Official Publication of the State Bar of New Mexico

Bar Bulletin

August 8, 2018 • Volume 57, No. 32

Cone Flowers, by Sarah Hartshorne (see page 3)

www.sarahhartshorne.com

Inside This Issue

STATE BAR of NEW MEXICO

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August 8, 2018 • Volume 57, No. 32

Table of Contents

Meetings

August

8
Children's Law Section Board
Noon, Juvenile Justice Center

8
Tax Law Section Board
11 a.m., teleconference

9
Business Law Section Board
4 p.m., teleconference

9
Public Law Section Board
Noon, Legislative Finance Committee, Santa Fe

14
Appellate Practice Section Board
Noon, teleconference

14
Bankruptcy Law Section Board
Noon, U.S. Bankruptcy Court

15
Trust and Estate Division Section Board
Noon, teleconference

17
Family Law Section Board
9 a.m., teleconference

Workshops and Legal Clinics

August

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

15
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

22
Consumer Debt/Bankruptcy
Workshop 6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

September

5
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6022

5
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

14
Civil Legal Clinic
10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

About Cover Image and Artist: The focus of Sarah Hartshorne's work has been on capturing the unique in the ordinary, the beauty in the mundane. Like the impressionists, she paints in oil from everyday life and the world around her, sharing what often goes unnoticed and exploring the play of light and shadow. View more of her work at www.sarahhartshorne.com.

Notices

Court News

New Mexico Supreme Court Supreme Court Law Library

Hours and Information

The Supreme Court Law Library is open to anyone in the legal community or public at large seeking legal information. The Library has a comprehensive legal research collection of print and online resources, and a staff of professional librarians is available to assist. Search the online catalog at https://n10045.eos-intl.net/N10045/OPAC/Index.aspx Call 505-827-4850, Click https://lawlibrary.nmcourts.gov or email libref@nmcourts.gov for more information. Visit the Law Library at the Supreme Court Building, 237 Don Gaspar, Santa Fe, NM 87501. The Library is open Monday-Friday, 8 a.m.–5 p.m. Reference and circulation is open Monday–Friday 8 a.m.–4:45 p.m.

Second Judicial District Court

Destruction of Tapes

In accordance with 1.17.230.502 NMAC, taped proceedings on domestic matters cases in the range of cases filed in 1972-1990 will be destroyed. To review a comprehensive list of case numbers and party names, or attorneys who have cases with proceedings on tape and wish to have duplicates made, should verify tape information with the Special Services Division at 505-841-6717 from 8 a.m.-5 p.m., Monday-Friday. The aforementioned tapes will be destroyed after Sept. 22.

Sixth Judicial District Court

Judicial Vacancy Nominees

The Sixth Judicial District Court Nominating Commission convened on July 27 in Silver City and completed its evaluation of the one applicant for the vacancy on the Sixth Judicial District Court. The Commission recommends the following applicant to Governor Susana Martinez: **William Perkins**.

Bernalillo County Metropolitan Court

Court Closure Notice:

Bernalillo County Metropolitan Court will be closed from 11 a.m.-5 p.m. on Aug. 24 for the Court's annual employee conference. Misdemeanor Custody Arraignments will commence at 8:30 a.m. and will be immediately followed by Felony First Appearances. Traffic Arraignments and Preliminary Hearings will not be held that day. The outside Bonding Window will be open from 11 a.m.-5 p.m. for the filing of emergency motions and for posting bonds. The conference is sponsored by the New Mexico Judicial Education Center and paid for by fees collected by state courts.

Professionalism Tip

With respect to the courts and other tribunals:

I will voluntarily withdraw claims or defenses when they are superfluous or do not have merit.

State Bar News

Appellate Practice Section

Court of Appeals Candidate Forum

The Appellate Practice Section will host a Candidate Forum for the eight candidates running for the New Mexico Court of Appeals this November. Save the date for 4-6 p.m., Oct. 18, at the State Bar Center in Albuquerque.

Board of Bar Commissioners

Meeting Agenda

8 a.m., Aug. 9, Hyatt Regency Tamaya Resort, Santa Ana Pueblo

A. Call to Order
   Approval of May 18, 2018 Meeting Minutes
I. Strategic Planning
   A. SOPA Update / Other Court Initiatives
   B. Regulatory Committee Report
   C. MCLE Update
II. Committee Reports
   A. Finance Committee Report
   B. Executive Committee Report
   C. Policy and Bylaws Committee Report and Recommendations
   D. Client Protection Fund Commission Annual Report
   E. Immigration Law Section Update
III. Other Action Items
   A. 2019 Board Officer Nominations
IV. Informational Items
   A. Print Shop / *Bar Bulletin* Update
   B. Annual Meeting Highlights
   C. President Report
   D. President-Elect Report
   E. Executive Director Report
   F. Bar Commissioner Division / District Reports
V. Other Business
   A. New Business
   B. Adjourn
VI. Parking Lot (issues for future planning and discussion)
   A. Communications Plan
   B. Client Protection Fund Commission Recommendation Regarding a Mandatory Fee Arbitration Program for Lawyer / Client Fee Disputes

Committee on Women and the Legal Profession

Aaron Wolf Honored with Justice Pamela B. Minzner Outstanding Advocacy for Women Award

Join the Committee on Women and the Legal Profession for the presentation of the 2017 Justice Pamela B. Minzner Outstanding Advocacy for Women Award to Aaron Wolf for his work providing legal assistance to women who are underrepresented or under served and for his egalitarian approach towards working with women colleagues. The award reception will be held from 5:30–7:30 p.m., Aug. 30, at the Albuquerque Country Club. Hors d'oeuvres will be provided and a cash bar will be available. R.S.V.P.s are appreciated. Contact Committee co-chair Quiana Salazar-King at salazar-king@law.unm.edu.

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- 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#.
- Oct. 1, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group normally meets the first Monday of the month but will skip September due to the Labor Day holiday.)

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

UNM School of Law

Law Library

Summer 2018 Hours

Through Aug. 19

Building and Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.

Reference

Monday–Friday	9 a.m.–6 p.m.

Other Bars

New Mexico Black Lawyers Association

Annual Poolside Brunch

The New Mexico Black Lawyers Association invites members to attend its annual poolside brunch on Aug. 25, 11 a.m.-2 p.m. at 1605 Los Alamos Ave. SW, Albuquerque, N.M., 87104. Join NMBLA for food, drinks and fun! Tickets are only $35 and can be purchased on the New Mexico Black Lawyers Association Facebook page or by emailing nmblacklawyers@gmail.com. Each brunch ticket comes with an entry into our raffle for $500. There will only be 100 tickets sold, act fast. NMBLA also accepting sponsorships for this event. For information about sponsorships, email us nmblacklawyers@gmail.com.

New Mexico Defense Lawyers Association

Save the Date—Women in the Courtroom VII CLE Seminar

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

New Mexico Criminal Defense Lawyers Association

Defending Sex Offense Cases: Tips, Trials and Legal Update

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 offenses, 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. A membership party will 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.

Other Bars

Workers' Compensation Administration

Judicial Reappointment

The director of the Workers' Compensation Administration , Darin A. Childers, is considering the reappointment of Judge Reginald "Reg" Woodard to a five-year term pursuant to NMSA 1978, Section 52-5-2 (2004). Judge Woodard's term expires on Nov. 24. Anyone who wants to submit written comments concerning Judge Woodard's performance may do so until 5 p.m. on Aug. 31. All written comments submitted per this notice shall remain confidential. Comments may be addressed to WCA Director Darin A. Childers, PO Box 27198, Albuquerque, New Mexico 87125-7198 or faxed to 505-841-6813.

Legal Education

August

8 **Defending Against IRS Collection Activity, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9-11 **2018 Annual Meeting**
12 G, with Possible 7.5 EP
Live Seminar, Hyatt Regency Tamaya Resort and Spa
Center for Legal Education of NMSBF
www.nmbar.org

10 **New Mexico Defense Lawyers Association and west Texas TADC Joint Seminar**
4.0 G, 1.0 EP
Live Seminar, Ruidoso
New Mexico Defense Lawyers Association
www.nmdla.org

14 **Joint Ventures Agreements in Business, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Joint Ventures Agreements in Business, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Discover Hidden and Undocumented Google Search Secrets**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Practice Management Skills for Success (2018)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct (2017)**
1.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **Lawyers' Duty of Fairness and Honesty (Fair or Foul: 2016)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **Time's Up! Women in the Courtroom—VII: Power In Numbers**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Defense Lawyers Association
www.nmdla.org

21 **Trust and Estate Update: Recent Statutory Changes that are Overlooked and Underutilized**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Selling to Consumers: Sales, Finance, Warranty & Collection Law, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Technology: Time, Task, Document and Email Management**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Selling to Consumers: Sales, Finance, Warranty & Collection Law, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Gross Receipts Tax Fundamentals and Strategies**
6.0 G
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com

23-24 **11th Annual Legal Service Providers Conference: Poverty and the Law**
10.0 G, 2.0 EP
Live Seminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Advanced Google Search for Lawyers**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Women's Leadership Summit**
5.0 G
Live Seminar, Albuquerque
New Mexico Society of CPAs
505-246-1699

28 **Construction Contracts: Drafting Issues, Spotting Red Flags and Allocating Risk, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Construction Contracts: Drafting Issues, Spotting Red Flags and Allocating Risk, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **The Exclusive Rights (and Revenue) You Get With Music**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **2017 Real Property Institute**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **New Mexico Liquor Law for 2017 and Beyond**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Risky Business: Avoiding Discrimination When Completing the Form I-9 or E-Verify Process**
1.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **The Ethical Issues Representing a Band-Using the Beatles**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

September

5 **Choice of Entity for Nonprofits & Obtaining Tax Exempt Status, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Choice of Entity for Nonprofits & Obtaining Tax Exempt Status, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Attorney Orientation and the Ethics of Pro Bono**
2.0 EP
Live Seminar, Albuquerque
New Mexico Legal Aid
505-814-6719

6 **Microsoft Word's Styles: A Guide for Lawyers**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Planning with Single Member, LLCs, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Ethics Issues of Moving Your Practice Into the Cloud**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Planning with Single Member, LLCs, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Boundary Issues and Easement Law**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com

13 **How to Practice Series: Civil Litigation, Pt II – Taking and Defending Depositions**
4.5 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Income and Fiduciary Tax Issues for Estate Planners, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Income and Fiduciary Tax Issues for Estate Planners, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Military Retired Pay Primer**
2.0 G, 1.0 EP
Live Seminar, Albuquerque
FAMlaw LLC
www.famlawseminars.com

21 **2018 Annual Tax Symposium (Full Day)**
6.0 G, 1.0 EP
Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **2018 Annual Tax Symposium - Morning Session: Federal and State Tax Updates**
3.0 G
Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **2018 Annual Tax Symposium - Afternoon Session: Tax Law Special Topics**
3.0 G, 1.0 EP
Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

25 **2018 Sexual Harassment Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **2018 Collaborative Law Symposium: The Basics**
6.0 G, 1.0
Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **2018 Advanced Collaborative Law Symposium**
7.0 G
Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **The California New Rules Review**
1.0 EP
Live Webinar
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 27, 2018

PUBLISHED OPINIONS

A-1-CA-34675	F Dart v. K Westall	Affirm	07/23/2018
A-1-CA-35330	State v. A Yepez	Affirm	07/24/2018

UNPUBLISHED OPINIONS

A-1-CA-34685	State v. F Fierro	Affirm	07/23/2018
A-1-CA-35266	State v. T Sanchez	Affirm/Reverse	07/23/2018
A-1-CA-35688	State v. J Bowen	Affirm	07/23/2018
A-1-CA-36846	State v. C De-Aquinolopez	Affirm	07/23/2018
A-1-CA-36937	Bank of New York v. B Price	Dismiss	07/23/2018
A-1-CA-35465	State v. P Clifford	Affirm	07/24/2018
A-1-CA-36087	State v. A Hensley	Affirm	07/24/2018
A-1-CA-36101	State v. J Watson	Affirm	07/24/2018
A-1-CA-37098	Suntrust Mortgage v. R Saul	Affirm	07/25/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF ADMISSION

On July 24, 2018:
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602-553-4557 (fax)
tsmith@wilkesmchugh.com

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective July 5, 2018:
Christopher Dziak
3500 Comanche NE, Bldg. B
Albuquerque, NM 87107
505-385-6887

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective July 25, 2018:
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6300 Second Street NW
Albuquerque, NM 87107
505-410-2989
505-554-3976 (fax)
waynegriego@gmail.com

Ron Sanchez
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Albuquerque, NM 87125
505-224-2882
rsanchez127@gmail.com

CLERK'S CERTIFICATE OF CORRECTION

A clerk's certificate of address and/or telephone changes dated June 25, 2018, reported an incorrect email address for Lawrence M. Marcus.
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Albuquerque, NM 87109
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505-246-2806 (fax)
lmarcus@parklawnm.com

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 August 1, 2018

The Supreme Court is considering amendments to Rules 23-107, 2-114, and 6-116 NMRA, which would authorize the broadcasting, televising, photographing, and recording of proceedings in the magistrate courts subject to the same procedures and conditions that currently govern the appellate, district, and metropolitan courts. This proposal consists of amendments to the Supreme Court General Rules, Rules of Civil Procedure for the Magistrate Court, and Rules of Criminal Procedure for the Magistrate Courts. The proposed amended rules are posted to the Supreme Court's website as Proposal 2018-031, and may be found at https://supremecourt.nmcourts.gov/open-for-comment.aspx. Due to the length of the proposal, the full text is not being published in the *Bar Bulletin*.

If you would like to comment on the proposed amendments before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://supremecourt.nmcourts.gov/open-for-comment.aspx or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before Sep. 7, 2018, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

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-033
No. S-1-SC-36028 (filed June 18, 2018)

IN THE MATTER OF
ANHAYLA H., a child,

STATE OF NEW MEXICO ex rel.
CHILDREN, YOUTH AND FAMILIES
DEPARTMENT,
Petitioner-Petitioner,
v.
KEON H.,
Respondent-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
William E. Parnall, District Judge

NEW MEXICO CHILDREN, YOUTH & FAMILIES DEPARTMENT
KELLY P. O'NEILL
CHILDREN'S COURT ATTORNEY
Albuquerque, New Mexico
for Petitioner

JANE B. YOHALEM
LAW OFFICES OF JANE B. YOHALEM
Santa Fe, New Mexico
for Respondent

Opinion

Petra Jimenez Maes, Justice

{1} The New Mexico Children, Youth and Families Department (the Department) appeals from a judgment of the Court of Appeals reversing the district court's termination of Father's parental rights with regard to Child. The Court of Appeals concluded that the Department failed to make reasonable efforts to assist Father in remedying the conditions and causes of neglect and abuse that rendered Father unable to properly care for Child under NMSA 1978, Section 32A-4-28(B)(2) (2005). *See State ex rel. Children, Youth & Families Dep't v. Keon H.*, 2017-NMCA-004, ¶ 1, 387 P.3d 313. We granted certiorari to review whether the district court's determination that the Department made reasonable efforts to assist Father was supported by substantial evidence. We reverse the Court of Appeals opinion and affirm the district court order terminating Father's parental rights.

I. BACKGROUND

{2} On February 20, 2013, Mother and Father took two-month-old Child to the hospital. Mother and Father reported that two days prior Father had been standing and rocking Child when he accidentally dropped her on the carpet. Child was in critical condition, having sustained multiple fractures, including twenty-three rib fractures and four skull fractures in various stages of healing, facial bruising, liver lacerations, brain bleeding, and a possible detached retina. Doctors determined that the "volume, distribution, and severity of [Child's] injuries [were] not consistent with a short fall in the home" and instead evidenced multiple incidents of blunt force trauma to Child's head and body. Child is severely physically and mentally impaired as a result of the injuries.

{3} On February 25, 2013, the Department filed a petition with the district court alleging Child to be neglected and/or abused under NMSA 1978, Section 32A-4-2 (2009, amended 2017). Mother and Father entered no contest pleas to the neglect and abuse allegations on April 5, 2013. The adjudicatory and dispositional hearing was held on April 22, 2013. An initial judicial review hearing and three permanency hearings were held between May 20, 2013 and August 22, 2014. Father's termination of parental rights hearing was conducted over two days, approximately six months apart, August 27, 2014 and February 6, 2015. Pertinent details of the various hearings are outlined below.

A. Initial Custody

{4} The Department took Child into custody on February 21, 2013 on allegations of neglect and/or abuse filed February 25, 2013. On February 26, 2013, the district court granted the Department continued custody of Child until further order. On March 7, 2013, a custody hearing was held; both Mother and Father were present. At the custody hearing, the court ordered Mother and Father to participate in psychosocial, psychological, domestic violence, substance abuse, and parenting assessments, as well as drug screens. Mother was also instructed to participate in an independent living skills assessment. The court further instructed Mother and Father to keep their attorneys and the Department's permanency planning worker (PPW) apprised of their current addresses and phone numbers at all times and promptly notify them of any changes. The Department assigned Richard Gaczewski as the PPW for Child and Diane Drobinski as the PPW for Mother and Father.

B. Mediation and Plea

{5} On April 5, 2013, Mother and Father participated in a mediation conference and pled no contest to Child being neglected and/or abused under Section 32A-4-2 (2009, amended 2017). The factual basis for Mother's and Father's plea agreements was that Child was seriously injured while in the care of Mother, Father, and others, and "no action was taken by [Mother or Father] to protect [Child] from injury or seek medical care." Mother's stipulated judgment and disposition also noted that "domestic violence in the home between [Father] and [Mother] in the presence of [Child] [had] impaired [Mother's] ability to provide for the care, safety and supervision of [Child]."

C. Adjudication and Disposition

{6} At the adjudicatory and dispositional hearing on April 22, 2013, the district court adopted the Department's proffered findings of fact and incorporated into its

order the Department's family treatment[1] plan and predispositional study dated April 16, 2013. Although the court had ordered several assessments, the treatment plans recommended by the Department for Mother and Father called for initial psychosocial assessments on which other Department recommendations would be based. By the hearing date, Mother had completed her psychosocial assessment and the Department had developed personalized treatment recommendations for her. Father had not yet participated in his psychosocial assessment and thus only had the one item in his treatment plan.[2]

{7} The record indicates that at the time of the hearing, Father was homeless and did not have an address. Father was not returning phone calls from his PPW, Ms. Drobinski, nor did he show for a scheduled office visit. Father's only visits with Child occurred prior to the adjudicatory hearing. The Department described one visit as "problematic" because Father had "angrily grabbed [Mother's] cell phone from her hands" when they were having an argument. The district court ordered Mother and Father to "undergo psychological evaluations and treatment to be arranged by the [Department] or consistent with [the c]ourt's order." The court also ordered Mother and Father to maintain regular contact with their attorneys and the PPW regarding the court-ordered treatment plans, court dates, and the case in general.

D. Initial Judicial Review Hearing

{8} The initial judicial review hearing was held on May 20, 2013. Mother was present by phone; Father was not present. The district court adopted the Department's facts and proposed family treatment plan contained in the judicial review and/or permanency hearing report dated May 20, 2013. The Department stated in the report that it offered Mother and Father office visits with their PPW to conduct psychosocial assessments, create treatment plans, and coordinate supervised visits with Child. The court found that Mother was participating in her treatment plan and regularly visiting Child. Father, however, had made no efforts to comply with his treatment plan, had made no efforts to maintain contact with Child given his circumstances and his abilities, and had not been in contact with the Department since the plea hearing on April 5, 2013. Because Father was not present at the hearing, the court asked Father's attorney if Father had been in contact with her. Father's attorney stated that she called Father the day before and asked if Father had been in contact with the Department. She said that Father told her that he had not been in contact with the Department, that he had not started to engage in his treatment plan, and that the only thing he was doing was looking for a job.

E. Initial Permanency Hearing

{9} The initial permanency hearing was held on November 25, 2013. Mother was present; Father was also present, having been transported from the Metropolitan Detention Center (MDC). The district court adopted the Department's facts and proposed family treatment plan contained in the judicial review and/or permanency hearing report dated November 25, 2013. The Department informed the court that Father was in custody due to a domestic violence incident with Mother. The Department also informed the court that Mother had been making good efforts at working her treatment plan but had recently stopped participating and that Father had made no efforts to participate in his treatment plan. Father's attorney told the court that Father intended to take his domestic violence charge to trial, so she did not expect that case to be resolved prior to the neglect and abuse proceedings.

{10} During the hearing, Father's attorney volunteered that Father had not been good about keeping in touch with her. In response, the court explained to Mother and Father the importance of maintaining contact with the Department. The court said, "When there's a problem, you need to go to the Department and let the Department know . . . [if you are] homeless . . . don't have a phone . . . can't get to the [urine analyses], . . . whatever. The Department's job is to make reasonable efforts to fix those things; so I'll ask the Department to do that, and I'll ask you to communicate with the Department so that [it will] do that." The court reminded Father that there were programs Father could complete while in custody and encouraged him to "keep that in mind and do what you can." Father responded, "Yes, sir." The court changed Child's permanency planning goal from reunification to adoption, but ordered the Department to make reasonable efforts to implement the family treatment plan and ordered Mother and Father to make reasonable efforts to comply with the plan.

F. Second Permanency Hearing

{11} The second permanency hearing was held on February 24, 2014. Mother was present; Father was also present, having been transported from MDC. The district court adopted the Department's facts and proposed family treatment plan contained in the judicial review and/or permanency hearing report dated February 24, 2014. In the report, Ms. Drobinski informed the court that Father had twice been scheduled for his psychosocial assessment but canceled both appointments, and that Mother's visits with Child had been canceled after Mother's domestic violence incident with Father. Further, Ms. Drobinski indicated that Father had not been in touch with the Department and had not participated in his treatment plan, but did note that Father had once visited with Child. Ms. Drobinski also informed the court that she visited Father at MDC in November 2013, that Father was transferred to Texas, and that she asked Father's attorney how to write to Father.

{12} The guardian ad litem, Karen Cantrell, was present and testified that Child would need highly skilled and specialized care for her entire life. Ms. Drobinski was also present and provided information about Child's therapy needs and the type of training a caregiver would need in order to provide Child with the twenty-four-hour-a-day care that Child requires. Ms. Drobinski testified that, at a minimum, Child's caregiver would need

[1]The district court's orders in the case refer to the Department's plans for Mother and Father as "case" plans instead of "treatment" plans. The terms appear to be used interchangeably by both the court and the parties. For consistency, we refer to the plans as "treatment" plans throughout this opinion. We do note, however, that when the Legislature amended the disposition statute in 2016, it substituted the word "case" for "treatment" throughout. *See* NMSA 1978, § 32A-4-22(C) (2016).

[2]Father's name was not originally listed in the parent/guardian plan items of the summary treatment plan; the summary only indicated that a psychosocial assessment was due. This typographical error was discussed on February 24, 2014 at the second permanency hearing. The parties acknowledged that this was simply an oversight. Father's name is listed in the family treatment plan, and there is nothing in the record to indicate that there was any confusion about Father's responsibility to participate in a psychosocial assessment.

to participate in training with the Association for Retarded Citizens of Albuquerque or another agency of that type, and participate in Child's occupational therapy, physical therapy, and hippotherapy.

G. Motion to Terminate Parental Rights

{13} On March 26, 2014, the Department filed a motion to terminate the parental rights of both Mother and Father, stating that Mother and Father "have been unable or unwilling to make the necessary changes to parent [Child] in a minimally safe and adequate manner." The Department alleged that Mother had stopped participating in her treatment plan items and that Father was in substantial noncompliance with his treatment plan and had abandoned Child. The Department asserted that, despite reasonable efforts by the Department to assist Mother and Father, it was "unlikely the underlying causes of the neglect [would] change in the foreseeable future." The Department also asserted that additional efforts would be futile. Father filed a response to the motion, denying the allegations. Mother ultimately voluntarily relinquished her parental rights.

H. Third Permanency Hearing

{14} On August 22, 2014, the district court held a third permanency hearing. Mother was present; Father was also present, having been transported from MDC. The district court adopted the Department's facts and proposed family treatment plan contained in the judicial review and/or permanency hearing report dated August 22, 2014. The court found that the Department had made reasonable efforts to implement the treatment plans of Mother and Father, that Mother had made some efforts to comply with her treatment plan but that her participation had been inconsistent, and that Father had made no effort to comply with his treatment plan. Again, the court ordered Mother and Father to participate in their treatment plans.

I. Termination of Parental Rights Hearing—First Day

{15} The termination of parental rights hearing began on August 27, 2014. On the day of the hearing, Mother voluntarily relinquished her parental rights to Child. Thereafter, the termination proceedings pertained solely to Father's parental rights. The court heard testimony from three witnesses: Luanne Stordahl, a family service coordinator and developmental specialist at Inspirations Early Intervention, Inc.; Richard Gaczewski, a senior PPW with the Department; and Father.

1. Luanne Stordahl's Testimony

{16} Ms. Stordahl testified that Child did not have any medical issues at birth; but when Ms. Stordahl evaluated Child in March 2013 when Child was approximately three months old, Child "was not using the right side of her body" and had "difficulty maintaining eye contact or [fixating] on toys or objects." Ms. Stordahl specifically described Child's visual diagnoses, which included multiple brain and eye issues. Child was assessed as having "delays in her motor skills, feeding skills, vision skills . . . and communication skills." Subsequent reassessments reconfirmed those delays. Ms. Stordahl testifed that as a result, Child was referred to multiple therapies, one of those being hippotherapy. When asked who could participate in hippotherapy with Child, Ms. Stordahl testified that both parents would have been able to participate. She stated that Mother had attended some sessions, but to her knowledge Father had never attended any sessions. Ms. Stordahl testified that she had not had any contact with Father.

2. Richard Gaczewski's Testimony

{17} Mr. Gaczewski testified that he was currently Father's PPW and had been since March 21, 2014. Mr. Gaczewski testified that he was also serving as Child's PPW and had been Child's PPW since March 2013. As Child's PPW, he worked closely with Ms. Drobinski, Father's first PPW, and later reviewed her notes about Father's case when he took over as Father's PPW.

{18} Mr. Gaczewski testified that Department PPWs are responsible for meeting monthly with parents, conducting psychosocial assessments, working with parents to create treatment plans, and coordinating services for parents and children. Mr. Gaczewski testified that as Child's PPW, he participated in the creation of the treatment plans in this case. When asked why Father's treatment plan contained only one element—the psychosocial assessment—as opposed to Mother's treatment plan which incorporated numerous items, Mr. Gaczewski explained that the psychosocial assessment is the first step of a treatment plan and that when the psychosocial assessment is complete, the Department establishes a more comprehensive treatment plan based upon the client's needs. Mr. Gaczewski said that Father came into the office at the beginning of the case but did not complete the psychosocial assessment.

{19} Mr. Gaczewski testified that Mother, on the other hand, completed her psychosocial assessment right away and had been working her treatment plan. Mr. Gaczewski indicated that as Child's PPW, he worked more with Mother than Father because Mother was involved in the case and Father was not. Mr. Gaczewski testified that Mother regularly attended sessions, that he interacted with Mother during visits, and that he performed Mother's independent living assessment. He said he would have done the same for Father had Father shown interest in being involved in the case.

{20} Mr. Gaczewski testified that Father was present at the custody hearing on March 7, 2013 and the mediation conference and plea hearing on April 5, 2013, and was made aware of his treatment plan. Father was also provided with the Department's contact information. Mr. Gaczewski testified that a PPW is always present at mediations and court hearings and that the PPW carries business cards containing the Department's contact information. To Mr. Gaczewski's knowledge, Father was not incarcerated between March 2013 and November 2013.

{21} Father was arrested in November 2013 for a domestic violence incident with Mother.[3] Mr. Gaczewski testifed that Ms. Drobinski visited Father at MDC after this arrest, but Father's psychosocial assessment was not completed at that time. Mr. Gaczewski testified that Ms. Drobinski's notes from the visit did not indicate anything other than the fact that Father told Ms. Drobinski he had been homeless and without a phone and that was why he had not contacted the Department.

{22} The remainder of Mr. Gaczewski's testimony focused on the contact Mr. Gaczewski had with Father after being assigned as Father's PPW on March 21, 2014. Mr. Gaczewski testified that he had not had any contact with Father because Father's whereabouts were unknown to him until August 2014. He testified that he made efforts to try to locate Father by asking Mother about Father's whereabouts, but Mother provided no information. He also said he checked the MDC website around April or May 2014 and again in

[3]On January 15, 2015, the State filed a nolle prosequi as to Father's criminal charges related to the domestic violence incident with Mother. *See* Case No. D-202-CR-2013-05298.

July 2014, but Father was not listed as an inmate the times Mr. Gaczewski checked. Mr. Gaczewski testified that he did not send Father letters because Father was not listed on the MDC website, but said he would have sent Father letters if he had located him. Mr. Gaczewski testified that between March 2014 and July 2014 Father had not contacted him, nor had Father visited Child.

{23} Mr. Gaczewski testified that Father had contact information for the Department but never attempted to make contact with the Department, never sent letters to the Department, never made phone calls to the Department, and never had anyone contact the Department on his behalf. Mr. Gaczewski reiterated that both the Department and Father were responsible for making efforts toward reunification of the family and that it was not solely the Department's responsibility. Mr. Gaczewski testified that Ms. Drobinski left a message on her voice mail when she left her PPW position which provided Mr. Gaczewski's phone number and Mr. Gaczewski's supervisor's phone number, and that the voice mailbox was open through July 2014. Mr. Gaczewski testified that he never received a message from Father and that Mr. Gaczewski's supervisor never contacted Mr. Gaczewski about receiving any messages from Father.

{24} Mr. Gaczewski testified that in his opinion, Child would incur great bodily harm if Child were returned to Father. He testified that Child's highly specialized needs would not be met given Father's lack of involvement in any services to date. To mitigate these safety threats, he noted that Father would have to participate in the psychosocial assessment, that the Department would have to look at Father's "levels of functioning," that "referrals would . . . need to be made," and that Father would have to be involved "with [Child's] service providers over a period of time, maybe six months, so that [Father could] have a full understanding of the long-term needs of [Child]." Mr. Gaczewski testified that Father had made no attempts to provide for Child and that the last contact Father had with Child was in March 2013. Mr. Gaczewski testified that in light of this information, the conditions that rendered Father unable to properly care for Child could not be changed in the foreseeable future. He further testified that Child was adoptable, based on monthly home visits he conducted with Child from March 2013 to April 2014, and that it was in Child's best interest to terminate Father's parental rights.

3. Father's Testimony

{25} Father testified that he had been incarcerated continuously since October 9, 2013. He stated that MDC sent him to Texas twice but that during those times his name would have appeared on MDC's website as being in custody at MDC had the Department attempted to locate him. Father reiterated that he had never, at any point since October 9, 2013, been released from MDC's custody.

{26} The district court noted during Father's testimony that the Department typically sends letters to incarcerated parents reminding them to work the treatment plan, along with self-addressed, stamped envelopes. Father testified that Ms. Drobinski did not have Father participate in a psychosocial assessment when she visited him in custody at MDC in November 2013, nor did she ever send him letters or self-addressed, stamped envelopes. He also testified that Ms. Drobinski never invited Father to make an appointment to do a psychosocial assessment or offered Father any dates to do the assessment. Father further testified that when Ms. Drobinski visited Father at MDC in November 2013, the only information Ms. Drobinski provided to Father was that Child's permanency planning goal would be changed from reunification to adoption. Father also testified, however, that he never communicated with the Department while he was in custody, never requested that a psychosocial assessment be completed, and never requested to participate in his treatment plan.

{27} At the end of the first day of the termination of parental rights hearing, the Department indicated that it needed to call a rebuttal witness. The court determined that a recess would be required and continued the hearing for approximately six months. The hearing resumed on February 6, 2015.

J. Termination of Parental Rights Hearing—Second Day

1. Richard Gaczewski's Testimony

{28} Mr. Gaczewski testified again for the Department. Mr. Gaczewski first addressed Father's testimony that Father had been continuously incarcerated since October 2013. To rebut this testimony, the Department introduced bench warrants issued for Father in May, June, and August 2014 in Father's pending criminal cases. Mr. Gaczewski testified that he checked Father's pending criminal cases and was able to determine that, contrary to Father's testimony, Father had, in fact, been in and out of custody during this time. Mr. Gaczewski stated that he checked the MDC website around the time the bench warrants were issued and that Father was not listed as an inmate. Mr. Gaczewski testified further that in reviewing Father's pending criminal cases, he determined that Father's current incarceration was for neglect and abuse charges, the same allegations that brought Child into the Department's custody.

{29} Mr. Gaczewski testified that on September 2, 2014, six days after the first day of the termination hearing, he mailed a letter to Father at MDC. With the letter, he included a psychosocial assessment and self-addressed, stamped envelopes. Father promptly completed and returned the psychosocial assessment. Upon receiving Father's psychosocial assessment, Mr. Gaczewski updated Father's treatment plan with personalized treatment recommendations. On September 23, 2014, Mr. Gaczewski mailed Father another letter in which he specified the treatment plan items and suggested ways for Father to meet the items while incarcerated.

{30} At the hearing, Mr. Gaczewski identified many of the requirements outlined in Father's plan: participate in psychological, substance abuse, and parenting assessments and follow the recommendations; participate in domestic violence counseling classes; participate in Child's non-emergency medical appointments; provide contact information for possible placements for Child; provide a financial plan for how Father would support Child; maintain contact with the Department PPW at least once a month; inform the Department PPW of any changes in Father's address or phone number; and provide contact information for Father's case manager at MDC. Mr. Gaczewski acknowledged that some of the items in the new treatment plan, such as Father attending Child's medical appointments, were impossible for Father to fulfill while in jail, but Mr. Gaczewski had included recommendations for how Father could fulfill each item while incarcerated. For example, as to Child's medical appointments, Mr. Gaczewski indicated that he intended to provide Father with updates regarding Child's medical needs. Mr. Gaczewski testified that he never heard back from Father. Father only sent letters to Child.

{31} Mr. Gaczewski testified that he sent follow-up letters to Father on October 16, 2014 and again on November 21, 2014, but

did not receive a response. Mr. Gaczewski further testified that he informed Father in his November 21, 2014 letter that Father and Child were receiving new PPWs and he provided contact information for those workers. Father's new PPW was identified as Lareina Manuelito.

2. Lareina Manuelito's Testimony

{32} Lareina Manuelito, Father's third PPW, then testified about her contact with Father in the months leading up to the second day of the termination of parental rights hearing. Ms. Manuelito testified that she received letters from Father in December 2014 and January 2015, but the letters were specifically directed to Child, not to her. She testified that she sent a letter to Father at the end of January 2015, attaching a copy of Father's previous treatment plan, notes from the last home visit with Child, and self-addressed, stamped envelopes so Father could correspond with her and with Child. When Ms. Manuelito was asked why she had not contacted Father in November or December 2014, Ms. Manuelito testified that she was acclimating to her new role as a PPW. Ms. Manuelito also testified that the Department was not currently authorizing visits to clients in jail and that PPWs were only communicating through letters. Ms. Manuelito testified that she had not received any documentation from Father regarding his treatment plan.

K. Termination of Father's Parental Rights

{33} At the close of the second day of the termination of parental rights hearing, the district court criticized the Department for not doing more for Father while he was incarcerated, but ultimately found that the Department made reasonable efforts to assist Father under the facts and circumstances of the case. The court also found that the conditions and causes of Child's neglect and abuse were unlikely to change in the foreseeable future. The court did not enter a finding of futility or aggravated circumstances. The court terminated Father's parental rights.

{34} Father appealed the termination of his parental rights, arguing that the Department had not fulfilled its obligation to make reasonable efforts and that the Department "made its own determination from the outset that efforts to work with Father toward reunification would be futile." The Court of Appeals reversed, finding that there was not substantial evidence to prove by clear and convincing evidence that the Department made reasonable efforts. *Keon H.*, 2017-NMCA-004, ¶¶ 1, 19. The Court of Appeals noted that the Department was free to bring additional allegations of neglect or abuse on remand. *Id.* ¶ 18.

{35} The Department petitioned for a writ of certiorari on the issue of whether the Court of Appeals erred in reversing the district court's finding of reasonable efforts. We granted certiorari and exercise our jurisdiction to review the opinion of the Court of Appeals under Article VI, Section 2 of the New Mexico Constitution and Rule 12-502 NMRA.

II. STANDARD OF REVIEW

{36} There is no dispute that Child was neglected and/or abused as defined by the Children's Code. *See* § 32A-4-2 (2009, amended 2017). The issue before the Court is whether there was substantial evidence to support the district court's finding that the Department made reasonable efforts to assist Father. *See* § 32A-4-28(B)(2). "The statutory prerequisite of reasonable efforts to assist the parent must be satisfied before parental rights may be terminated." *State ex rel. Children, Youth & Families Dep't v. Patricia H.*, 2002-NMCA-061, ¶ 21, 132 N.M. 299, 47 P.3d 859. "Substantial evidence is relevant evidence that a reasonable mind would accept as adequate to support a conclusion." *Id.* ¶ 22 (internal quotation marks and citation omitted).

{37} "Parents have a fundamental liberty interest in the care and custody of their children; due process of law is required before parents can be deprived of that right." *State ex rel. Children, Youth & Families Dep't v. Marlene C.*, 2011-NMSC-005, ¶ 37, 149 N.M. 315, 248 P.3d 863. Due process requires that findings necessary to terminate parental rights be supported by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982); *State ex rel. Children, Youth & Families Dep't v. Nathan H.*, 2016-NMCA-043, ¶ 31, 370 P.3d 782. "Clear and convincing evidence means evidence that instantly tilts the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *Nathan H.*, 2016-NMCA-043, ¶ 31 (internal quotation marks and citation omitted).

{38} "Our standard of review is therefore whether, viewing the evidence in the light most favorable to the [Department], the fact finder could properly determine that the clear and convincing evidence standard was met." *In re Termination of Parental Rights of Eventyr J.*, 1995-NMCA-087, ¶ 3, 120 N.M. 463, 902 P.2d 1066; *see also State ex rel. Children, Youth & Families Dep't v. Hector C.*, 2008-NMCA-079, ¶ 11, 144 N.M. 222, 185 P.3d 1072 (requiring clear and convincing evidence in termination cases). Our standard of review does not require us to determine "whether the [district] court could have reached a different conclusion." *Patricia H.*, 2002-NMCA-061, ¶ 31. Furthermore, this Court is not permitted to "reweigh the evidence." *Eventyr J.*, 1995-NMCA-087, ¶ 3; *see also State ex rel. Children, Youth & Families Dep't v. Vanessa C.*, 2000-NMCA-025, ¶¶ 24, 28, 128 N.M. 701, 997 P.2d 833 (providing that when reviewing a termination of parental rights case, the appellate court must not reweigh the evidence nor assess the credibility of witnesses, but must defer to the conclusions of the trier of fact).

III. DISCUSSION

A. Termination of Parental Rights Proceedings and the Reasonable Efforts Requirement

{39} The reasonable efforts requirement originated in the Adoption Assistance and Child Welfare Act of 1980, which conditioned federal funding on the requirement that states put forth reasonable efforts to reunify a family before placing a child up for adoption. *See* Cristine H. Kim, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. Ill. L. Rev. 287, 288 (1999) (citing 42 U.S.C. §§ 620-28, 670-79a) (1991, amended 1997). Congress enacted this legislation to limit the "unnecessary placement of children in foster care who could have been adequately protected at home if their families had access to support services." Kim, *supra*, at 289. Congress later amended this legislation to clarify that the child's health and safety is the paramount concern in determining the reasonable efforts to be made and in making those efforts. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.); 42 U.S.C. 671(a)(15)(A) (2012). In the amended legislation, Congress sought to strike a balance between the interests of family unity and health and safety. Kim, *supra*, at 316-17.

{40} The New Mexico Legislature has adopted the same approach to the reasonable efforts requirement: "Reasonable efforts shall be made to preserve and reunify the family, with the paramount concern being the child's health and safety." *See* §

32A-4-22(C) (2009, amended 2016); *see also In re Grace H.*, 2014-NMSC-034, ¶ 45, 335 P.3d 746 ("A child's health and safety shall be the paramount concern." (quoting NMSA 1978, § 32A-1-3(A) (2009))). District courts, in termination of parental rights proceedings, are instructed to "give primary consideration to the physical, mental and emotional welfare and needs of the child." Section 32A-4-28(A). Section 32A-4-28(B)(2) provides that the district court shall terminate parental rights to a neglected or abused child when

> the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite *reasonable efforts* by the [D]epartment or other appropriate agency to assist the parent in adjusting the conditions that render the parent unable to properly care for the child.

(Emphasis added.) The district court may excuse the reasonable efforts requirement when "there is a clear showing that the efforts would be futile" or "the parent has subjected the child to aggravated circumstances." Section 32A-4-28(B)(2)(a), (b).

{41} Section 32A-4-28(B)(2) does not enumerate the specific methods of assistance that are sufficient to constitute reasonable efforts, beyond stating that the efforts should be directed to assist the parent in remedying the conditions and causes of neglect and abuse. That being the case, we have traditionally considered the totality of the circumstances when reviewing the district court's determination. *See State ex rel. Children, Youth & Families Dep't v. Alfonso M.-E.*, 2016-NMCA-021, ¶ 59, 366 P.3d 282; *Patricia H.*, 2002-NMCA-061, ¶ 31. Efforts to assist a parent "may include individual, group, and family counseling, substance abuse treatment, mental health services, transportation, child care, and other therapeutic services." *Patricia H.*, 2002-NMCA-061, ¶ 26. As our Court of Appeals has noted, "[w]hat constitutes reasonable efforts may vary with a number of factors, such as the level of cooperation demonstrated by the parent and the recalcitrance of the problems that render the parent unable to provide adequate parenting." *Id.* ¶ 23.

{42} The district court's consideration of Child's health and safety does not relieve the Department of the statutory requirement that reasonable efforts be made. *See id.* ¶ 21. When examining whether the Department's efforts were reasonable in this case, we find it helpful to look to the distinction our Court of Appeals has drawn between "active" efforts and "passive" efforts in other termination cases. *See State ex rel. Children, Youth & Families Dep't v. Yodell B.*, 2016-NMCA-029, 367 P.3d 881. In cases where the Indian Child Welfare Act (ICWA) applies, a showing of *active* efforts on the part of the Department is required before a parent's parental rights may be terminated. *Id.* ¶ 8. The Court of Appeals has distinguished active efforts from passive efforts, determining that "active efforts connotes a more involved and less passive standard than that of reasonable efforts." *Id.* ¶ 20 (internal quotation marks and citation omitted). The Court of Appeals describes the distinction as follows:

> Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts . . . is where the state [PPW] takes the client through the steps of the plan rather than requiring that the plan be performed on its own.

Id. ¶ 17 (internal quotation marks and citation omitted). "The term active efforts, by definition, implies heightened responsibility compared to passive efforts. Giving the parent a treatment plan and waiting for [the parent] to complete it would constitute passive efforts." *Id.* (quoting *In re A.N.*, 2005 MT 19, ¶ 23, 325 Mont. 379, 106 P.3d 556). "[A]ctive efforts requires more than pointing the parent in the right direction, it requires 'leading the horse to water.'" *Yodell B.*, 2016-NMCA-029, ¶ 17 (internal quotation marks and citation omitted).

B. The District Court's Determination That the Department Made Reasonable Efforts to Assist Father Is Supported by Substantial Evidence

{43} In this case, the Department's efforts, although imperfect, were reasonable. *See Patricia H.*, 2002-NMCA-061, ¶ 28 ("[O]ur job is not to determine whether [the Department] did everything possible; our task is . . . to [determine] whether [the Department] complied with the minimum required under law."). In the beginning months of the case, the Department prepared a treatment plan for Father, went over the treatment plan with Father, provided Father with the Department's contact information, and scheduled appointments for Father's psychosocial assessment. Father did not show up for the appointments and did not participate in the psychosocial assessment.

{44} The district court heard testimony that Father was taken into custody in either October or November 2013. This means that Father was not incarcerated for the first seven or eight months of this case; that is, March 2013 to October/November 2013. Father was present at the custody hearing on March 7, 2013 and the mediation conference and plea hearing on April 5, 2013, was made aware of his treatment plan, and was provided the Department's contact information. But Father never contacted the Department when he was out of custody during the first several months of the case or during any other period of time when he was out of custody. The same is true for the time Father was incarcerated; he made no attempts to contact the Department.

{45} The Department's senior PPW, Mr. Gaczewski, has been personally and intimately involved with this case since Child was taken into the Department's custody on February 21, 2013. He served as Child's PPW from March 2013 to November 2014 and served as Father's PPW from March 2014 to November 2014. For almost two years, Mr. Gaczewski served a critical role in this matter and, having done so, was able to testify to Father's lack of participation in the case from its inception.

{46} Mr. Gaczewski's continuous involvement in the case may have provided the district court with the nexus it needed to gain a broader understanding of the Department's efforts to assist Father. Although the picture of the Department's efforts is by no means perfectly complete, Mr. Gaczewski's testimony, even without the testimony of Father's first PPW, Ms. Drobiniski, appears to have been adequate to fill any questionable void. If not, however, when the termination of parental rights hearing resumed on February 6, 2015, the court heard from Mr. Gaczewski about his additional efforts to assist Father while the court was in recess. There is no reason why the court could not consider these additional efforts when determining whether the Department's efforts as a whole were reasonable.

{47} Six days after the first day of the termination of parental rights hearing, the Department sent a letter to Father along with the psychosocial assessment and self-addressed, stamped envelopes. When Father returned the psychosocial assessment, the Department prepared a comprehensive treatment plan for Father and sent Father a letter detailing the ways Father could comply with the plan while

in custody. Father never responded to the Department or acknowledged the treatment plan. Even after the Department sent follow-up letters, Father did not respond. Father only sent letters to Child.

{48} Both the Department and Father are responsible for making efforts toward reunification of the family. *See* § 32A-4-22(C) (2009, amended 2016) ("[T]he court shall . . . order the [D]epartment to implement and the child's parent . . . to cooperate with any treatment plan approved by the court."). While we acknowledge that Father finally completed the psychosocial assessment, Father has continuously failed to show any desire or willingness to address the conditions and causes that brought Child into custody. Father never contacted the Department, he missed or canceled scheduled appointments with the Department, and he only visited Child once or twice at the beginning of the case.

{49} Around the time of the plea hearing in April 2013, Father was homeless and did not have an address. Although Father had been instructed by the court to maintain regular contact with his attorney and the Department, he did not do so. When Father failed to attend the initial judicial review hearing on May 20, 2013, Father's attorney informed the court that she did not know why Father was not in court and volunteered that when she had spoken with Father the day before, Father stated that he had not been in touch with the Department, he had not begun to engage in his treatment plan, and he was only looking for a job. Later, at the initial permanency hearing on November 25, 2013, Father's attorney again informed the court that Father had not kept in touch with her, contrary to the court's instructions.

{50} Father was given another chance during the recess of the termination hearing to show his willingness to work with the Department on a treatment plan and declined to participate in any meaningful way. Although the new treatment recommendations proposed by the Department were not yet approved by the district court, the delay in formulating a more comprehensive treatment plan could be attributed to Father's lack of initiative in participating in the psychosocial assessment at the outset. The record indicates that the Department made reasonable efforts to assist Father, but Father did not take advantage of those efforts.

{51} We do acknowledge that there are some conflicts in the testimony of Mr. Gaczewski and Father, specifically those pertaining to the dates Father was in and out of custody and Ms. Drobinski's visit to Father at MDC in November of 2013. Based on the evidence presented at the termination hearing, the district court could have concluded that Mr. Gaczewski was a more credible witness than Father. It is not our job to assess the credibility of witnesses; it is our duty to defer to the district court's conclusions in this regard. *See Vanessa C.*, 2000-NMCA-025, ¶ 24.

{52} When making a determination as to whether the Department's efforts to assist Father were reasonable, the district court was required to consider Child's health and safety. *See* § 32A-4-22(C) (2009, amended 2016) ("Reasonable efforts shall be made to preserve and reunify the family, with the paramount concern being the child's health and safety."); § 32A-4-28(A) ("In proceedings to terminate parental rights, the court shall give primary consideration to the physical, mental and emotional welfare and needs of the child, including the likelihood of the child being adopted if parental rights are terminated."). Throughout the course of the proceedings in this case, Child's guardian ad litem, Karen Cantrell, testified to Child's extensive injuries and the highly specialized care that Child would need for the rest of her life. At the termination hearing, Ms. Stordahl testified to the numerous therapies Child had been receiving and the continued treatments that would be required to keep her alive. As was the case in *Patricia H.*, "[t]he testimony raised significant questions regarding [Father's] present ability to meet Child's specialized needs." 2002-NMCA-061, ¶ 33 (affirming termination of mother's parental rights where child had specialized needs requiring a high level of care and mother stopped participating in services). Indeed, the district court expressed concern that Father had not shown any interest or initiative in learning about Child's needs and had not obtained any training on how to care for Child.

{53} Aside from a reasonable efforts determination, the district court was also required under Section 32A-4-28(B)(2) to determine whether the conditions and causes of the neglect and abuse were unlikely to change in the foreseeable future. "Foreseeable future" means "a reasonably definite time or within the near future." *Patricia H.*, 2002-NMCA-061, ¶ 34 (internal quotation marks and citation omitted). The court found, based on Father's lack of performance in the past two years, that Father would not realistically be able to care for Child. The court also considered the fact that Father was currently incarcerated on criminal allegations of abuse stemming from the case at hand, with no anticipated release date.[4] *See Patricia H.*, 2002-NMCA-061, ¶ 34 ("[I]n balancing the interests of the parents and children, the court is not required to place [Child] indefinitely in a legal holding pattern." (internal quotation marks and citation omitted)).

{54} Because of Child's highly specialized needs and Father's inability to meet those needs in the near future, as well as Father's failure to maintain contact with Child and the Department, the district court determined that termination was in Child's best interest. In addition to finding that the Department made reasonable efforts to assist Father, the court found that Father did not "substantially comply with his court-ordered treatment plan and was not successful in addressing his issues with substance abuse, housing and mental health." We will not disturb the district court's findings.

IV. CONCLUSION

{55} Considering the totality of the circumstances, there was substantial evidence for the district court to find that the conditions and causes of Child's neglect and abuse were unlikely to change in the foreseeable future despite reasonable efforts by the Department under Section 32A-4-28(B)(2). The Court of Appeals usurped the role of the district court by reweighing the evidence and failing to give deference to the district court's determinations. Therefore, we reverse the opinion of the Court of Appeals, affirm the district court order terminating Father's parental rights, and remand for proceedings consistent with this opinion.

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

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice, specially concurring

[4]Father subsequently pled no contest to four counts of child abuse in the criminal matter. *See* Case No. D-202-CR-2014-00244.

GARY L. CLINGMAN, Justice, not participating

VIGIL, Justice (specially concurring).

{57} I agree with the majority that substantial evidence supported the termination of parental rights. The totality of the circumstances sustained the district court's eventual determination that the Department made reasonable efforts to assist Father under Section 32A-4-28(B)(2). Respectfully, I write separately to underscore three points. First, a parent's recalcitrance does not in itself relieve the Department from the responsibility to render reasonable efforts. *See* maj. op. ¶ 48. Second, passive efforts are not reasonable efforts under Section 32A-4-28(B)(2). *Contra* maj. op. ¶ 42. Third, the Department must do more than it did in this case to assist a parent who is incarcerated in order to meet its statutory responsibility under Section 32A-4-28(B)(2).

{58} First, the district court cannot terminate parental rights unless it finds that the Department made "reasonable efforts . . . to assist the parent in adjusting the conditions that render the parent unable to properly care for the child." Section 32A-4-28(B)(2). The methods of assistance required to support a finding of reasonable efforts vary with the facts and circumstances of the case. *Patricia H.*, 2002-NMCA-061, ¶¶ 23, 26. Although the totality of the circumstances may be considered in establishing reasonable efforts, including "the level of cooperation demonstrated by the parent and the recalcitrance of the problems that render the parent unable to provide adequate parenting," Section 32A-4-28(B)(2) requires the Department to provide the parent with a reasonable and appropriate level of support under the individual circumstances. *See Patricia H.*, 2002-NMCA-061, ¶¶ 23, 26, 31. This requires ongoing efforts to engage the parent in a way that will reasonably enable the parent to adjust the causes and conditions that led to the abuse and neglect of the child. *See* § 32A-4-28(B)(2).

{59} In this case, the district court could have concluded that Father was uncooperative when the Department initiated reasonable efforts to engage him and Father did not respond. *Patricia H.*, 2002-NMCA-061, ¶ 23. It must be noted, however, that parental cooperation is but one circumstance informing whether the Department made reasonable efforts. *See id.* A lack of engagement on the part of the parent does not authorize the Department to abandon its ongoing responsibility to reach out to the parent to render assistance. This would be contrary to the statute, under which the Department may be relieved from its statutory responsibility based only upon a showing that further efforts would be futile or the child has been subjected to aggravated circumstances. *See* § 32A-4-28(B)(2)(a)-(b); *see also* NMSA 1978, § 32A-4-29(I))2009((providing that the exceptions must be proven by clear and convincing evidence). The Department may not circumvent these statutory requirements with a posthoc claim that a parent was uncooperative after failing to make reasonable efforts in the first place. Absent a finding of futility or aggravating circumstances, the Department's statutory responsibility remains in place.

{60} Reasonable efforts is a mandatory predicate to the termination of parental rights, and reflects a legislative determination that when there are grounds for a child to be taken into custody, the Department is required to make efforts to assist the parent. *See Patricia H.*, 2002-NMCA-061, ¶ 21. While reunification may ultimately turn on a parent's success in treatment, it is the Department's responsibility to initiate and continually pursue communication and efforts to assist the parent in treatment. *See* Section 32A-4-28(B)(2). These efforts are a component of due process and consistent with the fundamental nature of parental rights. *Marlene C.*, 2011-NMSC-005, ¶ 37; *see also Santosky*, 455 U.S. at 747, 769.

{61} Second, "reasonable efforts" is an affirmative responsibility, not a passive one. The majority implies that passive efforts may suffice for reasonable efforts, citing *Yodell B.*, 2016-NMCA-029, ¶ 17. In *Yodell B.*, however, the Court of Appeals considered whether there was substantial evidence to support a finding that the Department made *active efforts* to assist a parent. *Id.* ¶ 1. "Active efforts" is an independent statutory directive arising under the Indian Child Welfare Act, 25 U.S.C. § 1912(d) (ICWA). In *Yodell B.*, the Court of Appeals distinguished "active efforts" from "passive efforts," a term other states have used in construing the ICWA,[5] and explained that "active efforts connotes a more involved and less passive standard than that of reasonable efforts." 2016-NMCA-029, ¶ 20 (citing *In re C.D.*, 2008 UT App 477, ¶ 34, 200 P.3d 194). The Court of Appeals did not conclude that passive efforts are sufficient to fulfill New Mexico's reasonable efforts requirement, and this Court does not do so here.

{62} Neither "active" nor "passive" efforts are the equivalent of "reasonable" efforts under Section 32A-4-28(B)(2). These standards are separate and distinct from the requirement that the Department make reasonable efforts to assist a parent. By contrast, reasonable efforts are efforts tailored to the circumstances of a case. And under all of these standards, the Department must develop a treatment plan directed to assist the parent in his or her specific circumstances and individualized needs. *See Yodell B.*, 2016-NMCA-029, ¶ 17.

{63} Third, the Department's responsibility to render assistance does not cease because a parent is incarcerated. To the contrary. The Department must refrain from pursuing a termination of parental rights on the sole basis that a parent is incarcerated. Section 32A-4-28(D). As stated, Section 32A-4-28(B)(2) requires the Department to render individualized support. Therefore, when a parent is in jail, the Department must do more to assist the parent, as the parent is limited in his or her ability to appear at the Department to receive information and support. *See, e.g.*, *State ex rel. Children, Youth & Families Dep't v. William M.*, 2007-NMCA-055, ¶¶ 27, 68-71, 141 N.M. 765, 161 P.3d 262; *Hector C.*, 2008-NMCA-079, ¶ 26.

{64} In other cases involving incarcerated parents, the Department has diligently and intentionally fulfilled its responsibility by maintaining contact with the parent and the parent's counsel; calling and visiting the parent in jail; bringing an interpreter to the jail to assist the parent in completing a psychosocial assessment; arranging

[5] *Yodell B.*, 2016-NMCA-029, ¶ 17 (citing *A.A. v. State, Dep't of Family & Youth Servs.*, 982 P.2d 256, 261 (Alaska 1999); *In re Welfare of Child of E.A.C.*, 812 N.W.2d 165, 174 (Minn. Ct. App. 2012); *In re A.N.*, 2005 MT 19, ¶ 23, 325 Mont. 379, 106 P.3d 556; *In re J.S.*, 2008 Okla. Civ. App. 15, ¶ 16, 177 P.3d 590); *but see In re Michael G.*, 63 Cal. App. 4th 700, 714 (1998) (noting that while state law did not require "active efforts," "[e]ach reunification plan must be appropriate to the parent's circumstances. The plan should be specific and internally consistent, with the overall goal of resumption of a family relationship." (citation omitted)).

visits between the parent and child at the jail; and following up on the parent's request to complete a home study of relatives who lived out of state. *William M.*, 2007-NMCA-055, ¶¶ 68-71; *Hector C.*, 2008-NMCA-079, ¶ 26.

{65} The Department knew Father was incarcerated in this case and visited Father in jail in November 2013. *See* maj. op. ¶ 21. Yet, for reasons that are not explained, the Department did not assist Father with his psychosocial assessment at that time. *Id.* The Department did not contact Father until the first day of the termination hearing on August 27, 2014, and the psychosocial assessment remained pending. *See id.* ¶¶ 22, 26. At the hearing, Mr. Gaczewski testified that he was unaware that Father was still in jail and had been unsuccessful in locating Father on the jail website. *See id.* ¶ 22. Not until the nearly sixth-month recess between the first and second days of the termination hearing did the Department mail the psychosocial assessment to Father, who completed it forthwith. *Id.* ¶ 29. Only then did the Department proceed to develop an individualized treatment plan. *Id.*

{66} Although the precise dates of Father's incarceration are unclear from the record, what is clear is that the Department knew Father was incarcerated in November 2013 and failed to assist Father in completing the psychosocial assessment at that time. Maj. op. ¶ 21. In other cases, the Department has assisted incarcerated parents with the psychosocial assessment, and the Department offered no explanation for why it did not do so in this case. *See, e.g.*, *William M.*, 2007-NMCA-055, ¶¶ 27, 69; *Hector C.*, 2008-NMCA-079, ¶ 26. The failure to do so was not reasonable and left to speculation how Father would have otherwise progressed in treatment, particularly given that he promptly completed the psychosocial assessment when provided with it. *Keon H.*, 2017-NMCA-004, ¶¶ 11, 16-17.

{67} In conclusion, I agree that the totality of the circumstances supported a finding that the Department made reasonable efforts to address the causes and conditions of abuse and neglect. The Department initiated efforts to engage Father and renewed its efforts during the recess between the first and second day of the termination hearing. *See* maj op. ¶ 29. However, I write separately to clarify that Father's recalcitrance did not relieve the Department from its statutory responsibility; passive efforts are not reasonable efforts under Section 32A-4-28(B)(2); and the Department should have done more to assist Father while he was incarcerated.

BARBARA J. VIGIL, Justice

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-040

No. A-1-CA-35857 (filed April 2, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
DARCIE PAREO and
CALVIN PAREO,
Defendants-Appellees.

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

HECTOR H. BALDERAS,
Attorney General
MARIS VEIDEMANIS,
Assistant Attorney General
Santa Fe, New Mexico
for Appellant

SANDRA E. GALLAGHER
Portales, New Mexico
for Appellees

Opinion

Emil J. Kiehne, Judge

{1} In this case we are called on to decide whether Defendants had a statutory right to testify before the grand jury that indicted them, whether that right was violated, and if so, whether they had to demonstrate prejudice to have the indictments quashed. We hold that Defendants had a statutory right to testify before the grand jury, that their right to do so was violated, and that the failure to allow them to exercise that right was a structural error that required no showing of prejudice. We therefore affirm the district court's order quashing the indictments.

BACKGROUND

{2} This matter is before us on the State's consolidated appeal from the dismissal of grand jury indictments returned against Defendants Darcie Pareo and Calvin Pareo. The district court quashed the indictments against Defendants because they were not allowed to testify before the grand jury, despite their presence and desire to do so. Before the grand jury proceeding, Defendants informed the prosecutor of their desire to testify. Defendants then appeared for the grand jury investigation and again indicated that they wished to testify. The prosecutor assisting the grand jury informed it multiple times of Defendants' presence and desire to testify but did not tell the grand jury that Defendants had a right to testify. The grand jury informed the prosecutor that it did not wish to hear Defendants' testimony and was ready to begin its deliberations. Defendants were therefore never given the opportunity to testify before the grand jury. The grand jury indicted Defendants on multiple counts of fraud, conspiracy to commit fraud, forgery, racketeering, and conspiracy to commit racketeering.

{3} Defendants filed a motion to quash the indictments arguing that their right to testify before the grand jury was violated. The district court quashed the indictments, finding that Defendants had a right to testify before the grand jury under NMSA 1978, Section 31-6-11(C)(3) and (4) (2003), Rule 5-302A(B) NMRA, and NMSA 1978, Section 31-6-4(D) (2003); that they were denied their right to testify; and that because the right to testify is a "structural protection," Defendants were not required to demonstrate prejudice. The State appeals.

DISCUSSION

Defendants' Statutory Right to Testify Before the Grand Jury Was Violated

{4} The dismissal of an indictment is a matter of law that we review de novo. *State v. Blue*, 1998-NMCA-135, ¶ 5, 125 N.M. 826, 965 P.2d 945. Our holding in this case turns on whether Section 31-6-11(C)(3) and (4) provide grand jury targets a right to testify before a grand jury, and whether *Jones v. Murdoch*, 2009-NMSC-002, 145 N.M. 473, 200 P.3d 523 held that a grand jury may decline to hear that testimony.

{5} We begin with the applicable statute. Section 31-6-11(C) includes a notice provision that requires a prosecutor to inform the target of a grand jury investigation: that he is a target; of the nature and date of the alleged crime being investigated as well as any applicable statutory citations; and of the target's right to assistance of counsel during the investigation. The statute also provides that a grand jury target must be notified of his "right to testify" before the grand jury. Section 31-6-11(C)(3), (4). Additionally, Rule 5-302A(A)(1)(d) requires a prosecutor to notify the target of a grand jury investigation in writing that he has a right to testify. The prosecutor may decline to notify the target only if the district court determines by clear and convincing evidence that notice to the target may result in flight, obstruction of justice, or danger to another person. *See* § 31-6-11(C).

{6} Although Section 31-6-11(C)(3) and (4) are within a notice provision, we conclude that they create a right to testify, because it would make no sense for the Legislature to require the prosecutor to notify the target of the "right to testify" if the Legislature did not also intend for such a right to exist. *Id.*; *State v. Davis*, 2003-NMSC-022, ¶ 13, 134 N.M. 172, 74 P.3d 1064 (observing that appellate courts will not interpret statutes "in a manner that leads to absurd or unreasonable results").

{7} The statute's history also indicates that the Legislature intended to expand a target's ability to testify before the grand jury. As enacted in 1969, and originally codified as NMSA 1953, § 41-5-11 (1969), the statute contained no provision that granted a target a right to testify. *See* 1969 N.M. Laws, ch. 276, § 11. The 1979 and 1981 amendments to the recodified statute, § 31-6-11, added language providing that "[t]he target shall be notified of his target status and be given an opportunity to testify, if he desires to do so, unless the prosecutor determines that notification may result in flight, endanger other persons, obstruct justice, or the prosecutor is unable with reasonable diligence to notify said person." 1979 N.M. Laws, ch. 337, § 8(B); 1981 N.M. Laws, ch. 238, § 1. In 2003, the Legislature added subsection C, detailing the requirements for giving notice to a target of a grand jury investigation, and

specifically providing that the target shall be notified of his "right to testify." *See* § 31-6-11(C)(3), (4).

{8} Here, the right to testify before the grand jury was not afforded to Defendants. Although the prosecutor informed the grand jury that Defendants were present and ready to testify, he did not inform it that Defendants had a right to testify. Evidently under the impression that it could choose whether or not to hear from Defendants, the grand jury declined to hear their testimony. The prosecutor's failure to provide correct and complete advice to the grand jury resulted in Defendants being deprived of their right to testify.

{9} The State argues that under *Jones* the prosecutor assisting the grand jury was not required to present Defendants' testimony to the grand jury, but only had to alert the grand jury to the Defendants' desire to testify, and that it was the grand jury's prerogative to decide whether or not to hear it. We do not agree.

{10} In *Jones*, our Supreme Court considered Section 31-6-11(B), which provides in relevant part that "[a]t least twenty-four hours before grand jury proceedings begin, the target or his counsel may alert the grand jury to the existence of evidence that would disprove or reduce an accusation or that would make an indictment unjustified, by notifying the prosecuting attorney who is assisting the grand jury in writing regarding the existence of that evidence." While resolving the dispute in that case, which concerned a letter proffered by the target, and the parties' disagreement about whether it should have been provided to the grand jury, our Supreme Court observed that "[e]ven if the grand jury judge determines that the grand jury should be alerted to the existence of the evidence, the grand jury remains free to decide not to hear the evidence offered by the target or to hear the evidence and weigh it as it sees fit." *Jones*, 2009-NMSC-002, ¶ 12.

{11} The State seizes on this language and argues that it was also within the grand jury's discretion to decide whether or not to hear Defendants' testimony. We disagree. Our Supreme Court's observation in *Jones* was based on Section 31-6-11(B)'s language requiring only that the grand jury be "alerted to the existence of [potentially exculpatory] evidence" offered by the target. *Jones*, 2009-NMSC-002, ¶ 12; *see id.* ¶ 11 ("Assuming that the target's offer of evidence meets the evidentiary standards set forth by statute, Section 31-6-11(B) only requires that the grand jury be alerted to its existence. We contemplate requiring nothing more."); *see also id.* ¶ 24 ("The provision at issue does not purport to command the grand jury to accept the target's evidence. Instead, the provision simply identifies the prosecutor as the conduit by which a target may alert the grand jury to pertinent evidence. As such, the provision at issue in this case does not diminish the grand jury's prerogative to weigh the evidence before it as it sees fit in making an independent decision whether to indict. Indeed, the grand jury is not even required to hear the evidence once it is made aware of its existence.").

{12} By contrast, Section 31-6-11(C)(3) and (4) recognize that targets have a "right to testify," not merely a right to alert the grand jury that they would like to testify. As used in this context, the word "right" means "[a] power, privilege, or immunity secured to a person by law[.]" *Black's Law Dictionary* 1517 (10th ed. 2014). We therefore conclude that Section 31-6-11(C) provides a target with the power to choose whether to testify, and does not provide the grand jury with any power to decline to hear a target's testimony. Likewise, if a target expresses a desire to testify, the prosecutor must advise the grand jury that the target has a right to do so.

{13} Having held that a grand jury target has a statutory right under Section 31-6-11(C)(3) and (4) to testify before a grand jury, we need not address the district court's ruling that Section 31-6-4(D), which provides that the target's attorney may accompany him while testifying, also creates a right to testify. Nor will we consider Defendants' argument that their right to testify before the grand jury is a substantive due process right under the United States and New Mexico Constitutions. *See Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 ("It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so." (internal quotation marks and citation omitted)).

Defendants Were Not Required to Show Prosecutorial Bad Faith or Prejudice Because the Failure to Allow Defendants to Testify Before the Grand Jury Was a Structural Defect in the Grand Jury Proceeding

{14} Our Supreme Court has explained that "[c]hallenges arising from grand jury proceedings ordinarily fall into two categories: (1) challenges to the quality or sufficiency of the evidence before the grand jury and (2) structural challenges involving the manner in which the grand jury process has been conducted." *Herrera v. Sanchez*, 2014-NMSC-018, ¶ 12, 328 P.3d 1176. To succeed on a challenge in the first category, as required by statute, the target must show that the prosecutor acted in bad faith in presenting the evidence to the grand jury. *See id.* ¶ 13 (citing § 31-6-11(A)). But "[i]f the target of a grand jury investigation establishes, pretrial, that the grand jury proceedings were conducted in violation of these structural protections, the target is entitled to dismissal of the indictment and is not required to demonstrate prejudice." *Id.* ¶ 17.

{15} The State argues that the district court erred by not requiring Defendants to demonstrate prosecutorial bad faith or prejudice. We disagree and affirm the district court's determination that Defendants' challenge was a structural one. The issue here is not the sufficiency or the quality of the evidence supporting the indictments, but rather that the grand jury proceeding was conducted in violation of Section 31-6-11(C)(3) and (4) because Defendants were not permitted to exercise their right to testify.

{16} The State relies on several previous decisions, such as *State v. Penner*, 1983-NMCA-116, 100 N.M. 377, 671 P.2d 38; *State v. Tisthammer*, 1998-NMCA-115, ¶ 24, 126 N.M. 52, 966 P.2d 760; and *State v. Gallegos*, 2009-NMSC-017, 146 N.M. 88, 206 P.3d 993, to support its argument. In *Penner*, we did hold that the state's violation of one of the notice requirements in Section 31-6-11 did not require an indictment to be quashed absent a showing of prejudice, but the version of the statute in effect at that time required the target to "establish[] actual and substantial prejudice" before he could obtain relief. *Penner*, 1983-NMCA-116, ¶¶ 1-2 (internal quotation marks and citation omitted). The Legislature removed this language from the statute in 2003, *see* § 31-6-11, and thus *Penner* is irrelevant.

{17} The State's reliance on *Tisthammer* also fails. The State relies on paragraph twenty-four of the *Tisthammer* opinion in support of the proposition that a defendant must show prejudice before a grand jury indictment may be dismissed, but our ruling there was based on a violation of the right to counsel under Section 31-15-10(B) of the Public Defender Act, NMSA 1978, Sections 31-15-1 to -12 (1973, as amended through 2014). *See Tisthammer*, 1998-NMCA-115, ¶¶ 20-24. The State does not explain the relevance of the Public Defender Act to

our construction of Section 31-6-11. *See State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (noting that appellate courts are under no obligation to review unclear or undeveloped arguments).

{18} Finally, in *Gallegos*, our Supreme Court addressed a challenge to the quality of the evidence supporting an indictment and held that the defendant's challenge could not succeed absent a showing of prosecutorial bad faith as required by Section 31-6-11(A). *Gallegos*, 2009-NMSC-017, ¶¶ 9, 11. But as we have explained, here Defendants did not challenge the sufficiency of the evidence supporting their indictments under Section 31-6-11(A). Rather, they challenged the State's failure to ensure that the grand jury process was conducted in accord with Section 31-6-11(C).

CONCLUSION

{19} We affirm the district court's order quashing the indictments. Defendants had a statutory right to testify before the grand jury, and the failure to respect that right was a structural error in the grand jury process that required no showing of prejudice or of prosecutorial bad faith. An order quashing an indictment does not preclude the State from presenting its case against Defendants to another grand jury. *See State v. Ulibarri*, 1999-NMCA-142, ¶ 24, 128 N.M. 546, 994 P.2d 1164 ("[D]ismissals for failure to comply with the grand jury statutes and rules are of necessity without prejudice."). Should the State ask another grand jury to consider charges against Defendants and if Defendants still wish to testify, the State must inform the grand jury that Defendants have a right to testify.

{20} IT IS SO ORDERED.
EMIL J. KIEHNE, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
MICHAEL E. VIGIL, Judge

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-041

No. A-1-CA-36304 (filed April 5, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
STEVEN VANDERDUSSEN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
Fred T. Van Soelen, District Judge

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Opinion

Emil J. Kiehne, Judge

{1} Defendant appeals from the district court's order denying dismissal of the charges against him on double jeopardy grounds. The district court ruled that the magistrate court properly declared a mistrial based on manifest necessity, where a juror was discharged for stating that she could not be impartial after deliberations had begun and the alternate jurors were dismissed from the courtroom. Defendant argues that the magistrate court failed to consider less severe alternatives to a mistrial—namely, the magistrate court refused to call back the alternate jurors who remained in the courthouse—and, therefore, the mistrial was not based on manifest necessity. We hold that the mistrial was justified by manifest necessity and affirm the district court's denial of Defendant's motion to dismiss.

PROCEDURAL BACKGROUND

{2} To frame our examination of the mistrial, we first address the limits of the record before us and the roles of the courts through which this case has traveled. Because charges were originally filed against Defendant in magistrate court, which is not a court of record, there is no record of the events that occurred there. *See* NMSA 1978, § 35-1-1 (1968) (establishing magistrate courts as courts not of record); *Black's Law Dictionary* 431 (10th ed. 2014) (defining "court of record" as "[a] court that is required to keep a record of its proceedings"). After the magistrate court declared a mistrial, the State refiled the same charges in district court. In district court, proceedings are held de novo. *Cf.* NMSA 1978, § 35-13-2(A) (1996) ("Appeals from the magistrate courts shall be tried de novo in the district court."); *see State ex rel. Bevacqua-Young v. Steele*, 2017-NMCA-081, ¶ 9, 406 P.3d 547 ("In a de novo appeal to the district court, there is a new trial on the entire case—that is, on both questions of fact and issues of law—conducted as if there had been no trial in the first instance." (internal quotation marks and citation omitted)). In the de novo proceedings here, Defendant filed numerous motions including a motion to dismiss for violation of the Double Jeopardy Clause, the subject of this appeal. Because the district court was not sitting in a typical appellate capacity, the district court was not bound by the magistrate court's decisions and was required to make an independent determination of whether manifest necessity supported the magistrate court's declaration of a mistrial. *See State v. Foster*, 2003-NMCA-099, ¶¶ 9, 19, 134 N.M. 224, 75 P.3d 824 (holding that because the magistrate court is not a court of record, appeals from there are heard de novo in district court, which required the district court to decide anew, without deference to the magistrate court, whether a mistrial was warranted). The district court, however, was bound by events that transpired in magistrate court and therefore was required to base its independent judgment on the limited record brought before it and the arguments made by counsel in district court. *See id.* ¶¶ 19-20; *City of Farmington v. Piñon-Garcia*, 2013-NMSC-046, ¶ 12, 311 P.3d 446 (stating that the history of a case in a court not of record is not disregarded when appealed to the district court for a trial de novo).

{3} The State raises arguments in this case about Defendant's failure to more fully develop the record to establish error. It appears that, at least in the context of a challenge in district court to a plea agreement entered into in magistrate court, the district court is permitted to take evidence to clarify the limited record from magistrate court. *See State v. Gallegos*, 2007-NMCA-112, ¶¶ 16, 18, 142 N.M. 447, 166 P.3d 1101 (explaining that the district court properly conducted an evidentiary hearing to reconstruct the magistrate proceedings to allow it to fulfill its "obligation to determine the validity of the plea in order to determine its jurisdiction over the appeal"). Our Supreme Court has also explained that it is permissible for the district court to hold a hearing to reconstruct the magistrate proceedings when asked to decide whether the magistrate court acquitted the defendant on the merits or dismissed the complaint for a procedural violation. *See State v. Baca*, 2015-NMSC-021, ¶¶ 2, 27, 352 P.3d 1151.

{4} In this case, the district court held a hearing on Defendant's motion to dismiss and relied on the limited magistrate court record and the parties' stipulation to facts, including the stipulation to the defense's offer of proof, in order to clarify events in magistrate court. There was no objection to this process. Also, neither the parties nor the district court asked that the record be supplemented with testimony from the magistrate judge to determine whether the magistrate judge considered less severe alternatives to a mistrial. We therefore decline the State's request to hold that it is a defendant's burden to re-create a complete record of the magistrate court proceedings. *See* Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."). In this appeal, we simply

rely on the facts as they were presented to, and found by, the district court to review whether the declaration of a mistrial was an abuse of discretion. *See State v. Baca*, 2015-NMSC-021, ¶ 25 (stating that we review double jeopardy claims de novo and defer to the facts found by the district court, not the magistrate court, "because it was the district court that had to find the facts on which to apply the law in ruling on the motion to dismiss"); *see also State v. Gutierrez*, 2014-NMSC-031, ¶ 21, 333 P.3d 247 (noting that "manifest necessity mistrial rulings are reviewed for abuse of discretion").

FACTUAL BACKGROUND

{5} Defendant was charged and tried in magistrate court for misdemeanor DWI and failure to maintain his lane. The case was tried before eight jurors—six regular jurors and two alternates. After the trial concluded and the jury was instructed on the law, the magistrate court dismissed the two alternate jurors and excused the six-person jury from the courtroom to deliberate. Approximately five minutes into deliberations, a juror informed the magistrate judge by note that she could not be impartial based on her personal and business dealings with Defendant's family. The magistrate judge walked into the courtroom, showed the note to the parties, and directed the parties to discuss the note in chambers. Defense counsel immediately turned to his legal assistant and instructed her to leave the courtroom to see if she could find the two alternate jurors. Defense counsel accompanied his legal assistant and saw that the two alternate jurors were still in the courthouse, standing in the lobby at a counter, doing paperwork or waiting to do paperwork. Defense counsel immediately walked back to chambers and asked the magistrate judge to call the alternate jurors back to determine whether they could still serve as impartial jurors and replace the biased juror. The State asked for a mistrial, and the defense objected. The magistrate judge rejected the defense's proposal without attempting to locate and question the alternate jurors, and declared a mistrial. Thereafter, the magistrate court entered a written order declaring a mistrial due to manifest necessity.

{6} After hearing the parties' presentation of the facts and legal argument on the events in magistrate court, the district court took the matter under advisement. The district court also considered the parties' briefs on the matter and entered a detailed letter decision. The district court observed a lack of dispute that good cause existed to dismiss the juror who expressed bias regarding Defendant and framed the question as whether the magistrate court adequately inquired into alternatives to a mistrial. The district court further observed that the absence of a record made it difficult to determine whether alternatives to a mistrial were considered and acknowledged the parties' stipulation that the magistrate judge did not question the alternate jurors about their ability to serve after they were released. On the facts presented to it, the district court concluded that manifest necessity justified a mistrial, based on the district court rule governing alternate jurors, i.e. Rule 5-605(B) and (C) NMRA, and on a Supreme Court opinion holding that Rule 5-605 does not permit substitution of an alternate juror after jury deliberations have begun. *See State v. Sanchez*, 2000-NMSC-021, ¶¶ 1, 23, 129 N.M. 284, 6 P.3d 486. Defendant appeals from this ruling.

DISCUSSION

{7} The Double Jeopardy Clause guarantees that no person shall be "twice put in jeopardy" for the same offense. U.S. Const. amend. V; N.M. Const. art. II, § 15. "However, the principles of double jeopardy do not prohibit retrying a defendant, even over the defendant's objections, after a mistrial that was justified by manifest necessity." *State v. Desnoyers*, 2002-NMSC-031, ¶ 33, 132 N.M. 756, 55 P.3d 968 (internal quotation marks and citation omitted), *abrogated on other grounds as recognized by State v. Rivas*, 2017-NMSC-022, ¶ 47, 398 P.3d 299. The burden of proving "manifest necessity" falls on the prosecutor, and the magnitude of that burden is appropriately characterized by its very terms. *Arizona v. Washington*, 434 U.S. 497, 505 (1978). Two requirements must be met for an appellate court to uphold a mistrial for manifest necessity. "First, the circumstances necessitating the mistrial must be extraordinary ones, sufficient to override the defendant's double jeopardy interests. Second, the trial judge must determine whether an alternative measure—less drastic than a mistrial—can alleviate the problem so that the trial can continue to an impartial verdict." *State v. Yazzie*, 2010-NMCA-028, ¶ 13, 147 N.M. 768, 228 P.3d 1188 (internal quotation marks and citation omitted).

{8} As indicated above, we review the trial court's declaration of a mistrial for abuse of discretion, which in this case is the standard we apply to the district court's de novo ruling. *See Baca*, 2015-NMSC-021, ¶ 25. The degree of deference and scrutiny we accord the declaration of a mistrial under the abuse of discretion standard depends on the reason for the mistrial. *See Washington*, 434 U.S. at 508-10 (providing examples that fall within the continuum of appellate scrutiny and deference accorded to mistrials); *Gutierrez*, 2014-NMSC-031, ¶ 22 (acknowledging that while abuse of discretion is the appropriate standard of review for mistrials, the strictest scrutiny is applied to mistrials ordered for missing prosecution witnesses).

{9} The parties in this case do not dispute that it was appropriate to remove the deliberating juror who said she could not be impartial from the jury, which left only five jurors. There also is no dispute that a jury in magistrate court must be comprised of six jurors. *See* NMSA 1978, § 35-8-3(A) (1974); Rule 6-605(A). Thus, the dispute is focused entirely on the second requirement for a finding of manifest necessity—whether there was a less drastic alternative to a mistrial that would "alleviate the problem so that the trial [could] continue to an impartial verdict." *Yazzie*, 2010-NMCA-028, ¶ 13 (internal quotation marks and citation omitted).

{10} Defendant argues that the district court's ruling, relying on district court Rule 5-605, overlooks the fact that procedures in magistrate court differ from those in district court. As Defendant points out, Rule 5-605(C) mandates that in a non-capital case before the district court, "an alternate juror who does not replace a regular juror shall be discharged before the jury retires to consider its verdict." *Id.* The magistrate court rules have no such requirement for the discharge of alternate jurors. Defendant informs us that, unlike in district court, it is common practice in the Clovis Magistrate Court for the judge to ask counsel whether they wish to retain the alternate jurors during deliberations or release them. Defendant contends that the magistrate court should have explored the possibility of replacing the biased juror with one of the alternates and refers this Court to several federal cases that permit, in the absence of prejudice to the defendant, the substitution of an alternate juror who had been dismissed when the case was submitted to the jury for deliberation—the practice is called "post-submission substitution."

{11} We agree with Defendant that generally the magistrate court is not required to follow a district court rule in the absence of a similar magistrate court rule, and we

further acknowledge that, typically, the district court is required to apply the rules of the magistrate court when considering issues in de novo proceedings. *See State v. Sharp*, 2012-NMCA-042, ¶ 8, 276 P.3d 969 (emphasizing that, in de novo proceedings, the district court is required to apply the rules of the lower, non-record court in its independent consideration of an issue decided below). Under the circumstances, however, we are not persuaded that the district court erred by relying on the district court rule and New Mexico case law governing the discharge of alternate jurors.

{12} Even assuming that the magistrate court usually gives the parties the option of retaining alternate jurors during deliberations, and assuming that this is permitted in New Mexico, the parties in the current case agreed that the alternate jurors could be excused. There is no indication that the magistrate court advised the alternate jurors that they continued to be bound by their oath and obligations as alternate jurors when it discharged them. Thus, the alternate jurors were discharged from jury duty, left the courtroom, and were present in the courthouse lobby. *See State v. Rodriguez*, 2006-NMSC-018, ¶ 7, 139 N.M. 450, 134 P.3d 737 (recognizing a presumption of prejudice "once a juror has left the presence and control of the court into an area occupied by the general public"). The magistrate court rules contain no provisions for the use of alternate jurors or the discharge of jurors. While nothing in the magistrate court rules mandates the use of district court rules, we cannot say it was error for the magistrate court to use the rules adopted for district courts in New Mexico as guidance in this situation. *Cf. State v. Romero*, 2014-NMCA-063, ¶¶ 6-8, 327 P.3d 525 (finding guidance, where logical, in civil procedure on a matter where the Rules of Criminal Procedure were silent).

{13} Furthermore, our Supreme Court has declared by rule and case law that the New Mexico policy governing alternate jurors does not authorize post-submission substitution of jurors. *Sanchez*, 2000-NMSC-021, ¶ 21 ("In the absence of a rule authorizing post-submission substitution, however, we interpret our rule as not authorizing post-submission substitution."). Our Supreme Court considered the approach Defendant advocates in this case and determined that such an approach was rejected in our state by the absence of a rule authorizing it. *Id.* ¶¶ 21-23. Although our Supreme Court felt bound by the restrictive language of Rule 5-605, it acknowledged that some changes to the rule may be constitutionally permissible and invited future consideration of changes to it. *Id.* ¶ 21 ("We are not at liberty, in a decisional context, to change the language of our rule. If there is to be a change in the rule or the policy underlying the rule, it must come through the normal rule-making process."(alteration, omissions, internal quotation marks, and citation omitted)). Our Supreme Court, however, has not altered Rule 5-605 since the opinion in *Sanchez* was published in 2000. *Sanchez* then states the prevailing view in New Mexico that a "post-submission substitution is error under Rule 5-605; it is error that creates a presumption of prejudice; the state must show under the circumstances . . . that the trial court took adequate steps to ensure the integrity of the jury process." *Id.* ¶ 23.

{14} We have no case law deciding whether, under any circumstances, it was an abuse of discretion to declare a mistrial based on a refusal to make a post-submission substitution in the jury after the alternate jurors were dismissed. *Cf. State v. Sanchez*, 1995-NMSC-053, ¶ 16, 120 N.M. 247, 901 P.2d 178 (holding that the district court did not abuse its discretion by denying the defendants' motion for a retrial and refusing the defendants' request to replace a juror "with an alternate juror after the jury had retired to deliberate, and the alternate jurors had been dismissed for more than one day[,]" where the defendants were aware from voir dire of the juror's relationship to an employee for the prosecution).We conclude that a higher degree of deference is appropriate when the court's refusal to make a post-submission substitution, after alternate jurors were already dismissed, resulted in a mistrial given our Supreme Court's prevailing view that a post-submission substitution is error that creates a presumption of prejudice.

{15} In this case, not only were the alternate jurors discharged and present in a public place, the deliberating juror Defendant sought to replace was removed, not for illness or another case-neutral emergency, but for a late disclosure of bias. *See Washington*, 434 U.S. at 513 ("There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias."); *State v. Saavedra*, 1988-NMSC-100, ¶ 9, 108 N.M. 38, 766 P.2d 298 (stating that where "the underlying issue involves a deadlocked jury or possible jury bias, the trial judge should be allowed broad discretion whether to declare a mistrial"); *cf. Sanchez*, 2000-NMSC-021, ¶¶ 4, 9, 13, 16 (cataloging cases across the country involving post-submission substitution where a deliberating juror became disabled, ill, or incapacitated, and holding that the district court erred by making a post-submission substitution where the district court failed to take adequate precautions to protect the deliberative process, where a deliberating juror was discharged for illness).

{16} Although the timing of the biased juror's disclosure was only five minutes into deliberations, Defendant's own proffer in district court to present testimony from one of the other deliberating jurors demonstrates that five minutes is not an insignificant time to deliberate; rather, it can be adequate time for jurors to reach certain conclusions. Indeed, Defendant asserted in the district court that "[t]he jury was five (5) to one (1) for acquittal." Our case law has long recognized that, generally, "a lone biased juror undermines the impartiality of an entire jury[.]" *State v. Gallegos*, 2009-NMSC-017, ¶ 22, 146 N.M. 88, 206 P.3d 993 (internal quotation marks and citation omitted). We agree with the State that the timing of the juror's confession of bias—after hearing the entire trial and having been excused to deliberate with the jury for even five minutes—gives rise to grave concerns that the juror's bias could have tainted or contaminated the remaining jurors. *See State v. Mann*, 2002-NMSC-001, ¶ 27, 131 N.M. 459, 39 P.3d 124 ("Jury tampering and juror bias present the clearest examples of potentially improper influences upon a jury[.]"); *cf. Gallegos*, 2009-NMSC-017, ¶ 23 (holding that a mistrial was not warranted given the early stage of the trial, the absence of a claim that there were improper communications among the jurors suggesting bias, the discreet manner in which the biased juror alerted the judge, and the early replacement of the juror with an alternate). The Supreme Court of the United States has stated that "[n]either party has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, the public's interest in fair trials designed to end in just judgements must prevail over the defendant's valued right to have his trial concluded before the first jury impaneled." *Washington*, 434 U.S. at 516 (internal quotation marks and citation omitted). This Court also has acknowledged that "where the irregularity

involves possible partiality within the jury, it has been more often held that the public interest in fair verdicts outweighs [the] defendant's interest in obtaining a verdict by his first choice of jury." *State v. C. De Baca*, 1975-NMCA-120, ¶ 8, 88 N.M. 454, 541 P.2d 634.

{17} We recognize that the limited record available does not disclose the extent to which the magistrate court considered less drastic alternative measures to a mistrial, and we recognize that our case law requires some duty to inquire into those alternatives, but it is " 'not clear as to what kind or how much of an inquiry into alternatives is necessary.' " *State v. Salazar*, 1997-NMCA-088, ¶ 14, 124 N.M. 23, 946 P.2d 227 (alteration omitted) (quoting *C. De Baca*, 1975-NMCA-120, ¶ 10). Nonetheless, we are not persuaded that, where faced with this risk of jury contamination, the trial court was *required* to explore the proposed alternative to a mistrial—a post-submission substitution—which itself would have created a presumption of prejudice and would not have alleviated or even addressed the potential taint to the remaining jurors. *See Yazzie*, 2010-NMCA-028, ¶ 13 (explaining that the second requirement for manifest necessity requires the trial judge to "determine whether an alternative measure—less drastic than a mistrial—can alleviate the problem so that the trial can continue to an impartial verdict" (internal quotation marks and citation omitted)). We have said that the proposed alternatives to a mistrial must be feasible or reasonable. *See State v. Messier*, 1984-NMCA-085, ¶¶ 13-14, 101 N.M. 582, 686 P.2d 272. Where the proposed alternative to a mistrial carries a likelihood of reversal, that alternative would not be reasonable.

{18} We will not hold that it was an abuse of discretion, after the disclosure of a deliberating juror's bias, for the magistrate court to refuse a measure that would violate our only rule governing the discharge of alternate jurors in criminal trials and would also result in presumptive prejudice. *See Washington*, 434 U.S. at 500-02, 513 (explaining that the absence of an express finding from the trial court that alternatives to a mistrial were considered does not prevent a court from affording great deference to a trial judge's assessment of the potential bias of a jury); *Sanchez*, 2000-NMSC-021, ¶¶ 21-23. We agree with the district court and hold that the mistrial was justified by manifest necessity. *See Saavedra*, 1988-NMSC-100, ¶ 16 (concluding that where there are "sufficient reasons presented to justify declaration of a mistrial, . . . the fact that the judge would have been in a better position to assess the situation had he taken the steps suggested by the defendant" does not preclude an affirmance of manifest necessity for a mistrial).

CONCLUSION

{19} Based on the foregoing, we affirm the district court's denial of Defendant's motion to dismiss for violation of the Double Jeopardy Clause.

{20} IT IS SO ORDERED.
EMIL J. KIEHNE, Judge

WE CONCUR:
MICHAEL E. VIGIL, Judge
HENRY M. BOHNHOFF, Judge

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Legal Secretary: The First Judicial District Attorney's Office has an opening available for a legal secretary. This position provides assistance to DA staff by preparing documents, assisting in trial preparation, performing data entry, maintaining calendars, as well as other related job duties. Victim Witness Specialist: The Office also has an opening available for a Victims of Crime Act (VOCA) grant funded victim witness specialist to provide services to victims and witnesses of crime. This is a mid-level position, 2 to 5 years experience required. Applicant must be fluent in Spanish. Salary is based on experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to: "DA Employment," PO Box 2041, Santa Fe, NM 87504, or via e-mail to 1stDA@da.state.nm.us.

Attorney

Attorney. Team, Talent, Truth, Tenacity, Triumph. These are our values. Parnall Law is seeking an attorney to help advocate and represent the wrongfully injured. You must possess confidence, intelligence, and genuine compassion and empathy. You must care about helping people. You will receive outstanding compensation and benefits, in a busy, growing plaintiffs personal injury law firm. Mission: Fighting Wrongs; Protecting Rights. To provide clients with intelligent, compassionate and determined advocacy, with the goal of maximizing compensation for the harms caused by wrongful actions of others. To give clients the attention needed to help bring resolution as effectively and quickly as possible. To make sure that, at the end of the case, the client is satisfied and knows Parnall Law has stood up for, fought for, and given voice and value to his or her harm. Keys to success in this position Litigation experience (on plaintiff's side) preferred. Strong negotiation skills. Ability to thrive in a productive and fast-paced work environment. Organized. Independent / Self-directed. Also willing / unafraid to collaborate. Proactive. Detail-oriented. Team player. Willing to tackle challenges with enthusiasm. Frequent contact with your clients, team, opposing counsel and insurance adjusters is of paramount importance in this role. Integrate the 5 values of Parnall Law. Compelled to do outstanding work. Strong work ethic. Interested in results. Barriers to success: Lack of fulfillment in role. Not enjoying people. Lack of empathy. Not being time-effective. Unwillingness to adapt and train. Arrogance. We are an established personal injury firm experiencing steady growth. We offer competitive salary and benefits, including medical, dental, 401k, and performance bonuses or incentives – all in a great team-based work environment. We provide a workplace where great people can do great work. Our employees receive the training and resources to be excellent performers – and are rewarded financially as they grow. We want people to love coming to work, to take pride in delivering our vision, and to feel valued for their contributions. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at www.HurtCallBert.com/jobs. Emailed applications will not be considered.

Full-time Law Clerk

United States District Court, District of New Mexico, Albuquerque, Full-time Law Clerk, assigned to Judge Browning, $61,425 to $73,623 DOQ. See full announcement and application instructions at www.nmd.uscourts.gov. Successful applicants subject to FBI & fingerprint checks. EEO employer.

Supreme Court Chief Counsel

The Supreme Court of New Mexico is accepting applications to serve as its Chief Counsel, which is a full-time, at-will position located in Santa Fe, New Mexico. Applications will be accepted until the position is filled. Under the administrative direction of the Chief Justice, the Supreme Court's chief counsel manages the operations of the Supreme Court's Office of Legal Counsel and serves as a member of the Court's management team working in a close, collaborative environment with the Clerk of Court to provide advice and support to the Chief Justice and Justices of the Supreme Court on all aspects of the Supreme Court's caseload and administrative responsibilities as the highest court in the state with superintending control over the New Mexico bench and bar. The successful candidate will demonstrate an exceptional breadth and depth of legal knowledge, excellent legal research and writing skills, superior management and supervisor skills, fluency with the Court's rulemaking and committee processes, the ability manage a substantial workload involving a wide variety of complex matters under tight deadlines, and the highest ethical standards. The position requires a law degree from an ABA-accredited law school, a license to practice law, a minimum of 7 years of experience in the practice of law, including appellate law experience, and at least 3 years of supervisory experience. To apply, interested applicants should submit a Letter of Interest, Resume, Writing Sample, and New Mexico Judicial Branch Application for Employment to Agnes Szuber Wozniak, NM Supreme Court, 237 Don Gaspar, Santa Fe, NM 87501. The full job description and the New Mexico Judicial Branch Application for Employment form can be accessed online at https://www.nmcourts.gov/careers.aspx

Associate Attorney

Geer Wissel & Levy, P.A., a family law firm, seeks an experienced family law attorney for an immediate opening in its downtown Albuquerque office. Willing to consider an attorney with an established practice. Excellent benefits including health, dental, life insurance, and 401(k) plan. Must be licensed to practice law in New Mexico. If interested, please send resume and salary requirement to GWLH, P.O. Box 7549, Albuquerque NM 87194 or email to chwilliams@gwlpa.com. All replies are kept confidential.

Associate Attorney – AV Rated Estate Planning Firm

Albuquerque Law Firm seeks an attorney who is licensed and in good standing with 3-5 years of experience preferably in estate planning, probate law and transactional law. Please Email resume to resume@kcleachlaw.com.

Supreme Court Law Library Reference Attorney

The Supreme Court of New Mexico is seeking applicants to serve as a Law Library Reference Attorney in the Supreme Court Law Library, which is a full-time, at-will position. The position is located in Santa Fe, New Mexico, in the historic Supreme Court Building. Applications will be accepted until the positions are filled. The successful candidate will be a person of high ethical standards, with strong legal research and writing skills, who will bring a service-first orientation to the New Mexico Supreme Court Law Library. Our law library reference attorneys will be thorough and responsive to requests for legal research assistance from judges and court staff throughout New Mexico. The successful candidate will demonstrate the ability to take initiative and exercise independent judgment when appropriate, to work in a collaborative, courteous, diplomatic, and organized manner, and to provide prompt and courteous service to all library patrons who call or visit the Supreme Court Law Library. The position requires law degree from an ABA-accredited law school and a license to practice law. A Master's Degree in Library/Information Science from an American Library Association accredited college or university is desirable. One (1) year of experience in the practice of law or as a law clerk is required. Experience as a librarian is highly desirable. To apply, interested applicants should submit a Letter of Interest, Resume, Writing Sample, and New Mexico Judicial Branch Application for Employment to Agnes Szuber Wozniak, NM Supreme Court, 237 Don Gaspar, Santa Fe, NM 87501. The full job description and the New Mexico Judicial Branch Application for Employment form can be accessed online at https://www.nmcourts.gov/careers.aspx

Assistant City Attorney – Land Use and General City Representation City of Santa Fe

The Santa Fe City Attorney's Office seeks a full-time lawyer to advise and represent multiple City departments, including but not limited to the City's Land Use Department. The City is seeking someone with good people skills, strong academic credentials, excellent written and verbal communications skills, and an interest in public service. Experience in land use, administrative law, litigation, appellate practice, and related law, particularly in the public context, is preferred. Evening meetings are required. The pay and benefits package are excellent and are partially dependent on experience. The position is located in downtown Santa Fe at City Hall and reports to the City Attorney. This position is exempt and open until August 17, 2018. Qualified applicants are invited to apply online at https://www.santafenm.gov/job_opportunities.

Assistant Trial Attorney to Deputy District Attorney

The Office of 11th Judicial District Attorney, Division I, in Farmington, NM is Equal Opportunity Employer and is accepting resumes for positions of Assistant Trial Attorney to Deputy District Attorney. Salary DOE, please send resume to: Jodie Gabehart jgabehart@da.state.nm.us

Attorney

Butt Thornton & Baehr PC seeks an attorney with at least 3 years' legal experience. Our growing firm is in its 59th year of practice. We seek an attorney who will continue our tradition of excellence, hard work, and commitment to the enjoyment of the profession. Please send letter of interest, resume, and writing samples to Ryan T. Sanders at rtsanders@btblaw.com.

Senior Attorney/ Pro Bono Program Manager

New Mexico Immigrant Law Center (NMILC) is seeking a Senior Attorney/Pro Bono Program Manager. This position will be responsible for the supervision and management of the volunteer legal services program and the implementation of a statewide and national strategy to support NMILC's pro bono program. The Senior Attorney/Pro Bono Program Manager will supervise and mentor attorneys, paralegals, interns and volunteers and also maintain a caseload. Frequent communication with the entire NMILC legal team, funders, government officials, local bar associations and immigrant and advocacy organizations will be required. This position is based in Albuquerque, NM but may require travel statewide. For more information, visit http://nmilc.org/who-we-are/job-opportunities/. Interested candidates should send a cover letter and resume to jobs@nmilc.org.

AOC Statewide Program Manager for Alternative Dispute Resolution (ADR)

Pay range $28.128 - $35.160; To apply please go to nmcourts.gov website – position #10107773; Manage the statewide program for Alternative Dispute Resolution (ADR), including supervision of the Children's Court Mediation Program (CCMP) and the Magistrate Court Mediation Program (MCMP). Coordinate the work of volunteers, contract personnel and outside entities. Work with statewide district courts to implement or enhance ADR programs. May supervise judicial branch program staff and provide professional support to judicial commission(s). Under general direction, as assigned by a supervisor, review cases, perform legal research, evaluation, analysis, writing and make recommendations concerning the work of the Court or Judicial Entity.

Supervising Attorney

New Mexico Immigrant Law Center (NMILC) is seeking a Supervising Attorney. This position will be responsible for supervision and management of the daily tasks associated with the provision of legal services. The Supervising Attorney will supervise a team of staff attorneys, paralegals, interns and volunteers and also maintain a caseload. The Supervising Attorney will identify new and creative ways to respond to internal and external needs in the delivery of legal services. Frequent communication with the entire NMILC legal team, funders, government officials, local bar associations and immigrant and advocacy organizations will be required. This position is based in Albuquerque, NM but may require some travel statewide. For more information, visit http://nmilc.org/who-we-are/job-opportunities/. Interested candidates should send a cover letter and resume to jobs@nmilc.org.

Attorney III

The Regulation and Licensing Department is currently advertising for the position of Attorney III. This position will assist the Department's Deputy General Counsel with providing legal services to the agency. For more information, or to apply, please visit: careers.share.state.nm.us and search for job posting #100533. If questions, please contact Claudia Armijo at Claudia.Armijo2@state.nm.us.

Seeking Legal Secretary/Paralegal

A highly valued member of our staff is retiring and we need to fill her position! The Davidson Law Firm is a small, established firm in Corrales with a very busy practice. Our team needs a legal secretary/paralegal, with at least 5 years' experience in civil litigation, to work on water law and medical malpractice matters. We are looking for a professional and friendly person who enjoys a direct and hands-on working relationship with attorneys and clients. Competitive compensation provided. Those needing a flex/part time positon will be considered. Please email a resume and cover letter with salary requirements to corralesfirm@gmail.com. All inquiries will be kept strictly confidential.

Litigation Paralegal

Litigation paralegal needed for Albuquerque plaintiff's law firm, McGinn, Montoya, Love & Curry PA. Medical malpractice experience preferred but not required. Must be able to work in a busy, fast-paced litigation practice. 3-5 years relevant experience required. Experience obtaining & organizing medical records, compiling and reviewing records, and strong skills in Adobe PDF and Microsoft Office Suite a plus. The right candidate needs strong writing, communication and organization skills. Excellent benefit package included. Salary commensurate with experience. Spanish speaking helpful. Please send a resume and writing sample to MCMLAdmin@mcginnlaw.com

Senior Program Coordinator

The State Bar of New Mexico seeks a full-time Senior Program Coordinator for its Regulatory Programs Department. The Regulatory Programs Department includes the MCLE, IOLTA, and Bridge the Gap Mentorship Programs. The successful applicant must be able to work as part of a team and have excellent project management, customer service and computer skills. Prior work experience in the legal environment is a plus. Degree (Bachelor's or Associate's) preferred. Compensation $35,000 to $40,000 plus an excellent benefits package. Please email cover letter and resume to hr@nmbar.org, EOE.

Paralegal

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

Legal Secretary

Domenici Law Firm is seeking a part-time Legal Secretary. Hours are flexible. The position requires excellent communication and organizational skills, knowledge of State and Federal court rules, and proficient in Odyssey and CM/ECF e-filing. Job duties include preparing correspondence, filing with the court, and requesting medical records from providers, communicating with clients, transcribing dictation. Please send a letter of interest and resume by fax to 505-884-3424 Attn: Tammy Culp, or by e-mail to tculp@domenicilaw.com

Intake Specialist

Intake Specialist: Team, Talent, Truth, Tenacity, Triumph. These are our values. (Please read below concerning how to apply.) We are a growing plaintiffs personal injury law firm. Candidate must be enthusiastic, confident, a great team player, a self-starter, and able to multi-task in a fast-paced environment. Parnall Law is seeking an Intake Specialist to talk to prospective clients when they call for help. You will be talking to people who have experienced a recent injury and are looking for help. You must possess confidence, intelligence, and genuine compassion and empathy. You must care about helping people. Keys to success in this position: A successful Intake Specialist requires outstanding interpersonal communication skills. You must have experience in customer service, inside sales or personal injury law. Spanish fluency is a plus. Strong organizational skills, attention to detail, and basic computer and data entry skills are required. You must be able to track and monitor the progress of each Inquiry. This job requires that you do more than just follow a script: you must be able to identify and ask the important questions, and convey care and concern to our clientele. The Intake Specialist will also be providing other types of assistance in the office. Barriers to success: Lack of drive and confidence, inability to ask questions, lack of fulfillment in role, procrastination, not being focused, too much socializing, taking shortcuts, excuses. Being easily overwhelmed by information, data and documents. We are an established personal injury firm experiencing steady growth. We offer competitive salary and benefits, including medical, dental, 401k, and performance bonuses or incentives – all in a great team-based work environment. We provide a workplace where great people can do great work. Our employees receive the training and resources to be excellent performers – and are rewarded financially as they grow. We want people to love coming to work, to take pride in delivering our vision, and to feel valued for their contributions. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at www.HurtCallBert.com/jobs. Emailed applications will not be considered.

Part Time Paralegal or Legal Assistant

Las Cruces general civil practitioner focusing on real estate, business and family law seeks a part time (20-30 hours per week) paralegal or legal assistant. Top wage for the right individual. Please forward resume and salary expectations to: Email: lcnmlaw@gmail.com

Services

Board Certified Orthopedic Surgeon
Board certified orthopedic surgeon available for case review, opinions, exams. Rates quoted per case. Owen C DeWitt, MD, odewitt@alumni.rice.edu

Office Space

2040 4th St., N.W.
Three large professional offices for rent at 4th and I-40, Albuquerque, NM. Lease includes on site tenant and client parking, two (2) conference rooms, security, kitchen and receptionist to greet clients and answer phone. Call or email Gerald Bischoff at 505-243-6721 and gbischof@dcbf.net.

Law Office In Historic Building
Fully-furnished downtown Santa Fe office with existing law firm. Restored National Register building around enclosed patio, 3 blocks from State and Federal Courthouses. Copier, fax, telephone system, conference room, high-speed internet. Please contact Chris Carlsen, (505) 986-1131.

New Offices For Rent
New offices for rent in an established firm walking distance to the courthouse. Office includes parking, shared receptionist, copier, fax, telephone system, conference rooms and internet. Contact Lucia Erickson at billing@roybalmacklaw.com and (505)288-3500.

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

Offices Available To Rent
Two furnished offices available to rent in a recently renovated space at 1100 Fourth St. NW. Cubicles available for an assistant if needed. Access to wi-fi, conference room and kitchen. Located two blocks from courthouses in an easily accessible area with off street parking on site. Please contact Catherine at (505) 243-1676.

Office Space
Office space for rent with an established law firm at 20 First Plaza downtown Albuquerque. Space consists of one large office, one medium size office with outside area that is perfect for an assistant's desk/office. Prefer to rent total space. Convenient location that includes parking, receptionist, high speed internet, copier, fax, telephone system, office furniture (optional). Call Carol at 505-243-1733.

Business Opportunities

Seeking Established Practice to Purchase
Las Cruces general civil practice focusing on real estate, business and family law seeks an established practice to purchase, take over by an attorney retiring or focusing on other areas. Please email: lcnmlaw@gmail.com with inquiries.

Miscellaneous

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

STATE BAR of NEW MEXICO
CHILDREN'S LAW SECTION

16th Annual Art Contest

The pieces that make up our LIVES

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

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

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

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

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

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

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Adrianne Rutledge Baird
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Susan & Alicia Feil
505-690-2225/505-235-9398


Ann Taylor
505-379-7774


Kelly Hardison & Bryan Lee
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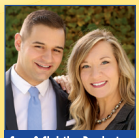
Carol Bouloy
505-450-2574


Carol Sauder
505-620-3898


Charissa Grigsby
505-319-3989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505-977-2004

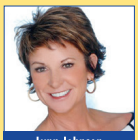

Dana Wilson
505-400-4199


David Roybal
505-459-0765


Diana L. Griego
505-238-6478

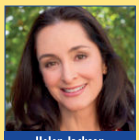

Rachael Flance
505-977-6569


Gary Shaw
505-506-9941


Lynn Johnson
505-350-5966

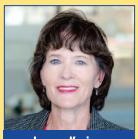

H. Christensen & L. McGuire
505-220-8370/505-450-6742

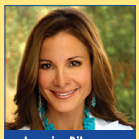

Helen DeMott
505-610-8355


Helen Jackson
505-610-6960


Jan DeMay
505-450-7635


Patty Culp
505-440-9895


Jeanne Kuriyan
505-249-7666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Jennifer Wilson
505-440-1256


Jennise Phillips
505-331-2288


Jessica Beecher
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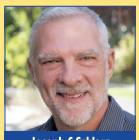
Joan Wagner & Jill Levin
505-220-0060/505-385-7714


Jo Cook
505-379-6099


Joe Maez
505-515-1719


Kate Southard
505-264-9586


Kas MacKenzie
505-205-4375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505-269-1819


Kelly Taliaferro
505-270-5552


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Greg Lobberegt
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Michelle Smith
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Mindy Prokos
505-400-6488


Missy Aschcraft
505-362-6823

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505-480-2121

Naomi Apodaca
505-510-0610

J. Gilmore-Daniels & K. Mosley
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Dominic Serna
505-319-1604

Wende Calvert
505-452-6934

Sandi Reeder
505-269-9498

Sandy Levinson
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Susan Nelson Anderson
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Suzanne Kinney
505-249-1212

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