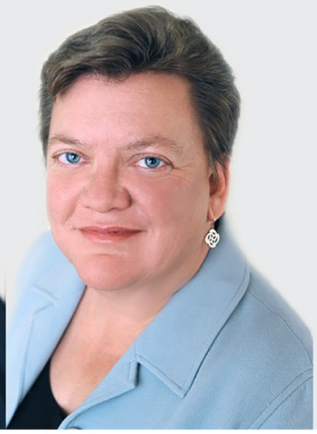

WHITE COLLAR
CRIME INVESTIGATIONS

•

SUPPORT FOR
CRIMINAL & CIVIL
LITIGATION

•

EXPERT WITNESS
TESTIMONY

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Pre-litigation case analysis, discovery assistance and analysis of financial records

Expert witness testimony, including appointed neutral expert

Consulting expert – non-testifying expert as a strategic member of your legal team

Financial Investigations

Investigating allegations of fraud & financial discrepancies

Reconstruction of accounting records for probate and other litigated matters

Partnership dissolution and other business disputes

Employment matters such as investigating allegations of theft or fraud

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