

# BAR BULLETIN

September 19, 2018 • Volume 57, No. 38



*Silks*, by Janet Bothne

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## Inside This Issue

Notices .....	4
Board of Editors	
Bar Bulletin Readership Survey.....	4
UNM School of Law	
Distinguished Achievement	
Awards Dinner .....	5
Board of Bar Commissioners	
Election Notice 2018 .....	9
Nomination Petition for Board of Bar	
Commissioners .....	10
From the New Mexico Court of Appeals	
2018-NMCA-051, A-1-CA-34961 & A-1	
CA-35661 (cons.): Lueras v. GEICO	
Gen. Ins. Co. ....	14
2018-NMCA-052, A-1-CA-34986:	
State v. Blea .....	20



# Celebrate Pro Bono in New Mexico!



**OCTOBER 2018:** The American Bar Association has dedicated an entire week in October to the “National Celebration of Pro Bono.” In New Mexico, the local Judicial District Court Pro Bono Committees have extended this celebration to span the entire month of October (and part of September). The committees are hosting a number of pro bono events across the state, including free legal fairs, clinics, recognition luncheons, Continuing Legal Education classes and more!

To learn more about any of the events below, or to get involved with your local pro bono committee, please contact Aja Brooks at [ajab@nmlegalaid.org](mailto:ajab@nmlegalaid.org) or (505)814-5033. Thank you for your support of pro bono in New Mexico!

## 1st Judicial District

Pro Bono Appreciation Luncheon & CLE  
October 15, 2018 from 11 AM – 1:15 PM  
Hilton of Santa Fe  
(100 Sandoval St., Santa Fe, NM 87501)  
Luncheon from 11 AM - 12:15 PM (luncheon price TBA)  
CLE from 12:15 PM - 1:15 PM: "Personal Income Tax under the Tax Cuts and Jobs Act: What Every New Mexican Needs to Know" presented by Grace Allison, Director of the Low Income Taxpayer Clinic at New Mexico Legal Aid.

Free Legal Fair  
October 20, 2018 from 10 AM – 1 PM  
Genoveva Chavez Community Center  
(3221 Rodeo Rd, Santa Fe, NM 87507)

## 2nd Judicial District

Law-La-Palooza Free Legal Fair  
October 18, 2018 from 3 – 6 PM  
Location TBA

## 3rd Judicial District

Free Legal Fair  
October 26, 2018 from 10 AM – 1 PM  
Third Judicial District Court  
(201 W. Picacho Avenue, Las Cruces, NM 88005)

## 5th Judicial District (Chaves)

Pro Bono Appreciation Luncheon & Free Legal Fair  
October 19, 2018  
Roswell Adult and Senior Center  
(807 N. Missouri Ave., Roswell, NM 88201)  
Luncheon from 12 noon – 1 PM  
Free Legal Fair from 1 – 4 PM

## 6th Judicial District (Luna)

Free Legal Fair  
September 28, 2018 from 10 AM – 1 PM  
Luna County District Court  
(855 S. Platinum, Deming, NM 88030)

## 8th Judicial District

CLE & Free Legal Fair  
October 11, 2018  
CLE (details TBA)  
Free Legal Fair from 4 – 7 PM  
Taos Senior Center  
(601 Lovato Place, Taos NM 87571)

## 9th Judicial District

CLE, Pro Bono Appreciation Luncheon, & Free Legal Fair  
October 12, 2018  
Traci's Greenhouse  
(2600 Mabry Dr., Clovis, NM, 88101)  
CLE from 11 AM – 12 noon (details TBA)  
Luncheon from 12 noon – 1:30 PM  
Free Legal Fair from 1:30 – 4 PM

## 11th Judicial District (San Juan)

Free Legal Fair & Pro Bono Appreciation Luncheon  
September 21, 2018 from 12 noon – 5 PM  
San Juan County District Courthouse  
(103 S. Oliver, Aztec, NM 87410)

## 12th Judicial District

Free Legal Fair  
October 27, 2018 from 10 AM – 2 PM  
Otero County Courthouse  
(1000 New York Ave., Alamogordo, NM)

## 13th Judicial District

Pro Bono Appreciation Breakfasts & Legal Clinics  
Breakfasts at 8:30 AM; Free Legal Clinics from 10 AM - 2 PM  
Thursday, October 11, 2018  
13th Judicial District Court in Valencia County  
(1835 Hwy. 314 SW, Los Lunas, NM 87031)  
Tuesday, October 16, 2018  
13th Judicial District Court in Cibola County  
(700E Roosevelt Ave Ste. 60, Grants, NM 87020)  
Friday, October 19, 2018  
13th Judicial District Court in Sandoval County  
(500 Idalia Road, Bernalillo, NM 87004)



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September 19, 2018 • Volume 57, No. 38

## Table of Contents

Notices .....	4
Calendar of Continuing Legal Education.....	6
Court of Appeals Opinions List.....	12
Rule Making Activity .....	13

#### From the New Mexico Court of Appeals

2018-NMCA-051, Nos. A-1-CA-34961 & A-1-CA-35661 (cons.): Lueras v. GEICO Gen. Ins. Co.....	14
2018-NMCA-052, A-1-CA-34986: State v. Blea.....	20

Advertising .....	27
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## Meetings

### September

- 20**  
**Elder Law Section Board**  
Noon, State Bar Center
- 21**  
**Family Law Section Board**  
9 a.m., teleconference
- 21**  
**Indian Law Section Board**  
Noon, State Bar Center
- 25**  
**Intellectual Property Law Section Board**  
Noon, Lewis Roca Rothgerber Christie LLP
- 26**  
**NREEL Section Board**  
Noon, teleconference
- 27**  
**Trial Practice Law Section Board**  
Noon, State Bar Center
- 28**  
**Immigration Law Section Board**  
Noon, NMILC/teleconference

## Workshops and Legal Clinics

### September

- 19**  
**Family Law Clinic**  
10 a.m.–1 p.m., Second Judicial District  
Court, Albuquerque, 1-877-266-9861
- 26**  
**Consumer Debt/Bankruptcy Workshop**  
6–9 p.m., State Bar Center, Albuquerque,  
505-797-6094

### October

- 3**  
**Divorce Options Workshop**  
6–8 p.m., State Bar Center, Albuquerque,  
505-797-6022
- 3**  
**Civil Legal Clinic**  
10 a.m.–1 p.m., Second Judicial District  
Court, Albuquerque, 1-877-266-9861
- 12**  
**Civil Legal Clinic**  
10 a.m.–1 p.m., Bernalillo County  
Metropolitan Court, Albuquerque,  
505-841-9817

**About Cover Image and Artist:** Janet Bothne's artwork focuses on the limitless possibilities color presents as subject matter. Born near Boston, Bothne studied art at the University of MA at Amherst as well as UCLA, and Brentwood Art Center in California. She has exhibited in numerous venues such as The Los Angeles County Museum's Sales & Rental Gallery, The Santa Monica Art Museum and Miami Solo. She is currently represented in CA, FL, MA, MD & TX. She relocated to New Mexico in 2013 where she now shares her enthusiasm for art with the students she coaches in her abstract painting classes at "Studio J" in the North Valley of Albuquerque. View additional works by visiting: [www.janetbothne.com](http://www.janetbothne.com). Contact Bothne to schedule a studio visit by email: [janetbothne@mac.com](mailto:janetbothne@mac.com) or call: 310-666-1944.



# Notices

## COURT NEWS

### Twelfth Judicial District Court Announcements

The Twelfth Judicial District Court would like to extend an invitation to anyone who would like to electronically receive Court announcements and newsletters. To be added to the email distribution list, submit a request to [aladref@nmcourts.gov](mailto:aladref@nmcourts.gov).

### Attorney General's Office Notice of Disabilities Summit

The Office of New Mexico Attorney General Hector Balderas invites members of SBNM to a day-long opportunity for networking and outreach for organizations that work with the community of people with disabilities. The event is set from 9 a.m.-5 p.m., Oct. 4, on the east side of the Albuquerque Convention Center. The conference is sponsored by the Office of Attorney General, and use of the convention center is arranged through the co-sponsorship of Albuquerque city councilors Isaac Benton and Clarissa Pena. For information, visit [www.nmag.gov](http://www.nmag.gov) or email Amira Rasheed at [arasheed@nmag.gov](mailto:arasheed@nmag.gov).

## STATE BAR NEWS

### Animal Law Section

#### Animal Talk: Animal Cruelty

The Animal Law Section is pleased to host Captain Andi Taylor, a commander with the Bernalillo County Sheriff's Department in Albuquerque, for an Animal Talk on animal cruelty, the evidence of the crime and the proper crime to charge when discovering different types of calls and evidence. The event will be at noon, Sept. 21, at the State Bar Center in Albuquerque. R.S.V.P. to Breanna Henley at [bhenley@nmbar.org](mailto:bhenley@nmbar.org). A teleconference option is available for those unable to attend in person. Contact Breanna for call-in information.

### 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 Nov. Save the date for 4-6 p.m., Oct. 18, at the State Bar Center in Albuquerque. The event will be live streamed at [www.nmbar.org/AppellatePractice](http://www.nmbar.org/AppellatePractice) for those who cannot attend in person. Thank you to the New Mexico Trial Lawyers As-

## Professionalism Tip

With respect to the courts and other tribunals:

In civil matters, I will stipulate to facts when there is no genuine dispute

sociation, New Mexico Defense Lawyers Association and Albuquerque Bar Association for their co-sponsorship of the event.

### Board of Editors Bar Bulletin Readership Survey

The Board of Editors invites readers of the *Bar Bulletin* to participate in a survey that will help us understand reader preferences and habits. The Board values readers feedback as it plans for the future. The survey will be open until Sept. 21. Visit <https://www.surveymonkey.com/r/YG7Y5LN> to take the survey.

### New Mexico Judges and Lawyers Assistance Program ABA Lawyer Retreat

The New Mexico Judges and Lawyers Assistance Program is proud to sponsor the American Bar Association's 2018 Lawyer Retreat on Oct. 5 at the Four Seasons Resort in Vail, Colo. Each participant will get new tools they can implement right away in order to make their practice and personal life, as a lawyer, even better. The ABA will provide attendees with world class facilitators and attendees will not only learn about having difficult conversations, the importance of emotional intelligence/self-awareness and design thinking, but they will also have the opportunity to learn through collaborative interaction how to put what they are learning into practice back in their own law firms or legal organizations. Learn more and register at [www.abalawyerretreat.org](http://www.abalawyerretreat.org).

### ABA Law Mental Health Day

The ABA Law Student Division officially moved Law School Mental Health Day to Oct. 10. American University Washington College of Law will host a YouTube live event featuring Laurie Besden, Pennsylvania Lawyers Concerned for Lawyers executive director, who is in recovery with an incredible story to share. The session will run live from 2-3 p.m. E.T. and then will be available for replay. The YouTube link is <http://auw.cl/tohellandback>. Besden's event is titled To Hell

and Back: One Lawyer's Path to Recovery. A YouTube Live Presentation. Besden had a privileged upbringing. She graduated college with a 3.97 GPA, and was in the top 15% of her law school class. On paper, Besden is the definition of success. Besden is also a drug addict. Listen as Besden candidly shares her story of crippling addiction, and ultimately, redemption. Learn how the district attorney approached the case and her current thoughts about it. Understand what it is like to be approached by a caring individual, with their experience strength and hope, even when you are not ready to accept your state of affairs. It is never too early or late to plant "the seed of hope".

### New Mexico Judges and Lawyers Assistance Program Attorney Support Groups

- 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.)
- Oct. 8, 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#.
- Oct. 15, 5:30 p.m.  
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

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

### Solo and Small Firm Section

## Fall Speaker Series Opens with U.S. Attorney John Anderson

On Oct. 16, the Solo and Small Firm monthly speaker series featured speaker is nationally-respected criminal defense attorney Mike Stout of Las Cruces, who will consider "True Believers and the Road to Hell." Nov. 20 features Robert Huelskamp, who will share his insights from almost forty years working with nuclear weaponry, non-proliferation, and counter terrorism, in "Russia, Iran, and North Korea: What Could Possibly Go Wrong?" Each presentation is open to all members of the State Bar and will take place from noon-1 p.m. at the State Bar Center in Albuquerque. Lunch will be provided. Please R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

## UNM SCHOOL OF LAW Law Library

### Fall 2018 Hours

Mon. Aug. 20,– Sat., Dec. 15

#### 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.
Saturday & Sunday	No reference

## Distinguished Achievement Awards Dinner

An evening to remember. Join UNM Law to honor Distinguished Honorees Justice Edward L. Chavez (ret.), Jill L. Marron, Steve Scholl and Alumni Promise Honoree Aja N. Brooks. The event will take place on Oct. 19, at UNM Student Union Ballrooms, reception starts at 6 p.m., followed by dinner and ceremony at 7 p.m. Register online at goto.unm.edu/daad or call 505-277-1457.

## OTHER BARS

### N.M. Association of Legal Administrators Effective Client Representation Presentation

The Disciplinary Board and the N.M. Judges and Lawyers Assistance Program have seen ethical violations in law firms in two main areas: competence and diligence as a result of lawyers taking cases not in their areas of expertise, experiencing cognitive impairment and/or mental health

or substance abuse issues. Learn how to prevent these issues, both as an individual lawyer and as a responsible member of your firm. The presenters will be Bill Slease and Pamela Moore. Join NMALA on Oct. 11 from 8:45-11:15 a.m., at the State Bar Center for 2.0 EP credits. The cost is \$80. For more information contact kknapp@pbwslaw.com or visit www.nmala.org.

### N.M. Criminal Defense Lawyers Association Elevate Your Practice CLE

Elevate your practice during the week of the Albuquerque International Balloon Fiesta. Including Balloon Fiesta activities exclusive to CLE participants, such as a chance to win a "Balloon Crew" experience and a salsa dance night open to all participants. Nancy Hollander, past president of NMCDLA will be moderating, and the seminar schedule includes jury selection, child porn law & technology, building client relations, and government surveillance. There will also be a lunch and Skype interview with Mohammedou Slahi, author of *Guantanamo Diary*. Visit www.nmcdla.org for information.

### Litigating for Accountability & Freedom

Rick Raemisch, director of the Colorado Corrections Department, will share the details of Colorado's successful move to reform solitary confinement at NMCDLA's upcoming "Litigating for Accountability & Freedom" CLE on Sept. 28. Also NMCLA will have special guest Dr. Stuart Grassian, who will speak on the psychiatric effects of solitary confinement on inmates, as well as working with mentally disabled clients. Also included on the schedule are navigating the PLRA and PREA, litigating sexual abuse cases in prisons and jails, and more. This seminar is open to both criminal defense and civil rights plaintiffs' attorneys, and is worth 6.2 CLE credits, including 1.0 ethics credit. Visit www.nmcdla.org to register.

### N.M. Defense Lawyers Association

#### Announces 2018 Award Winners

The New Mexico Defense Lawyers Association is pleased to announce that S. Carolyn Ramos has been selected as the 2018 Outstanding Civil Defense Lawyer of the Year and David Gonzales as the 2018 Young Lawyer of the Year. The awards

will be presented at the NMDLA Annual Meeting Awards Luncheon on Friday, Sept. 28, at Hotel Andaluz in Albuquerque. For registration information, visit www.nmdla.org or call 505-797-6021.

### N.M. Women's Bar Association Mugshots and Margaritas

The New Mexico Women's Bar Association invites all attorneys to its "Mugshots and Margaritas" event on Fri., Sept. 28 from 5-8 p.m., at El Pinto located at 10500 4th Street NW. The Association will provide appetizers and one free margarita to all attendees. Photographer Liz Lopez will be available to take professional headshots at the reduced cost of \$60 for members. Non-members may join that day only for a reduced membership price of only \$30. Enjoy getting to know board members and fellow attorneys, while getting a current headshot at a great price. If you wish to have your photo taken, please email nmwba1990@gmail.com by Sept. 25 to reserve a time slot. To simply attend and have fun, there is no need to R.S.V.P.

## OTHER NEWS

### Environmental Law Institute 27th Annual Eastern Boot Camp on Environmental Law

Join ELI for a stimulating three-day immersion in environmental law at Eastern Boot Camp. Designed for both new and seasoned professionals, this intensive course explores the substance and practice of environmental law. The faculty members are highly respected practitioners who bring environmental law, practice, and emerging issues to life through concrete examples, cases and practice concerns in this three-day intensive course for ELI members. The Boot Camp is a great deal, offering up to 20 hours of CLE credit for \$1,100 or less, with special discounts provided to government, academic, public interest employees and students. Designed originally for attorneys, the course is highly useful for environmental professionals such as consultants, environmental managers, policy and advocacy experts, paralegals and technicians seeking deeper knowledge of environmental law. The registration deadline is Oct. 19. Visit <https://www.eli.org/boot-camp/eastern-bootcamp-environmental-law> for more details.

# Legal Education

## September

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|---|---|---|
| <p><b>20 Income and Fiduciary Tax Issues for Estate Planners, Part 2</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                          | <p><b>21 2018 Annual Tax Symposium (Full Day)</b><br/>6.0 G, 1.0 EP<br/>Webcast/Live Seminar<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                                  | <p><b>25 2018 Sexual Harassment Update</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                                      |
| <p><b>20 Military Retired Pay Primer</b><br/>2.0 G, 1.0 EP<br/>Live Seminar, Albuquerque<br/>FAMlaw LLC<br/>www.famlawseminars.com</p>  | <p><b>21 2018 Annual Tax Symposium - Morning Session: Federal and State Tax Updates</b><br/>3.0 G<br/>Webcast/Live Seminar<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>    | <p><b>27 2018 Collaborative Law Symposium: The Basics</b><br/>6.0 G, 1.0<br/>Live Seminar<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
| <p><b>20 The Lifecycle of a Trial, from a Technology Perspective (2017)</b><br/>4.3 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>21 2018 Annual Tax Symposium - Afternoon Session: Tax Law Special Topics</b><br/>3.0 G, 1.0 EP<br/>Webcast/Live Seminar<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>28 2018 Advanced Collaborative Law Symposium</b><br/>7.0 G<br/>Live Seminar<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>         |
| <p><b>20 2017 ECL Solo and Small Business Bootcamp Parts I and II (2017)</b><br/>3.4 G, 2.7 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>22 Best Practices for New Mexico Bankruptcy Practitioners</b><br/>1.0 G<br/>Live at the home of Dan Behles, 709 El Alhambra Cir NW, Los Ranchos, NM 87107<br/>Albuquerque</p>                         | <p><b>28 The California New Rules Review</b><br/>1.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                                  |
| <p><b>20 Bankruptcy Law: The New Chapter 13 Plan (2017)</b><br/>3.1 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                          |   | <p><b>28 Who's Hacking Lawyers and Why</b><br/>1.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                                    |

## October

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|---|--|--|
| <p><b>4 The Ins-and-Out of Licensing Technology, Part 1</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>5 2018 Employment and Labor Law Institute (Full Day)</b><br/>5.0 G, 1.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>12 2018 Health Law Symposium</b><br/>5.5 G, 2.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   |
| <p><b>5 The Ins-and-Out of Licensing Technology, Part 2</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>Effective Client Representation</b><br/>2.0 EP<br/>Live Seminar, Albuquerque<br/>New Mexico Association of Legal Administrators<br/>www.nmala.org</p>                          | <p><b>15 Basic Practical Regulatory Training for the Natural Gas Local Distribution Industry</b><br/>25.2 G<br/>Live Seminar, Albuquerque<br/>Center for Public Utilities, New Mexico State University<br/>business.nmsu.edu</p> |

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| <p><b>15 Basic Practical Regulatory Training for the Electric Industry</b><br/>25.2 G<br/>Live Seminar, Albuquerque<br/>Center for Public Utilities, New Mexico State University<br/>business.nmsu.edu</p>                      | <p><b>18 Fourth Annual Symposium on Diversity and Inclusion-Diversity Issues Ripped from the Headlines, II (2018)</b><br/>5.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>25 Children's Code: Delinquency Rules, Procedures and the Child's Best Interest</b><br/>1.5 G, 1.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>           |
| <p><b>17 Cybersleuth Investigative Series: Using Free Public Records and Publicly Available Information for Investigative Research</b><br/>1.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>19 2018 Administrative Law Institute (Full Day)</b><br/>5.0 G, 1.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>25 Liquidation: Legal Issues When a Client Decides to Close a Business</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  |
| <p><b>18 Ethics for Government Attorneys (2017)</b><br/>2.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   | <p><b>23 Boilerplate Provisions in Contracts: Overlooked Traps in Every Agreement</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>26 Cybersleuth Investigative Series: How to be Your Own Private Investigator With Pay Investigative Research Databases</b><br/>1.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
| <p><b>18 Trust and Estate Update: Recent Statutory Changes that are Overlooked and Underutilized</b><br/>1.0 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                       | <p><b>24 Practice Management Skills for Success (2018)</b><br/>5.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>30 Social Media as Investigative Research and Evidence</b><br/>1.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   |
| <p><b>18 Reforming the Criminal Justice System (2017)</b><br/>6.0 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>24 Oil and Gas: From the Basics to In-Depth Topics</b><br/>6.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>31 The Ethics of Social Media Research</b><br/>1.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  |

## November

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| <p><b>1 A Practical Approach to Indian Law: Legal Writing, 2018 Update and the Ethics of Practicing Indian Law</b><br/>2.0 G, 1.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>6 Releasing Employees &amp; Drafting Separation Agreements</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>9 Ethics and Changing Law Firm Affiliation</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
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| <p><b>13 Estate Planning for MDs, JDS, CPAs &amp; Other Professionals, Part 1</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>26 Secured Transactions Practice: Security Agreements to Foreclosures, Part 1</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>28 Ethics and Dishonest Clients</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
| <p><b>14 Estate Planning for MDs, JDS, CPAs &amp; Other Professionals, Part 2</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>26 Secured Transactions Practice: Security Agreements to Foreclosures, Part 2</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |  |
| <p><b>14 2018 Business Law Institute</b><br/>5.0 G, 1.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>            |   |  |
| <p><b>20 Ethics of Beginning and Ending Client Relationships</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                 |   |  |

## December

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| <p><b>5 Business Divorce, Part 1</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                       | <p><b>7 2018 Ethics and Social Media Update</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>    | <p><b>12 Employee v. Independent Contractor: Tax and Employment Law Considerations</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
| <p><b>6 Business Divorce, Part 2</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                       | <p><b>11 Guarantees in Real Estate Transactions</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>13 Drafting Client Letters in Trust and Estate Planning</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                      |
| <p><b>6 Attorney Orientation and the Ethics of Pro Bono</b><br/>2.0 EP<br/>Live Seminar, Albuquerque<br/>New Mexico Legal Aid<br/>505-814-6719</p> |   |  |

*Continued CLE Course on page 11*



# BOARD OF BAR COMMISSIONERS ELECTION NOTICE 2018



Pursuant to Supreme Court Rule 24-101, the Board of Bar Commissioners is the elected governing board of the State Bar of New Mexico. Voting members of the Board of Bar Commissioners are required to do the following:

## **Duties and Requirements for Board of Bar Commissioner Members:**

- Attend all Board meetings (up to six per year), including the Annual Meeting of the State Bar.
- Ensure financial accountability for the organization.
- Represent the State Bar at local bar-related meetings and events.
- Communicate regularly with constituents regarding State Bar activities.
- Promote the programs and activities of the State Bar and the New Mexico State Bar Foundation.
- Participate on Board and Supreme Court committees.
- Evaluate the State Bar's programs and operations on a regular basis.
- Establish and enforce bylaws and policies.
- Serve as a director of the New Mexico State Bar Foundation Board.

Notice is hereby given that the 2018 election of six (6) commissioners for the State Bar of New Mexico will close at noon, Nov. 30. Nominations to the office of bar commissioner shall be by the written petition of any 10 or more members of the State Bar who are in good standing and whose principal place of practice is in the respective district. Members of the State Bar may nominate and sign for more than one candidate. **(See the nomination petition on the next page.) The following terms will expire Dec. 31, and need to be filled in the upcoming election. All of the positions are three-year terms and run from Jan. 1, 2019–Dec. 31, 2021.**

### **First Bar Commissioner District**

#### **Bernalillo County**

Three positions currently held by:

- Kevin L. Fitzwater
- Clara Moran
- Benjamin I. Sherman

### **Second Bar Commissioner District**

#### **Cibola, McKinley, San Juan and Valencia Counties**

One position currently held by:

- Joseph F. Sawyer

### **Third Bar Commissioner District**

#### **Los Alamos, Rio Arriba, Sandoval and Santa Fe counties**

One position currently held by:

- Constance G. Tatham

### **Sixth Bar Commissioner District**

#### **Chaves, Eddy, Lea, Lincoln and Otero counties**

One position currently held by:

- Scotty A. Holloman\*

\*Ineligible to seek re-election

### **Send nomination petitions to:**

Executive Director Richard Spinello  
State Bar of New Mexico  
PO Box 92860  
Albuquerque, NM 87199-2860  
rspinello@nmbar.org

**Petitions must be received by 5 p.m., Oct. 19**

Direct inquiries to 505-797-6038 or kbecker@nmbar.org.

# NOMINATION PETITION FOR BOARD OF BAR COMMISSIONERS

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We, the undersigned, members in good standing and who have a principal place of practice in the respective district of the nominee, nominate \_\_\_\_\_, whose principal place of practice is in the \_\_\_\_\_ Bar Commissioner District, State of New Mexico, for the position of commissioner of the State Bar of New Mexico, representing the \_\_\_\_\_ Bar Commissioner District. Date Submitted \_\_\_\_\_

(1)	_____ Signature	_____ Type or Print Name	_____ Address
(2)	_____ Signature	_____ Type or Print Name	_____ Address
(3)	_____ Signature	_____ Type or Print Name	_____ Address
(4)	_____ Signature	_____ Type or Print Name	_____ Address
(5)	_____ Signature	_____ Type or Print Name	_____ Address
(6)	_____ Signature	_____ Type or Print Name	_____ Address
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## December

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| <p><b>14 Ethics and Virtual Law Offices</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of<br/>NMSBF<br/>www.nmbar.org</p>        | <p><b>18 Rights of First Offer, First Refusal<br/>in Real Estate</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>21 Ethics, Satisfied Clients &amp;<br/>Successful Representations</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
| <p><b>17 Trust and Estate Planning for<br/>Pets</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of<br/>NMSBF<br/>www.nmbar.org</p> |  |   |

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to [notices@nmbar.org](mailto:notices@nmbar.org). Include course title, credits, location/course type, course provider and registration instructions.

# Opinions

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

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

## Effective September 7, 2018

### PUBLISHED OPINIONS

A-1-CA-34496	State v. J Roeper	Reverse/Remand	09/04/2018
A-1-CA-35260	P Vanderlugt v. K Vanderlugt	Affirm/Reverse	09/05/2018

### UNPUBLISHED OPINIONS

A-1-CA-34945	State v. J Barela	Affirm/Reverse/Remand	09/04/2018
A-1-CA-35054	State v. E Moreno	Reverse	09/04/2018
A-1-CA-35363	M Valdez v. R Estrada	Affirm	09/04/2018
A-1-CA-36553	Federal National v. P Levey	Affirm	09/04/2018
A-1-CA-37096	Blue Canyon Well Association v. D Jevne	Reverse	09/04/2018
A-1-CA-37158	Bank of New York v. G Trujillo	Affirm	09/04/2018
A-1-CA-35080	G Silva v. M Silva	Affirm	09/05/2018
A-1-CA-36176	State v. Justin C	Dismiss	09/05/2018
A-1-CA-36727	State v. S Geisik	Affirm	09/05/2018
A-1-CA-35054	State v. E Moreno	Reverse	09/06/2018

Slip Opinions for Published Opinions may be read on the Court's website:

<http://coa.nmcourts.gov/documents/index.htm>



# 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 September 19, 2018**

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## **PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:**

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### **Comment Deadline**

*There are no proposed rule changes open for comment.*

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## **RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2018 NMRA:**

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### **Effective Date**

#### **Rules of Civil Procedure for the District Courts**

1-003.2	Commencement of action; guardianship and conservatorship information sheet	07/01/2018
1-079	Public inspection and sealing of court records	07/01/2018
1-079.1	Public inspection and sealing of court records; guardianship and conservatorship proceedings	07/01/2018
1-088.1	Peremptory excusal of a district judge; recusal; procedure for exercising	03/01/2018
1-104	Courtroom closure	07/01/2018
1-140	Guardianship and conservatorship proceedings; mandatory use forms	07/01/2018
1-141	Guardianship and conservatorship proceedings; determination of persons entitled to notice of proceedings or access to court records	07/01/2018

#### **Civil Forms**

4-992	Guardianship and conservatorship information sheet; petition	07/01/2018
4-993	Order identifying persons entitled to notice and access to court records	07/01/2018
4-994	Order to secure or waive bond	07/01/2018
4-995	Conservator's notice of bonding	07/01/2018
4-995.1	Corporate surety statement	07/01/2018
4-996	Guardian's report	07/01/2018
4-997	Conservator's inventory	07/01/2018
4-998	Conservator's report	07/01/2018

#### **Rules of Criminal Procedure for the District Courts**

5-302A	Grand jury proceedings	04/23/2018
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#### **Local Rules for the First Judicial District Court**

LR1-404	Family court services and other services for child-related disputes	09/01/2018
LR1-405	Safe exchange and supervised visitation program	09/01/2018

#### **Local Rules for the Second Judicial District Court**

LR2-401	Court clinic mediation program and other services for child-related disputes	09/01/2018
LR2-403	Safe exchange and supervised visitation	09/01/2018
LR2-Form 709	Court clinic referral order	09/01/2018

#### **Local Rules for the Third Judicial District Court**

LR3-401	Domestic relations mediation and safe exchange and supervised visitation programs	09/01/2018
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#### **Local Rules for the Fourth Judicial District Court**

LR4-401	Safe exchange and supervised visitation, and domestic relations mediation	09/01/2018
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#### **Local Rules for the Fifth Judicial District Court**

LR5-401	Safe exchange and supervised visitation; domestic relations mediation	09/01/2018
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#### **Local Rules for the Sixth Judicial District Court**

LR6-401	Safe exchange and supervised visitation, and domestic relations mediation	09/01/2018
LR6-404	Withdrawn	09/01/2018

#### **Local Rules for the Seventh Judicial District Court**

LR7-401	Domestic relations; mediation	09/01/2018
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#### **Local Rules for the Eighth Judicial District Court**

LR8-401	Safe exchange and supervised visitation; domestic relations mediation	09/01/2018
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#### **Local Rules for the Ninth Judicial District Court**

LR9-405	Domestic relations mediation	09/01/2018
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#### **Local Rules for the Eleventh Judicial District Court**

LR11-402	Domestic relations mediation; safe exchange and supervised visitation	09/01/2018
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#### **Local Rules for the Twelfth Judicial District Court**

LR12-401	Domestic relations mediation	09/01/2018
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#### **Local Rules for the Thirteenth Judicial District Court**

LR13-124	Fees non-refundable	09/01/2018
LR13-401	Domestic relations alternative dispute resolution (ADR); advisory consultation	09/01/2018
LR13-402	Domestic Relations Mediation Act; safe exchange and supervised visitation	09/01/2018

Certiorari Granted, August 16, 2018, No. S-1-SC-37135  
Certiorari Granted, August 16, 2018, No. S-1-SC-37137

From the New Mexico Court of Appeals

**Opinion Number: 2018-NMCA-051**

Nos. A-1-CA-34961 & A-1-CA-35661 (Consolidated) (filed June 14, 2018)

ANGELA LUERAS and JOE LUERAS, individually,  
Plaintiffs-Appellants,  
and  
ANGELA LUERAS and JOE LUERAS, as parents and guardians of A. LUERAS, a minor,  
Plaintiffs,  
v.  
GEICO GENERAL INSURANCE COMPANY,  
Defendant-Appellee,  
and  
MARIA RODRIGUEZ, FARMERS INSURANCE COMPANY OF ARIZONA a/k/a FARMERS INSURANCE GROUP a/k/a  
FARMERS INSURANCE EXCHANGE,  
Defendants,

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

Alan M. Malott, District Judge

And  
DAVID VAN EPPS,  
Plaintiff-Appellant,  
v.  
GEICO INDEMNITY COMPANY  
Defendant-Appellee,  
and  
CESAR MONTAÑO,  
Defendants.

**APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY**

Sarah C. Backus, District Judge

GEOFFREY R. ROMERO  
LAW OFFICES OF GEOFFREY R.  
ROMERO  
Albuquerque, New Mexico

ERIN B. O'CONNELL  
O'CONNELL LAW LLC  
Albuquerque, New Mexico

SUSAN H. WIDNER  
WIDNER LAW FIRM LLC  
Albuquerque, New Mexico  
for Lueras Appellants

ANTHONY G. LOPEZ  
ANTHONY G. LOPEZ, ATTORNEY AT  
LAW  
Taos, New Mexico  
for Van Epps Appellant

CHAPMAN AND PRIEST, PC  
STEPHEN M. SIMONE  
Albuquerque, New Mexico

MELONEY PERRY  
STACY THOMPSON  
PERRY LAW, P.C.  
Dallas, TX

for GEICO Appellees

**Opinion****EMIL J. Kiehne, Judge**

{1} Plaintiffs, Angela and Joe Lueras, and David Van Epps, filed two separate lawsuits against GEICO General Insurance Company and GEICO Indemnity Company<sup>1</sup>, respectively, in response to GEICO's refusal to pay uninsured/underinsured (UM/UIM) benefits to them. GEICO declined to pay because Plaintiffs had rejected UM/UIM coverage. The district courts granted summary judgment to GEICO in both cases. These appeals raise substantially similar issues, and for that reason we exercise our discretion to consolidate them for decision. *See* Rule 12-317(B) NMRA.

{2} On appeal, Plaintiffs make the following claims:

1. The UM/UIM rejection forms violated New Mexico law because they did not explain that the UM/UIM benefits would be stacked.
2. The insurance policies were misleading and ambiguous because they incorrectly stated that UM/UIM benefits would not be stacked.
3. The Luerases separately claim that GEICO violated New Mexico law because the declaration page misrepresents the amount of UM/UIM coverage.
4. GEICO's requirement that Plaintiffs either purchase the same level of UM/UIM insurance on each vehicle covered by a single policy, or reject UM/UIM insurance entirely, violated New Mexico law.
5. The Luerases separately claim that GEICO's failure to obtain another rejection of UM/UIM coverage when they added a vehicle to their policy entitles them to UM/UIM coverage.
6. Mr. Van Epps separately contends that after his wife initially selected UM/UIM coverage below the liability limits of the policy, GEICO sent her a form that improperly discouraged her from purchasing UM/UIM coverage, and that her rejection of UM/UIM coverage on that form is therefore invalid.

{3} We affirm. Claims 1 and 2 are identical to claims that we recently considered and rejected in *Ullman v. Safeway Insurance Co.*, 2017-NMCA-071, 404 P.3d 434, *cert. granted*, 2017-NMCERT-\_\_\_\_\_

(A-1-CA-36580 Aug. 24, 2017). Claim 3 is also foreclosed by the rationale in *Ullman*. We reject Claim 4 because New Mexico law does not preclude an insurer from requiring an insured to choose the same UM/UIM coverage (or to reject UM/UIM coverage entirely) for all vehicles covered by a single policy. Claim 5 is foreclosed by our decision in *Vigil v. Rio Grande Insurance of Santa Fe*, 1997-NMCA-124, ¶¶ 14-17, 124 N.M. 324, 950 P.2d 297, which has not been modified by any later decisions by our Supreme Court. Finally, we reject Claim 6 because GEICO was required by law to send the UM/UIM coverage form to Mrs. Van Epps, and nothing in it discouraged her from selecting UM/UIM coverage.

**BACKGROUND****I. Lueras v. GEICO General Insurance Company**

{4} The Luerases bought an automobile insurance policy for their three vehicles from GEICO in 2009. The policy had liability limits of \$50,000 per person and \$100,000 per occurrence. GEICO presented the Luerases with a form on which they could select or reject UM/UIM coverage. The form did not explain that the UM/UIM coverages for each vehicle would be stacked. The form provided the Luerases with the option of selecting the same UM/UIM coverage for all three vehicles, or rejecting UM/UIM coverage entirely. The Luerases rejected UM/UIM coverage. Later, the Luerases added a fourth vehicle to their policy, and GEICO again sent the Luerases a form on which to select or reject UM/UIM coverage. The Luerases did not sign or return the form to GEICO.

{5} In 2011, Plaintiff Angela Lueras was the driver of, and her daughter a passenger in, a vehicle that was involved in a crash with Defendant Maria Rodriguez. Ms. Rodriguez's automobile insurance coverage was not sufficient to fully compensate the Luerases for the injuries they suffered as a result of the crash. The Luerases asked GEICO to provide UIM benefits, but GEICO denied their claim because they had rejected UM/UIM coverage. The Luerases then sued GEICO and Ms. Rodriguez in the Second Judicial District Court, Bernalillo County, arguing that their rejection of UM/UIM coverage was invalid on several grounds. The parties filed cross-motions for summary judgment.

The district court granted summary judgment in GEICO's favor and denied the Luerases' cross-motion for summary judgment. The Luerases timely appealed.

**II. Van Epps v. GEICO Indemnity Company**

{6} Mr. Van Epps' wife, Wendy Van Epps, purchased a GEICO insurance policy in 2010 on four vehicles that the couple owned. The policy had liability limits of \$50,000 per person and \$100,000 per occurrence. Mrs. Van Epps selected UM/UIM coverage of \$25,000 per person and \$50,000 per occurrence, which was less than the liability limits. Two days later, GEICO sent Mrs. Van Epps a form letter asking her to select or reject UM/UIM coverage. According to the menu of options on the form, if Mrs. Van Epps wanted to select UM/UIM coverage, she had to purchase the same level of coverage on all four vehicles, and if she wanted to reject UM/UIM coverage, she had to reject it on all four vehicles. She could not select different UM/UIM coverage limits for each vehicle, or select UM/UIM coverage on some vehicles and reject it on others. The form also did not inform Ms. Van Epps that the UM/UIM policies would be stacked in the event of an accident with an uninsured or underinsured motorist. Mrs. Van Epps rejected UM/UIM coverage on all four vehicles.

{7} While working as a security officer at a local restaurant in 2012, Mr. Van Epps was threatened by Defendant Cesar Montañó, who was attempting to patronize the restaurant. When Mr. Montañó left in his car, he drove it towards Mr. Van Epps, hitting him and knocking him to the ground. Mr. Montañó then backed up his car and ran over Mr. Van Epps' leg. Mr. Van Epps sustained permanent injuries.

{8} Mr. Montañó also had a GEICO insurance policy, but it provided only \$25,000 in coverage, which was insufficient to cover Mr. Van Epps' injuries. Mr. Van Epps sought UIM benefits under his own policy. GEICO refused to pay based on Mrs. Van Epps' rejection of UM/UIM coverage. Mr. Van Epps then sued GEICO and Mr. Montañó in the Eighth Judicial District Court, Taos County, New Mexico, raising arguments similar to those made by the Luerases. The parties filed cross-motions for summary judgment. The district court

<sup>1</sup>GEICO General Insurance Company and GEICO Indemnity Company are referred to throughout this opinion collectively as GEICO

granted summary judgment to GEICO, and denied Mr. Van Epps' cross-motion for summary judgment. Mr. Van Epps timely appealed.

## DISCUSSION

### I. Standard of Review

{9} Each claim in this case involves the interpretation of insurance policy language, and we therefore apply de novo review. See *Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶ 60, 123 N.M. 752, 945 P.2d 970 ("The interpretation of an insurance contract is a matter of law about which the court has the final word."). We also apply de novo review to district court orders granting summary judgment. See *Farmington Police Officers Ass'n Comm'n Workers of America Local 7911 v. City of Farmington*, 2006-NMCA-077, ¶ 13, 139 N.M. 750, 137 P.3d 1204 ("An appeal from an order granting a motion for summary judgment presents a question of law subject to de novo review.").

### II. Plaintiffs' Claim That the Policies and Rejection Forms Should Have Explained That Their UM/UM Benefits Would Be Stacked, Their Claim That the Rejection Form Was Ambiguous Because It Purported to Prohibit Stacking, and the Luerases' Claim That the Declaration Page Misrepresents the Amount of UM/UM Coverage Are Controlled by Our Decision in *Ullman*

{10} In *Jordan v. Allstate Insurance Co.*, 2010-NMSC-051, ¶ 22, 149 N.M. 162, 245 P.3d 1214, our Supreme Court stated that to obtain a valid rejection of UM/UM coverage, an insurer must "(1) offer the insured UM/UM coverage equal to his or her liability limits, (2) inform the insured about the premium costs corresponding to the available levels of coverage, (3) obtain a written rejection of UM/UM coverage equal to the liability limits, and (4) incorporate that rejection into the policy in a way that affords the insured a fair opportunity to reconsider the decision to reject[.]" Plaintiffs argue that GEICO's insurance policy and its UM/UM rejection form violated requirements (2) and (3) of *Jordan* because they did not explain that UM/UM benefits would be stacked in the event of a collision with an uninsured or underinsured motorist, thus misrepresenting the amount of UM/UM coverage that was actually available to them. See *Black's Law Dictionary* 1623 (10th ed. 2014) (defining "stacking" as "[t]he process of obtaining benefits from a second policy on the same claim when

recovery from the first policy alone would be inadequate"). Plaintiffs also argue that GEICO's insurance policy was ambiguous and misleading because it contained language that purported to prohibit stacking, although the anti-stacking provision was invalid under New Mexico law.

{11} We recently considered, and rejected, identical claims in *Ullman*. 2017-NMCA-071, ¶¶ 39-52. That decision is controlling, and accordingly we affirm the district courts' orders rejecting these claims. See *Arco Materials, Inc. v. N.M. Taxation & Revenue Dep't*, 1994-NMCA-062, ¶ 3, 118 N.M. 12, 878 P.2d 330 (stating that a formal Court of Appeals opinion is controlling even when our Supreme Court has granted certiorari to review the case), *rev'd on other grounds sub nom. Blaze Constr. Co., Inc. v. N.M. Taxation & Revenue Dep't*, 1994-NMSC-110, 118 N.M. 647, 884 P.2d 803.

{12} In addition, the Luerases argue that GEICO violated requirement (4) of *Jordan*. Although the Luerases' rejection of UM/UM coverage was incorporated into the policy via a declarations page, the Luerases argue that the declarations page "affirmatively misrepresents how much coverage was rejected under GEICO's policy" because it shows "that only a single limit of UM coverage was waived" without explaining that UM/UM benefits would be stacked in the event of a collision with an uninsured or underinsured motorist. *Ullman* rejected claims that requirements (2) and (3) of *Jordan* were violated where the insurer did not explain that UM/UM benefits would be stacked, see *Ullman*, 2017-NMCA-071, ¶¶ 39-52, and we see no reason why *Ullman*'s rationale would not also apply to the Luerases' declarations page, which contains the same alleged defect. Accordingly, we affirm the district court's rejection of this claim.

### III. GEICO's Requirement That Plaintiffs Either Purchase the Same Level of UM/UM Insurance on Each Vehicle Covered by a Single Policy, or Reject UM/UM Insurance Entirely, Did Not Violate New Mexico Law

{13} Plaintiffs claim that GEICO's "all-or-nothing" requirement that they purchase the same level of UM/UM insurance on each of their vehicles, or reject UM/UM coverage on all vehicles, is contrary to our Supreme Court's decision in *Montaño v. Allstate Indemnity Co.*, 2004-NMSC-020, 135 N.M. 681, 92 P.3d 1255, and thus was an invalid offer of UM/UM coverage. Under Plaintiffs' view of the law, an

insured with four vehicles must be allowed to select, say, UM/UM coverage of \$100,000/\$200,000 on one vehicle, \$50,000/\$100,000 on the next two vehicles, and no UM/UM coverage at all on the fourth, or any other combination that the insured may desire. We conclude that Plaintiffs have misinterpreted *Montaño*, and we reject this claim.

{14} *Montaño* did not address the requirements for making a valid offer of UM/UM coverage, but instead involved the "judicially-created doctrine" of stacking. *Id.* ¶ 17. In that case, the plaintiff bought UM/UM coverages on his four vehicles, but the policy said that he could only stack two of those coverages. *Id.* ¶ 2. The plaintiff filed a lawsuit alleging that he was entitled to stack all four UM/UM coverages. *Id.*

{15} When the case reached our Supreme Court, the plaintiff asked the Supreme Court to "declare that all anti-stacking clauses are void as against New Mexico's stated policy in favor of stacking." *Id.* ¶ 8. Our Supreme Court acknowledged that its cases "ha[d] expressed a public policy in favor of stacking[.]" *id.* ¶ 9, but rejected the plaintiff's argument, stating that "requiring stacking in all cases on a take-it-or-leave-it basis would reduce the freedom of the parties to contract for less coverage and thus their freedom to decide how much coverage they can afford," which "could frustrate, rather than advance, the legislative intent behind the [UM/UM] statute." *Id.* ¶ 16. The Supreme Court explained that the Legislature's intent in requiring insurers to offer minimum levels of UM/UM coverage was "to encourage insureds to purchase such coverage[.]" and that "[r]equiring stacking for all vehicles would put the insured who owns multiple vehicles in the position of paying for all of the coverages or rejecting UM/[UM] coverage altogether, rather than deciding how much coverage they can afford." *Id.* ¶ 16. The Supreme Court stated that if an insurance company wants to preclude stacking, it "should obtain written rejections of stacking in order to limit its liability based on an anti-stacking provision." *Id.* ¶ 19.

{16} The Supreme Court then went on to explain how an insurance company could go about obtaining an adequate written rejection of stacking:

As an illustration of our holding, in a multiple-vehicle policy insuring three cars, the insurer shall declare the premium charge for each of the three UM coverages and allow the insured to reject, in



writing, all or some of the offered coverages. Thus, hypothetically, in the case of a \$25,000 policy, if the premium for one UM coverage is \$65, two coverages is an additional \$60, and three coverages \$57 more, the insured who paid all three (for a total premium of \$182) would be covered up to \$75,000 in UM bodily injury coverage. However, the insured may reject, in writing, the third available coverage and pay \$125 for \$50,000 of UM coverage; or the insured may reject, in writing, the second and third coverages and pay \$65 for \$25,000 of UM coverage; or the insured may reject all three UM coverages.

*Id.* ¶ 20. Our Supreme Court concluded that “an insurance policy that complies with this requirement will avoid the conclusion . . . that anti-stacking clauses are almost inherently ambiguous and are no longer effective at precluding stacking.” *Id.* ¶ 21.

{17} Plaintiffs interpret this “illustration” in *Montaño* as requiring all insurers to offer UM/UIM coverage on a per-vehicle basis and as prohibiting an insurer from offering UM/UIM coverage on a per-policy basis. But Plaintiffs forget the context that led to the inclusion of this passage. In *Montaño*, our Supreme Court considered an argument that stacking should be required on all vehicles covered by a multi-vehicle policy. 2004-NMSC-020, ¶¶ 8-21. The Court recognized New Mexico’s public policy in favor of stacking, but rejected the plaintiffs’ argument based on both freedom-of-contract grounds and a concern that requiring all-or-nothing policies would discourage the purchase of UM/UIM insurance. Thus, in the passage on which Plaintiffs rely, our Supreme Court was merely explaining what an insurance company would have to do if it wanted to obtain an effective rejection of stacking by an insured. By its own terms, *Montaño*’s “illustration” does not describe a mandatory requirement imposed on all insurers offering UM/UIM coverage, but rather provides a voluntary option for those insurers that do not wish to offer stacking.

{18} We conclude that *Montaño* did not consider whether automobile insurers should be required to offer policyholders UM/UIM coverage on a per-vehicle basis, much less impose such a requirement. See *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2002-NMCA-001, ¶ 10, 131 N.M. 419, 38

P.3d 187 (explaining that “cases are not authority for propositions not considered” (internal quotation marks and citation omitted)). Other than the illustration in *Montaño*, Plaintiffs have cited to no authority supporting their contention that GEICO must offer UM/UIM coverage on a per-vehicle basis, as opposed to a per-policy basis. Further, we find nothing in the UM/UIM statute that provides otherwise. See NMSA 1978, § 66-5-301; see also *Briggs v. Am. Nat’l Prop. & Cas. Co.*, 209 P.3d 1181, 1185-86 (Colo. Ct. App. 2009) (holding that insured has no right to be offered UM/UIM coverage on a per-vehicle basis under nearly identical Colorado statute). Accordingly, GEICO’s offer of UM/UIM coverage on a per-policy basis was not contrary to New Mexico law.

#### **IV. GEICO Was Not Required to Obtain an Additional Rejection of UM/UIM Coverage When the Luerases Added Another Vehicle to Their Policy**

{19} At some point after purchasing automobile insurance and rejecting UM/UIM coverage, but before the accident, the Luerases added a fourth vehicle to their policy. At that time, GEICO sent a UM/UIM rejection form to the Luerases, but the Luerases did not sign or return it. The Luerases argued in the district court, as they do on appeal, that adding the fourth vehicle was a new and different offer of coverage, and GEICO’s failure to obtain a new UM/UIM rejection form rendered the Luerases’ earlier rejection of UM/UIM coverage invalid.

{20} The district court rejected this argument, relying on our decision in *Vigil*, 1997-NMCA-124. In *Vigil* we held that when an insurer has obtained a valid rejection of UM/UIM insurance, the insurer is not required to obtain a new rejection from the insured each time a new vehicle is added to the policy. *Id.* ¶¶ 14-17. In reaching that conclusion, we noted that the relevant statute does not require that UM/UIM coverage be included in “a renewal policy where the named insured has rejected the coverage in connection with a policy previously issued to him or her by the same insurer.” *Id.* ¶ 14 (alteration omitted) (quoting NMSA 1978, § 66-5-301(C) (1983)). We also noted that the policy in question provided that any vehicles that the insured bought would be automatically added to the policy, which meant that “there [was] no change in the insurance contract or the coverage purchased pursuant to that contract when a vehicle [was] added to the policy.” *Id.* ¶ 15.

We concluded that in these circumstances, the addition of vehicles did not create a new policy, and therefore no new rejection of UM/UIM coverage was required. *Id.* ¶¶ 16-17.

{21} Here, the district court correctly determined that no new rejection of UM/UIM coverage was required when the Luerases added a vehicle to their policy. The Legislature has not amended Section 66-5-301(C) since *Vigil* was decided. The UM/UIM rejection form that the Luerases signed when they originally bought the policy informed them multiple times that their rejection of UM/UIM coverage would automatically apply to any vehicles added to the policy unless the Luerases informed GEICO otherwise. First, the form said that “my Uninsured/Underinsured Motorist Coverage election applies to this policy and all vehicles insured under this policy until I notify [GEICO], in writing, that I wish to change my election.” Next, the form advised the Luerases that “[m]y Uninsured/Underinsured Motorist coverage election shall apply to any renewal, reinstatement, substitute, amended, altered, modified, or replaced policy with this company or any affiliated Government Employees Insurance Company.” Finally, in the section of the form where the Luerases checked that they wished to reject UM/UIM coverage, the form stated that “I understand that until I inform [GEICO] in writing that I wish to add UM/UIM Coverage to my insurance policy, no automobile insurance policy issued to me by [GEICO] will provide coverage if I am injured or my property is damaged by an uninsured or underinsured motorist.” These provisions made it abundantly clear that any vehicles added to the policy would not create a new policy, and therefore no new rejection of UM/UIM coverage was required.

{22} The Luerases argue, however, that *Vigil* has been “modified” by our Supreme Court’s decisions in *Montaño*, 2004-NMSC-020, ¶ 20, and *Jordan v. Allstate Insurance Company*, 2010-NMSC-051, ¶¶ 20-22, 149 N.M. 162, 245 P.3d 1214. As we have already explained, *Montaño* was concerned with how insurance companies could obtain a valid waiver of stacking, not with how to obtain a valid rejection of UM/UIM coverage. *Montaño* did not even consider, much less hold, that *Vigil* was modified or overruled. In *Jordan*, our Supreme Court consolidated three cases in which the issue was whether the insureds had rejected UM/UIM coverage when they initially bought their policies. 2010-

NMSC-051, ¶¶ 3-12. The *Jordan* Court explained what an insurer must do to obtain a valid rejection of UM/UIM coverage and held that a policy that failed to meet those requirements would be reformed to provide UM/UIM coverage in the same amount as the policy's liability limits. 2010-NMSC-051, ¶¶ 3-12, 20-21. In *Jordan* our Supreme Court had no occasion to consider whether a new rejection form would be required if a vehicle was added to the policy at a later date, and nothing in *Jordan* even suggests, much less holds, that our decision in *Vigil* should be modified. Accordingly, we reject the Luerases' claim.

V. The Letter and UM/UIM Option Form That GEICO Sent to Mrs. Van Epps Were Not Improper or Ambiguous

{23} Mr. Van Epps argues that certain GEICO documents were misleading and discouraged Mrs. Van Epps from selecting UM/UIM coverage. Mrs. Van Epps originally selected UM/UIM coverage at the \$25,000/\$50,000 level, which was less than the \$50,000/\$100,000 bodily injury liability limits. Two days later, GEICO sent her both a letter and an "option form" on which to select or reject UM/UIM coverage. The letter said that "[i]t is important that we receive this form back in order to continue your policy at the current premium, so please don't delay. If you do not complete this form, we are required to make adjustments to your coverage, which will result in an increase in your premium." Neither the option form nor the letter explained what "adjustments" would be made or why the premium would increase if the form were not signed and returned to GEICO. Mr. Van Epps argues that GEICO sent the option form to "discourage" his wife from purchasing UM/UIM coverage, and that the option form caused her to believe that "in order to complete the processing of her new policy, she had to sign the [option form]." Mr. Van Epps contends that his wife's rejection of UM/UIM coverage is therefore invalid because "GEICO's scheme of sending its insureds this [option form] and [letter] after the insureds have selected UM/UIM coverage . . . violated New Mexico public policy by misleading and discouraging the purchase of UM/UIM coverage[.]"

{24} To the extent that Mr. Van Epps argues that GEICO should not have sent the letter, his argument lacks merit. As GEICO correctly points out, our Supreme Court has held that where, as here, an insured selects UM/UIM coverage that is lower than the policy's liability limits, that functions

as a rejection of the maximum amount of coverage statutorily available. See *Progressive Northwestern Ins. Co. v. Weed Warrior Servs.*, 2010-NMSC-050, ¶¶ 14-15, 149 N.M. 157, 245 P.3d 1209 (reflecting that "[a]s Section 66-5-301 requires insurers to offer UM/UIM coverage up to the liability limits of the policy, it follows that the choice by the insured to purchase any lower amount is a rejection"). Thus, to give effect to Mrs. Van Epps' choice, GEICO was required to send her a form on which to indicate her selection of a level of UM/UIM coverage. *Jordan*, 2010-NMSC-051, ¶ 2.

{25} Mr. Van Epps acknowledges that GEICO was required to obtain a written waiver from Mrs. Van Epps, but complains that "GEICO did not in any way indicate in its initial application that it would later be sending [an option form] with a [letter,]" and questions why GEICO did not do so at that time. Mr. Van Epps cites no legal authority in support of his argument that GEICO was required to provide the option form at the time of Mrs. Van Epps' original application for insurance, and therefore we assume that none exists. See *In re Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal."). Accordingly, we reject Mr. Van Epps' argument that GEICO acted improperly by sending the option form and letter to Mrs. Van Epps.

{26} As for Mr. Van Epps' arguments that the option form and letter were ambiguous and thus "discouraged" the purchase of UM/UIM insurance, we disagree. While it is true that the letter stated that failure to return the form would lead to an increase in the insurance premium, nothing in the letter or form suggested that Mrs. Van Epps had to reject UM/UIM coverage to prevent her premium from rising. The option form allowed her to select UM/UIM coverage at the same level as before, to select UM/UIM coverage at a different level, or to reject UM/UIM coverage entirely. Accordingly, we reject Mr. Van Epps' argument that the option form improperly discouraged the purchase of UM/UIM coverage.

#### CONCLUSION

{27} For all of these reasons, we affirm the district courts' grants of GEICO's motions for summary judgment and denials of Plaintiffs' cross-motions for summary judgment.

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

**I CONCUR:**  
STEPHEN G. FRENCH, Judge

**ATTREP, Judge (specially concurring).**

{29} I concur with today's opinion, but write separately as I have reservations about *Ullman*, 2017-NMCA-071, the decision upon which Section II of the Discussion is premised. The Court in *Ullman* broadly held that an insurer, in offering UM/UIM coverage on a multiple-vehicle insurance policy, is not required to explain stacked coverage or inform the insured about premium costs for each available level of stacked coverage. *Id.* ¶¶ 15, 44.

{30} *Ullman* relied heavily on, and adopted, the Tenth Circuit's approach in *Jaramillo v. Government Employees Insurance Co.*, 573 F. App'x 733 (10th Cir. 2014) (non-precedential). See *Ullman*, 2017-NMCA-071, ¶¶ 34-38. *Jaramillo*, in turn, hung its analysis on *Jordan*, 2010-NMSC-051, which set out a four-factor test an insurer must follow in order to obtain a valid rejection of UM/UIM coverage. *Id.* ¶ 30. The circumstances before the Supreme Court in *Jordan*, however, were different from those in *Jaramillo*. In *Jordan*, the insureds accepted UM/UIM coverage at a level lower than their policy liability limits; because one or more of the *Jordan* factors were not met, the policies were reformed to provide UM/UIM coverage equal to the policy limits. 2010-NMSC-051, ¶¶ 5-12, 31-35. In contrast, the insureds in *Jaramillo* (as well as in the cases before us today) rejected UM/UIM coverage entirely but were never informed of the total level of stacked coverage actually being offered. *Jaramillo*, 573 F. App'x at 734-36, 745, 747-48.

{31} Mechanically applying *Jordan*, the Tenth Circuit determined that an insurer is only obligated to set out the premium charges for each level of UM/UIM coverage—it need not inform the insured of the total amount of stacked coverage available at each level. *Jaramillo*, 573 F. App'x at 748-49; see also *Ullman*, 2017-NMCA-071, ¶ 15. The Tenth Circuit rationalized that it need not address stacking because stacking comes into play as a judicially-created doctrine only after an insured has purchased UM/UIM coverage. See *Jaramillo*, 573 F.

App'x at 744-46. The Tenth Circuit construed *Jordan* as being divorced from our Supreme Court's stacking jurisprudence, proclaiming that "except for the general reference to *Montaño*, the *Jordan* court was silent on the issue of stacking, and it did not clearly tie stacking to its new UM/UIIM coverage-rejection standard." *Id.* at 744.

{32} I think this to be an inaccurate gloss on our Supreme Court's jurisprudence. *Montaño* requires "insurers [to] disclose the premium costs for each available level of stacked coverage as a means of guaranteeing that consumers can knowingly exercise their statutory rights to UM/UIIM coverage." *Whelan v. State Farm Mut. Auto. Ins. Co.*, 2014-NMSC-021, ¶ 25, 329 P.3d 646 (citing *Montaño*, 2004-NMSC-020, ¶¶ 17, 20); see also *Jordan*, 2010-NMSC-051, ¶ 24 ("In *Montaño*, this Court struck th[e] balance [between freedom of contract and the intent of the UM/UIIM statute] by requiring insurance carriers to

not disclose the total amount of stacked coverage being offered at each premium level. A look at GEICO's UM/UIIM Selection/Rejection Form, which is reproduced in relevant part below, is worthwhile:

Looking at the first line, for example, GEICO offers the insured the statutory minimum amount of UM/UIIM coverage of \$25,000 per person/\$50,000 per accident. See NMSA 1978, §§ 66-5-301 (1983), 66-5-215 (1983). The insured has no option of purchasing this coverage on, for instance, only one or two vehicles. Instead, if the insured elects this coverage, she must pay four premiums. Yet GEICO's UM/UIIM Selection/Rejection Form makes no mention of the fact that if four premiums are paid, the insured is entitled to stacked coverage of four times the listed coverage (e.g., \$100,000/\$200,000, not \$25,000/\$50,000).

{34} Consistent with the holdings in *Ja-*

policies to avoid aggregating an insured's UM/UIIM coverage."). Perhaps GEICO has chosen to offer stacked UM/UIIM coverage because of the long line of New Mexico cases imposing stacking by judicial construction where the insurer has not obtained a valid waiver of stacked coverage. See *Montaño*, 2004-NMSC-020, ¶¶ 9-14 (summarizing the Supreme Court's stacking jurisprudence). The reason GEICO stacks, however, is of no import. GEICO stacks.

{35} But GEICO does not disclose to the insured the level of stacked UM/UIIM coverage that it is *actually* offering. This runs afoul of the guiding principle behind *Jordan*—that "in order for the offer and rejection requirements of [the UM/UIIM statute] to effectuate the policy of expanding UM/UIIM coverage, the insurer is required to *meaningfully* offer such coverage and the insured must *knowingly and intelligently* act to reject it before it can be excluded from the policy." *Marckstadt v. Lockheed Martin Corp.*, 2010-NMSC-001, ¶ 16, 147 N.M. 678, 228 P.3d 462; see *Jordan*, 2010-NMSC-051, ¶ 18 (citing *Marckstadt*, 2010-NMSC-001, ¶¶ 16-17). "If[, as here,] the policy documentation is unclear, the insured will not be able to make an informed decision whether to purchase and stay with that policy (and that insurance company) or to opt for another." *Rodriguez v. Windsor Ins. Co.*, 1994-NMSC-075, ¶ 21, 118 N.M. 127, 879 P.2d 759. Given GEICO's UM/UIIM Selection/Rejection Form and the fact that GEICO stacks from the outset, it would seem that GEICO's offers of UM/UIIM coverage in these cases may be "so inadequate or misleading as to render [the Plaintiffs'] rejection ineffective under the [UM/UIIM] statute." *Marckstadt*, 2010-NMSC-001, ¶ 16. *Ullman*, however, has charted a different course. Under *Ullman*, GEICO has complied with the four-factor test in *Jordan* and no further analysis is required.

{36} Notwithstanding my concerns about whether *Ullman* was correctly decided, I concur in this case because this issue was recently decided by a panel of our Court, in a published opinion, which now awaits decision by the Supreme Court. See *Arco Materials, Inc.*, 1994-NMCA-062, ¶ 19 ("Notwithstanding my concerns about whether the issue was correctly decided . . . , however, I believe it is more important for this Court to follow its own precedent than to allow the rights of the parties to be governed by which panel of judges is assigned to the case." (Black, J. specially concurring)).

JENNIFER L. ATTREP, Judge

UM/UIIM Bodily Injury Coverage Limits¶				
Your Bodily Injury Liability Coverage Limit is: \$50,000/\$100,000¶				
Coverage Limit¶				
Per-Person/Per-Accident →	VEHICLE1 →	VEHICLE2 →	VEHICLE3 →	VEHICLE4¶
(...) → \$25,000/\$50,000□	\$...36.60□	\$...36.60□	\$...36.60□	\$...36.60□
(...) → \$50,000/\$100,000□	\$...54.90□	\$...54.90□	\$...54.90□	\$...54.90□
(...) → \$100,000/\$200,000□	\$...73.20□	\$...73.20□	\$...73.20□	\$...73.20□
(...) → \$100,000/\$300,000□	\$...82.40□	\$...82.40□	\$...82.40□	\$...82.40□
(...) → \$300,000/\$300,000□	\$...95.60□	\$...95.60□	\$...95.60□	\$...95.60□
(...) → \$250,000/\$500,000□	\$...103.30□	\$...103.30□	\$...103.30□	\$...103.30□
(...) → \$300,000/\$500,000□	\$...104.40□	\$...104.40□	\$...104.40□	\$...104.40□
(...) → \$500,000/\$500,000□	\$...113.90□	\$...113.90□	\$...113.90□	\$...113.90□
(...) → \$500,000/\$750,000□	\$...121.20□	\$...121.20□	\$...121.20□	\$...121.20□
(...) → \$500,000/\$1MIL□	\$...124.80□	\$...124.80□	\$...124.80□	\$...124.80□
(...) → \$1MIL/\$1MIL□	\$...145.40□	\$...145.40□	\$...145.40□	\$...145.40□

provide insureds with the premium costs for each available level of stacked coverage in order to allow insureds to contract for the amount of coverage they can afford and want to purchase."). Notwithstanding this, our Court in *Ullman* adopted the reasoning of *Jaramillo* wholesale. See *Ullman*, 2017-NMCA-071, ¶¶ 34-38, 43.

{33} The problem with relieving insurers of any obligation to disclose stacked coverage levels when obtaining UM/UIIM rejections—as *Jaramillo* and *Ullman* permit—becomes apparent when examining the facts at issue in the cases before our Court today. In these cases, GEICO readily admits that it sells its insureds stacked UM/UIIM coverage. GEICO, however, does not explain this to its insureds, and does

*ramillo* and *Ullman*, GEICO claims that it has no obligation to disclose to its insureds the stacked coverage amounts. It reasons that this is a *rejection* case, governed by *Jordan*, not a *stacking* case. While it is true that this case is not necessarily governed by "judicial stacking," this misses the mark. GEICO stacks on its own initiative—not because it is judicially imposed after the fact. See *Jaramillo v. Providence Washington Ins. Co.*, 1994-NMSC-018, ¶ 4 n.1, 117 N.M. 337, 871 P.2d 1343 (explaining the difference between "judicial stacking" and "policy stacking"); see also *Jaramillo*, 573 F. App'x at 745 ("GEICO maintains that it *does* stack vehicle insurance coverage in New Mexico and that it has *never* employed anti-stacking language in such



Certiorari Denied, August 17, 2018, No. S-1-SC-37150

From the New Mexico Court of Appeals

**Opinion Number: 2018-NMCA-052**

No. A-1-CA-34986 (filed June 21, 2018)

STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
JOSEPH BLEA,  
Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

Judith K. Nakamura, District Judge

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for Appellant

**Opinion**

**Michael E. Vigil, Judge**

{1} Defendant Joseph Blea was convicted of multiple counts of first degree criminal sexual penetration and first degree kidnapping involving four separate victims in two separate district court cases, and appeals. In both appeals, cause no. A-1-CA-34986 and A-1-CA-35085, Defendant contends that New Mexico's DNA Identification Act (the Act) NMSA 1978, §§ 29-16-1 to -13 (1997, as amended through 2013) is unconstitutional on its face, and on our own motion we consolidated the appeals. We hold that the Act is not unconstitutional on its face, and summarily reject Defendant's remaining contentions. We therefore affirm the judgment and sentence in both cases.

**I. BACKGROUND**

**A. Cause No. A-1-CA-34986**

{2} On November 2, 1988, A.W. (Victim 1), who was 13 years old, went to her home after school where an unknown man wearing a ski mask was lying in wait, armed with a knife. The man vaginally penetrated Victim 1, and then forced her into the bathroom. After securing the bathroom

door so Victim 1 could not escape, the unknown man fled. Victim 1 was taken to the hospital, where a rape kit was obtained and evidence was collected from her. The rape kit and evidence were subsequently analyzed by the Albuquerque, New Mexico Police Department (APD) crime lab, and a DNA profile was obtained which was not Victim 1's. The foreign DNA profile was entered into the Combined DNA Index System (CODIS) database, but no matches were found. After this initial investigation, the case was closed pending further leads because no person was identified as the perpetrator.

{3} Almost twenty years later, on August 13, 2008, Bernalillo County Sheriff's Department (BCSD) deputies were dispatched to Defendant's home to investigate a violent domestic dispute, and arrested Defendant for aggravated assault against a household member and aggravated battery against a household member. Pursuant to the Act, a buccal cell swab was administered to Defendant at the Bernalillo County Metropolitan Detention Center to obtain a DNA sample. The resulting DNA profile was then entered into the CODIS computer database system. Prosecutors subsequently dismissed the domestic violence charges.

{4} On January 13, 2009, APD Detective Sally Dyer was informed of a CODIS database match involving Victim 1's 1988 criminal sexual penetration and foreign DNA collected from a known prostitute who was murdered in Albuquerque in 1985. Defendant was identified as the individual whose DNA matched the foreign DNA in the two cases. However, no arrest was made because APD detectives continued investigating Defendant for almost another year, as a suspect in the disappearance and death of eleven women and a fetus between 2003 and 2006—crimes colloquially referred to as the "West Mesa" killings.

{5} On December 4, 2010, Detective Dyer obtained a search warrant for a buccal cell swab from Defendant to be analyzed and compared to the foreign DNA profile collected in Victim 1's criminal sexual penetration case as well as other evidence APD detectives had obtained in connection with the West Mesa killings. Based on the DNA profile obtained as a result of the search warrant, APD forensic scientist, Donna Manogue, determined that Defendant could not be excluded as the source of the foreign DNA taken from Victim 1 in 1988. Defendant was charged with one count of criminal sexual penetration in the first degree, contrary to NMSA 1978, Section 30-9-11(D) (2009), and one count of kidnapping, contrary to NMSA 1978, Section 30-4-1 (2003).

{6} On the day of jury selection, Defendant said that he wanted to waive his appearance at trial because he felt he had no defense, other than those raised by pretrial motions which had already been denied. There was discussion about possible alternatives on how to proceed, and ultimately, it was agreed that the case would be tried to the jury on stipulated facts in Defendant's absence. Defendant signed a waiver of appearance, waiving his right to appear at "all proceedings in this case" and "trial" which the district court approved. A jury was selected, and opening instructions were given to the jury.

{7} The following morning, the district court was advised that the parties had agreed to a set of stipulations, and that Defendant still did not want to be present at trial. It was agreed that the court would read the stipulation of facts to the jury, and by doing so, Defendant would not waive his right to appeal. The stipulation of facts was formally agreed upon, and signed by counsel. Defendant also signed the stipulation of facts stating that:

I have read and understand the



above [stipulation of facts]. I have discussed this case and my constitutional rights with my lawyers. I understand that by agreeing to these stipulated facts above, I am agreeing [that] these facts will be presented to the jury as if they came in through the testimony of the state's witnesses. I voluntarily, knowingly and intelligently agree to this stipulation of facts without waiving any prior legal objections I have made in this case. I understand that a stipulation is an agreement that a certain fact is true.

The parties gave opening statements; the stipulation of facts was read to the jury; exhibits were admitted into evidence by stipulation; the court gave instructions to the jury; the parties gave closing statements; the jury retired to deliberate; and the jury then returned its guilty verdicts in open court. Defendant appeals.

#### **B. Cause No. A-1-CA-35085**

{8} In 2010 and 2011 APD Detectives asked APD forensic scientists to analyze and compare the DNA sample taken from Defendant pursuant to the December 4, 2010 search warrant to foreign DNA samples retrieved from three other victims of criminal sexual penetration which occurred in 1990 and 1993. The APD forensic scientists determined that Defendant could not be excluded as the source of the foreign DNA sample taken from the anal swab from K.H. (Victim 2), and vaginal swabs from A.M. (Victim 3) and L.O. (Victim 4). As a result, Defendant was charged in a subsequent indictment with six counts of criminal sexual penetration in the first degree, contrary to Section 30-9-11(D), and kidnapping of Victim 2, contrary to Section 30-4-1; three counts of criminal sexual penetration in the first degree, contrary to Section 30-9-11(D), and one count of kidnapping of Victim 3, contrary to Section 30-4-1; and two counts of criminal sexual penetration in the first degree, contrary to Section 30-9-11(D), and one count of kidnapping of Victim 4, contrary to Section 30-4-1.

{9} Defendant then entered into a conditional plea and disposition agreement approved by the district court in which Defendant agreed to plead no contest to two counts of criminal sexual penetration in the first degree of Victim 2; two counts of criminal sexual penetration in the first degree of Victim 3; and one count of criminal sexual penetration in the first

degree and one count of kidnapping of Victim 4. The plea was conditioned on Defendant reserving his right to appeal: (1) whether the Act is constitutional under the Fourth Amendment and the New Mexico Constitution; (2) whether the statute of limitations was improperly applied to his case; and (3) whether the December 4, 2010 search warrant was defective, as not being issued by an impartial magistrate. With regard to these issues, the parties also agreed that all pertinent pleadings, arguments and rulings made in cause no. D-202-CR-2010-04089 (cause no. 4089) were deemed to be incorporated and binding in cause no. D-202-CR-2013-01243 (cause no. 1243), and the parties entered into a stipulation of facts (SOF) which Defendant agreed would constitute the uncontested facts on appeal. Defendant appeals.

#### **II. Constitutionality of the DNA Identification Act**

{10} In 1994, Congress enacted legislation authorizing the Federal Bureau of Investigation (FBI) to establish an index of DNA samples. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2065 (codified, as amended at 34 U.S.C. §§ 12101 to 12643 (2012)). Under this authority, the FBI created CODIS, which “allows State and local forensics laboratories to exchange and compare DNA profiles electronically in an attempt to link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the system.” H.R. Rep. No. 106-900, pt. 1 at 8 (2000), *reprinted in* 2000 U.S.C.C.A.N. 2323, 2424.

{11} New Mexico elected to participate in CODIS with the adoption of the Act in 1997. 1997 N.M. Laws, ch. 105. The Act provides for the “collection, storage, DNA testing, maintenance and comparison of samples and DNA records for forensic purposes” and it specifies that procedures “shall meet or exceed the provisions of the federal DNA Identification Act of 1994 regarding minimum standards for state participation in CODIS, including minimum standards for the acceptance, security and dissemination of DNA records[.]” 1997 N.M. Laws, ch. 105, § 4(B)(1).

{12} The Act originally only required convicted felons to provide DNA samples for inclusion in the DNA identification system. 1997 N.M. Laws, ch. 105, § 2(A) (stating that a purpose of the Act is to “establish a DNA identification system for covered offenders”); 1997 N.M. Laws, ch.

105, § 3(D) (defining a “covered offender” to mean “any person convicted of a felony offense as an adult under the Criminal Code, the Motor Vehicle Code or the constitution of New Mexico or convicted as an adult pursuant to youthful offender or serious youthful offender proceedings under the Children’s Code[.]”); 1997 N.M. Laws, ch. 105, § 6 (requiring “covered offenders” to provide DNA samples).

{13} In 2006 the Act was expanded to require persons eighteen years of age or older who were arrested for the commission of specified felony offenses to provide a DNA sample to jail or detention facility personnel “upon booking.” 2006 N.M. Laws, ch. 104, § 1(A). The felonies specified were sex offenses defined as felonies and all other felonies involving death, great bodily harm, aggravated assault, kidnapping, burglary, larceny, robbery, aggravated stalking, use of a firearm or an explosive, or a violation of the Antiterrorism Act. 2006 N.M. Laws, ch. 104, 1(D)(3)(b). The DNA of these arrestees was included in the DNA identification system. *See id.* § 2(A) (stating that an additional purpose of the Act is to establish a DNA identification system for individuals arrested for the specified felonies).

{14} In 2011, the Legislature further expanded the Act to require any person eighteen years of age or older “who is arrested for the commission of a felony” to “provide a DNA sample to jail or detention facility personnel upon booking.” 2011 N.M. Laws, ch. 84, § 1(A). However, the DNA sample may only be included in the DNA identification system if “the arrest was made upon an arrest warrant for a felony;” or the defendant had “appeared before a judge or magistrate who made a finding that there was probable cause for the arrest;” or “the defendant posted bond or was released prior to appearing before a judge or magistrate and then failed to appear for a scheduled hearing.” 2011 N.M. Laws, ch. 84, § 1(B)(1)-(3). In all other cases, the DNA sample collected from a person arrested “shall not be analyzed and shall be destroyed.” 2011 N.M. Laws, ch. 84, § 1(B).

{15} This case concerns the Act as it existed following the 2006 legislation, and is codified as NMSA 1978, §§ 29-16-1 to -13 (2007). The current Act includes the changes made in 2011 and is codified as Section 29-16-1 to -13 (2013).

#### **A. Defendant’s Motions To Suppress**

{16} Defendant filed motions to suppress the DNA evidence collected from him in connection with his arrest for domestic violence in 2008, arguing that the seizure

of his DNA pursuant to the Act violated the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. After a hearing at which only legal arguments were presented, the district court denied Defendant's motions.

#### B. Standard of Review

{17} Defendant does not contend that the Act is unconstitutional as applied in any particular respect. His argument is that the Act, which requires all persons arrested for certain crimes to provide a DNA sample, is unconstitutional on its face. As such, Defendant has the burden to demonstrate that there is no potential set of facts to which the Act can be constitutionally applied. See *State v. Murillo*, 2015-NMCA-046, ¶ 4, 347 P.3d 284. In other words, Defendant must demonstrate that in all of its applications, the Act is unconstitutional. Moreover, because we presume the Act is valid, we will uphold it against the constitutional challenge “unless we are satisfied beyond all reasonable doubt that the Legislature went outside the bounds fixed by the Constitution” in its enactment. *Id.* (internal quotation marks and citation omitted).

#### C. Fourth Amendment Arguments

{18} Defendant contends that the seizure of his DNA upon his arrest in 2008 violated the Fourth Amendment to the United States Constitution. Defendant's argument was rejected by the United States Supreme Court in *Maryland v. King*, 569 U.S. 435 (2013).

{19} In *King*, in 2003 a man concealing his face broke into a woman's home in Maryland, armed with a gun, and raped her. *Id.* at 439-40. Although the police were unable to identify or apprehend the perpetrator, DNA of the perpetrator was collected from the victim. *Id.* at 440. In 2009 the defendant was arrested and charged with “first- and second-degree assault for menacing a group of people with a shotgun.” *Id.* The defendant's DNA was collected via buccal swab in the course of the routine booking procedures in Maryland for “serious offenses[.]” *Id.* The defendant's DNA matched the DNA taken from the victim in 2003. *Id.* at 441. Although additional DNA samples were taken from the defendant and used against him at the rape trial, “there seems to be no doubt that it was the DNA from the cheek sample taken at the time he was booked in 2009 that led to his first having been linked to the rape and charged with its commission.” *Id.* at 440. The Court of Appeals of

Maryland reversed the defendant's conviction, determining that the 2009 DNA sample taken from the defendant was an unlawful search and seizure under the Fourth Amendment as “an unreasonable search of the person.” *Id.* The U.S. Supreme Court reversed, holding that:

DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

*Id.* at 465-66.

{20} The Court first determined that the administration of a buccal swab, which “involves wiping a small piece of filter paper or a cotton swab similar to a Q-tip against the inside cheek of an individual's mouth to collect some skin cells[.]” is a search for purposes of the Fourth Amendment. *Id.* at 444-446 (internal quotation marks and citation omitted). “It can be agreed that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search. Virtually any intrusion into the human body, will work an invasion of cherished personal security that is subject to constitutional scrutiny[.]” *Id.* at 446 (alteration, internal quotation marks, and citations omitted); see *Schmerber v. California*, 384 U.S. 757, 767 (1966); see also *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (holding that the taking of blood to determine alcohol content in connection with arrest for driving under the influence of liquor is a search under the Fourth Amendment); *Skinner v. Ry. Labor Execs' Ass'n*, 489 U.S. 602, 616-18 (1989) (holding that administration of a “breathalyzer test, which generally requires the production of alveolar or ‘deep lung’ breath for chemical analysis” is a search under the Fourth Amendment); *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (holding that scraping of an arrestee's fingernails to obtain trace evidence is a search under the Fourth Amendment).

{21} However, “[t]o say that the Fourth Amendment applies here is the beginning point, not the end of the analysis.” *King*, 569 U.S. at 446. “Reasonableness is always

the touchstone of Fourth Amendment analysis, and reasonableness is generally assessed by carefully weighing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (alteration, internal quotation marks, and citations omitted). Thus, *King* proceeded by weighing “the promotion of legitimate governmental interests against the degree to which the search intrudes upon an individual's privacy.” 569 U.S. at 436, 448 (alteration, internal quotation marks, and citation omitted).

{22} The U.S. Supreme Court recognized that various governmental interests are legitimately served by collecting the DNA of an arrestee for a “serious offense” under Maryland's statute during a routine booking procedure. *Id.* at 448. “The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody.” *Id.* at 449. This interest is best understood as having its origin in the lineage of cases pertaining to the “‘routine administrative procedures at a police station house incident to booking and jailing the suspect’” in which “‘the law is in the act of subjecting the body of the accused to its physical dominion.’” *Id.* at 449-50 (alteration omitted) (quoting *Illinois v. Lafayette*, 462 U.S. 640, 643 (1983), and quoting *People v. Chiagles*, 237 N.Y. 193, 197 (1923) (Cardozo, J.)).

{23} First, this means that “‘[i]n every criminal case, it is known and must be known who has been arrested and who is being tried.’” *King*, 569 U.S. at 450 (quoting *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 191 (2004)). DNA testing identifies with “near certainty” the identity of a person by analyzing “noncoding” regions of DNA material in chromosomes. *King*, 569 U.S. at 442-43. “[F]orensic analysis focuses on ‘repeated DNA sequences scattered throughout the human genome, known as ‘short tandem repeats’ (STRs). The alternative possibilities for the size and frequency of these STRs at any given point along a strand of DNA are known as ‘alleles,’ and multiple alleles are analyzed in order to ensure that a DNA profile matches only one individual.” *Id.* at 443 (quoting J. Butler, *Fundamentals of Forensic DNA Typing* 25, 147-148 (2009) (hereinafter Butler)). The

“noncoding” regions of the DNA that are tested are not known to have any association with a genetic disease, genetic traits, or any other genetic predisposition, and the results are therefore only useful for testing human identity. *King*, 569 U.S. at 445 (quoting *Butler* 279).

{24} Thus, obtaining an arrestee’s DNA furthers the government’s interest in correctly identifying the person arrested. According to the United States Supreme Court, the use of DNA for identification purposes “represents an important advance in the techniques used by law enforcement to serve legitimate police concerns for as long as there have been arrests[.]” *King*, 569 U.S. at 456. The most direct “historical analogue” to DNA identification technology is fingerprinting technology, which federal precedent has long held to be “a natural part of ‘the administrative steps incident to arrest.’” *Id.* at 437 (quoting *Cty. Of Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991)); see also *United States v. Kelly*, 55 F.2d 67, 69-70 (2d Cir. 1932) (holding that routine fingerprinting during booking of an arrestee did not violate the Fourth Amendment: “[w]e find no ground in reason or authority for interfering with a method of identifying persons charged with crime which has now become widely known and frequently practiced”); *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) (stating that it is “elementary that a person in lawful custody may be required to submit to photographing, and fingerprinting, as part of routine identification processes” (citations omitted)).

{25} The U.S. Supreme Court added that “[a] suspect’s criminal history is a critical part of his identity that officers should know when processing him for detention.” *King*, 569 U.S. at 450. For example, “[i]t is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity[.]” including but not limited to name changes and changes to physical features. *Id.* (internal quotation marks and citation omitted). “In this respect the use of DNA for identification is no different than matching an arrestee’s face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee’s fingerprints to those recovered from a crime scene.” *Id.* at 451. Or in other words, “DNA is [merely] another metric of identification used to connect [an] arrestee with his or her public

persona, as reflected in records of his or her actions that are available to the police.” *Id.*

{26} Second, “law enforcement officers bear a responsibility for ensuring that the custody of an arrestee does not create inordinate risks for facility staff, for the existing detainee population, and for a new detainee.” *Id.* at 452 (internal quotation marks and citation omitted). Specifically, DNA identification can provide “untainted information” concerning whether, for example, an arrestee or detainee has a history of violence or mental disorder. *Id.* at 452.

{27} Third, “looking forward to future stages of criminal prosecution, the Government has a substantial interest in ensuring that persons accused of crimes are available for trials.” *Id.* (internal quotation marks and citation omitted). Specifically, “[a] person who is arrested for one offense but knows that he has yet to answer for some past crime may be more inclined to flee the instant charges, lest continued contact with the criminal justice system expose one or more other serious offenses.” *Id.* at 453. Similarly, “an arrestee’s past conduct is essential to an assessment of the danger he poses to the public,” which will inform the determination of whether the individual should be released on bail. *Id.*

{28} Finally, the U.S. Supreme Court said, “in the interests of justice, the identification of an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense.” *Id.* at 455.

{29} In considering an arrestee’s privacy interests, the Court reasoned that “the intrusion of a cheek swab to obtain a DNA sample is a minimal one.” *Id.* at 461. A buccal swab, which consists of a “gentle rub along the inside of the cheek [that] does not break the skin, and it involves virtually no risk, trauma, or pain” is a “minimal” and “brief” intrusion of an arrestee’s person as compared to “invasive surgery” or “a search of the arrestee’s home,” and “does not increase the indignity already attendant to normal incidents of arrest.” *Id.* at 463-64 (internal quotation marks and citation omitted). Additionally, “[t]he expectations of privacy of an individual taken into police custody ‘necessarily are of a diminished scope[.]’ ” *id.* at 462 (alteration omitted) (quoting *Bell v. Wolfish*, 441 U.S. 520, 557 (1979)), and searches of a “detainee’s person when he is booked into custody may ‘involve a relatively extensive exploration[.]’ ” *King*, 569

U.S. at 462 (quoting *United States v. Robinson*, 414 U.S. 218, 227 (1973), superseded by statute on other grounds as recognized by *Commonwealth v. Pierre*, 72 Mass. App. Ct. 580, 893 N.E.2d 378 (2008)); see also *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 334 (2012) (stating that booking or intake procedures, including requiring some detainees to “lift their genitals or cough in a squatting position” have been held constitutional). {30} Balancing the respective interests, the Court concluded that “[i]n light of the context of a valid arrest supported by probable cause [the defendant’s] expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying [the defendant] not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody.” *King*, 569 U.S. at 465.

{31} Defendant points out that under the Maryland statute construed in *King*, the DNA sample may not be tested or placed in a database until after a judicial officer makes a probable cause determination at arraignment to detain an arrestee on a qualifying “serious offense” (i.e., a crime of violence or an attempt to commit a crime of violence or burglary or an attempt to commit burglary); and the Maryland statute provides for automatic expungement if all the qualifying charges are deemed to be unsupported by probable cause, the criminal action does not result in a criminal conviction, the conviction is finally reversed or vacated, or “the individual is granted an unconditional pardon.” *King*, 569 U.S. at 443-44 (internal quotation marks and citation omitted). On the other hand, under the 2006 expansion and current version of the Act, a DNA sample is tested and placed in CODIS upon arrest, and the burden of seeking expungement is placed on the arrestee. Defendant asserts, without explaining why or citing to supporting authorities, that as a result, New Mexico’s statutory scheme violates the Fourth Amendment. We do not consider these distinctions as requiring us to conclude that the seizure of Defendant’s DNA upon his arrest in 2008 violated the Fourth Amendment to the United States Constitution. See *State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining that the appellate courts are under no obligation to review unclear or undeveloped arguments).

{32} Anticipating this result, Defendant



states, “If this Court does not find that the differences support an opposite result under *King*, however, [Defendant] asks that this Court decide the matter under Article II, Section 10 [of the New Mexico Constitution.]” We therefore turn to Defendant’s argument that the seizure of his DNA was in violation of the New Mexico Constitution.

#### D. New Mexico Constitution

##### Arguments

{33} Defendant contends that we should diverge from federal precedent and hold the seizure of his DNA was unconstitutional under Article II, Section 10 of the New Mexico Constitution. The parties do not dispute that Defendant has properly preserved this issue to be argued on appeal. *See State v. Ketelson*, 2011-NMSC-023, ¶¶ 10-11, 150 N.M. 137, 257 P.3d 957 (stating that “a defendant must properly preserve his argument under the state constitution” and setting forth the requirements for preservation).

{34} Article II, Section 10 of the New Mexico Constitution is similar to the Fourth Amendment. It provides: “The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.”

{35} We apply the interstitial approach to determine if our state provision provides broader protection than the Fourth Amendment because both provisions provide overlapping protections against unreasonable searches and seizures. *See Ketelson*, 2011-NMSC-023, ¶ 10. Under the interstitial approach, “we first consider whether the right being asserted is protected under the federal constitution.” *Id.* (internal quotation marks and citation omitted). “If the right is protected by the federal constitution, then the state constitutional claim is not reached.” *Id.* If the right is not protected by the federal constitution, “[the appellate courts] next consider whether the New Mexico Constitution provides broader protection, and [the appellate courts] may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.” *Id.* (internal quotation marks and citation omitted). Here, we have already concluded

that the right Defendant asserts is not protected under the Fourth Amendment. We therefore proceed to consider whether Article II, Section 10 affords Defendant greater rights than the Fourth Amendment.

{36} Defendant makes no argument that we should diverge from federal precedent due to structural differences between state and federal government, or distinctive state characteristics. Defendant does contend, that for the reasons stated in Justice Scalia’s dissent in *King*, the analysis and conclusion reached by the majority in *King* is flawed. Defendant also points to *People v. Buza*, 180 Cal. Rptr. 3d 753 (2014), which agreed with the *King* dissent and held that California’s DNA collection violates the California constitution. However, the California Supreme Court reversed the Court of Appeals in *People v. Buza*, 413 P.3d 1132 (2018). Finally, Defendant asks us to consider various law review articles, but fails to argue why they should lead us to conclude that the search of Defendant’s DNA violates the New Mexico Constitution. We therefore limit our analysis to whether the Scalia dissent in *King* demonstrates that we should grant greater protection to Defendant under Article II, Section 10 because the majority’s analysis in *King* is flawed.

{37} To place Defendant’s argument in perspective, we first review how CODIS operates. The CODIS database is composed of profiles of noncoding parts of the DNA that do not reveal genetic traits, and do not, at present, reveal information beyond identification. *King*, 569 U.S. at 445, 464. *See Boroian v. Mueller*, 616 F.3d 60, 66 (1st Cir. 2010) (stating that the resulting DNA profile provides a type of “genetic fingerprint, which uniquely identifies an individual” but no basis “for determining or inferring anything else about the person” (internal quotation marks and citation omitted)); *United States v. Kincade*, 379 F.3d 813, 818 (9th Cir. 2004) (stating that non-genic stretches of DNA are purposely selected for analysis “because they are not associated with any known physical or medical characteristics” (internal quotation marks and citation omitted)). The analysis only generates “a unique identifying number against which future samples may be matched.” *King*, 569 U.S. at 464.

{38} CODIS, according to *King*, connects laboratories at the local, and state level of all “50 States and a number of federal agencies.” 569 U.S. at 444-45. The system

“collects DNA profiles provided by local laboratories taken from arrestees, convicted offenders, and forensic evidence found at crime scenes.” *Id.* at 445. The CODIS database consists of two distinct collections. *Id.* at 472. One consists of DNA samples taken from known arrestees or convicts, and the second consists of DNA samples from unsolved crime scenes. *See id.* at 473. The CODIS system works by checking whether any of the samples from unsolved crime scenes match any of the samples from known arrestees and convicts. *See id.*

{39} The central argument made by Justice Scalia’s dissent in *King* is that the primary purpose of CODIS is to obtain known samples of DNA from arrestees so they can then be compared to unknown samples of DNA obtained from unsolved crimes, and thereby determine if a known arrestee was involved in the commission of an unsolved crime. *See id.* at 472-75, 480. Thus, the dissent contends, the majority opinion allows the searching of an arrestee’s DNA for evidence of a crime when there is no basis for believing that the arrestee committed an unsolved crime. *See id.* at 466. Because the Fourth Amendment’s prohibition against searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime is “categorical and without exception” the dissent concludes that the search of an arrestee for a DNA sample is unconstitutional. *Id.* “[S]uspicionless searches are *never* allowed if their principle end is ordinary crime-solving[.]” *id.* at 469, and CODIS is being used for nothing more than investigating ordinary criminal wrongdoing. *Id.* at 468, 472-476.

{40} Justice Scalia’s dissent further argues that the DNA search of an arrestee “had nothing to do” with establishing identity. *King*, 569 U.S. at 474. In *King*, the defendant’s identity was known, as the docket for the original criminal charges listed his full name, race, sex, height, date of birth, and address. *Id.* at 473-74. Moreover, the defendant’s DNA was not sent to the laboratory for testing until nearly three months after his arrest, and the lab tests were not available for several more weeks, when the results were entered into Maryland’s DNA database. *Id.* at 472. Bail had already been set, the defendant had engaged in discovery, and he requested a speedy trial. *Id.* Four months after the defendant’s arrest, and after the defendant’s identity was already known, CODIS returned the match of the defendant’s known DNA with the



DNA from the unsolved 2003 rape. *See id.* at 441.

{41} We now consider whether we should expand privacy rights of New Mexico arrestees beyond those recognized under the Fourth Amendment in *King*. “The key inquiry under Article II, Section 10 is reasonableness[,]” and “reasonableness depends on the balance between the public interest and the individual’s interest in freedom from police intrusion upon personal liberty.” *Ketelson*, 2011-NMSC-023, ¶ 20. We therefore begin by examining the public interest as expressed in the stated purposes of the Act. Section 29-16-2, as was in effect in 2007, without being further amended states:

The purpose of the Act is to:

A. establish a DNA identification system for covered offenders and persons required to provide a DNA sample pursuant to the provisions of Section 1 . . . of this 2006 act [NMSA 1978, § 29-3-10 (2007)];

B. facilitate the use of DNA records by local, state and federal law enforcement agencies in the:

(1) identification, detection or exclusion of persons in connection with criminal investigations; and

(2) registration of sex offenders required to register pursuant to the provisions of the Sex Offender Registration and Notification Act . . . ;

C. establish a missing persons DNA identification system consisting of the following DNA indexes:

(1) unidentified persons;

(2) unidentified human remains; and

(3) relatives of, or known reference samples from, missing persons; and

D. facilitate the use of DNA records by local, state and federal law enforcement agencies and the state medical investigator in the identification and location of missing and unidentified persons or human remains.

{42} The first stated purpose of the Act is to “establish a DNA identification” for two classes of persons. 2006 N.M. Laws, ch. 104, § 2(A). “[C]overed offenders” are persons convicted of felonies, and no argument is made here that a convicted felon cannot be constitutionally required to provide a DNA sample for identification purposes. *See* 2006 N.M. Laws, ch. 104, § 2(A). What is before us are the second category of persons required to provide a DNA sample in the DNA identification system. As we have pointed out above, the “persons required to provide a DNA sam-

ple” are persons arrested for sex offenses defined as felonies, and all other felonies involving “death, great bodily harm, aggravated assault, kidnapping, burglary, larceny, robbery, aggravated stalking, use of a firearm or an explosive or a violation pursuant to the Antiterrorism Act[.]” 2006 N.M. Laws, ch. 104, § 1(D)(3)(a)-(b). We herein refer to such persons as arrestees.

{43} It is fundamental that the State has a right to identify all persons it has arrested for committing a felony. *See Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humboldt Cty.*, 542 U.S. at 191 (“In every criminal case, it is known and must be known who has been arrested and who is being tried.”). Defendant makes no argument that a person arrested for a felony has a greater privacy right to his or her identifying information under the New Mexico Constitution than one does under the United States Constitution, nor is any argument made that the method for obtaining Defendant’s DNA violated the New Mexico Constitution. We agree with *King* that weighing the law enforcement need against the minimally invasive means for securing the DNA sample from Defendant’s cheek weighs in favor of concluding that the search is reasonable under Article II, Section 10. In addition, no argument is made why the State should be deprived, constitutionally, from using the most accurate method available for identifying persons arrested on felony charges. As our discussion of *King* illustrates, DNA testing identifies with “near certainty” a person’s identity, and it does so by testing only the “noncoding” regions of the DNA strand that are not known to be associated with any genetic disease or genetic traits. 569 U.S. at 442-43. The tests are therefore only useful for human identification. Finally, no argument is made that the New Mexico Constitution affords specific protection on how the identifying DNA information may be stored.

{44} Rather, Defendant’s argument seems centered on the Act’s second purpose, which is to “facilitate the use” of the DNA records in the “identification, detection or exclusion of persons in connection with criminal investigations[.]” Section 29-16-2(B)(1). This stated purpose, Defendant contends, demonstrates that the purpose for collecting DNA is to use the DNA collected from arrestees to investigate whether they have committed other, unknown crimes when there is no reason to believe they committed any other crimes. While this use does not violate the Fourth Amendment under *King*, Defendant

contends we should conclude it violates Article II, Section 10 of the New Mexico Constitution. We are not persuaded.

{45} The argument overlooks the fact that the State has obtained an arrestee’s DNA in a manner that is both lawful and consistent with the New Mexico Constitution. The *real* complaint is that other information, lawfully in the State’s possession—DNA from unsolved crime scenes—can be compared to the arrestee’s known DNA. A defendant has no constitutionally protected privacy interest in DNA he or she leaves at a past or future crime scene, and a defendant has no constitutionally protected interest in the DNA used for identification at booking upon arrest. Under these circumstances, we do not perceive a constitutional violation. Obviously, the comparison of known DNA, obtained at booking, with unknown DNA, seized from unsolved crime scenes, is exactly the same use that has been made of fingerprints for decades. Even Justice Scalia’s dissent in *King* recognizes that such use has not been deemed to be an unconstitutional privacy violation. *King*, 569 U.S. at 477-79.

{46} For the foregoing reasons, we hold that the initial collection of a DNA sample as part of a routine booking procedure, and its subsequent use under CODIS does not violate Article II, Section 10 of the New Mexico Constitution.

### III. Arguments Summarily Answered

#### A. Search Warrant Issued by Impartial Judge

{47} Pursuant to *State v. Franklin*, 1967-NMSC-151, ¶ 9, 78 N.M. 127, 428 P.2d 982 (stating that “appointed counsel should set forth contentions urged by a petitioner whether or not counsel feels they have merit and whether such contentions are in fact argued by counsel”); and *State v. Boyer*, 1985-NMCA-029, ¶¶ 17-24, 103 N.M. 655, 712 P.2d 1 (expressing same principle), Defendant contends that the December 4, 2010 search warrant for a DNA sample was invalid because it was not issued by a neutral and detached judge. The issue was raised in Defendant’s motion to suppress which the district court denied. Importantly, Defendant does not argue that the search warrant is not supported by probable cause.

{48} Defendant fails to establish factually or legally that the judge who issued the December 4, 2010 search warrant was legally disqualified from issuing the search warrant. We therefore do not consider this issue further. *See Guerra*, 2012-NMSC-014, ¶ 21 (explaining that the appellate

courts are under no obligation to review unclear or undeveloped arguments).

#### B. Statute of Limitations

{49} Defendant argues that the 1997 amendment to NMSA 1978, Section 30-1-8(I) (2009) which eliminated the statute of limitations for all first degree felonies does not apply to his case, and that he was entitled to the fifteen year statute of limitations for first degree felonies under the 1979 version of Section 30-1-8(B). The issue was preserved in Defendant's motion to dismiss which the district court denied.

{50} "When facts relevant to a statute of limitations issue are not in dispute, the standard of review is whether the district court correctly applied the law to the undisputed facts." *State v. Kerby*, 2007-NMSC-014, ¶ 11, 141 N.M. 413, 156 P.3d 704 (internal quotation marks and citation omitted). Interpretation of the statute of limitations in this context is therefore a legal question subject to de novo review. See *id.* Because the parties stipulated to the facts material to Defendant's statute of limitations claim, our review of Defendant's statute of limitations argument is de novo.

{51} Defendant's argument is answered by *State v. Morales*, 2010-NMSC-026, 148 N.M. 305, 236 P.3d 24. In *Morales*, our Supreme Court considered whether the 1997 amendment to Section 30-1-8 applied to crimes committed before July 1, 1997, the effective date of the amendment. *Id.* ¶ 1. The Court held:

Although the extension of a statute of limitations cannot revive a previously time-barred prosecution, we conclude that it can extend an unexpired limitation period because such extension does not impair vested rights acquired under prior law, require new obligations, impose new duties, or affix new disabilities to past transactions. Because capital felonies and first-degree violent felonies committed after July 1,

1982, were not time-barred as of the effective date of the 1997 amendment, we hold that the Legislature intended the 1997 amendment to apply to these crimes.

*Id.* (citation omitted). In other words, if the alleged crime was not time-barred under the fifteen year statute of limitations when the 1979 amendment of Section 30-1-8 became effective, then the 1997 amendment, with no limitations period applied. In cause no. 4089, the indictment alleged that the crimes were committed on November 2, 1988, meaning that the fifteen year statute of limitations would have expired in 2003, which was after the 1997 amendment became effective. Therefore, under *Morales*, the 1997 version of Section 30-1-8 with no statute of limitations applied. The same result is reached in cause no. 1243. The indictment alleges that the crimes were committed on October 7, 1990, June 7, 1993, and November 25, 1993, respectively. Fifteen years from each of these dates is 2005, 2008, and 2008, all of which are after the effective date of the 1997 amendment to Section 30-1-8.

{52} Defendant's attempts to distinguish *Morales* on the basis that application of the 1997 version of Section 30-1-8 is unconstitutional because "a right of action had accrued upon discovery, which occurred at the time these crimes were reported" and therefore the statute of limitations expired fifteen years after the crimes were reported is not supported by any authorities, is not persuasive, and is rejected. Finally, Defendant argues, pursuant to *Franklin* and *Boyer*, that because "the cause of action accrued at the time of discovery, the application of the 1997 amendment to [Defendant] is an ex post facto application of that law and is unconstitutional." We reject this argument as well. See *Guerra*, 2012-NMSC-014, ¶ 21 (rejecting the defendant's undeveloped and unprecedented construction that lacked "any principled analysis").

#### C. Speedy Trial

{53} Defendant's final claim is that the delay in bringing his case to trial amounted to a violation of his right to a speedy trial. The State responds that Defendant failed to preserve his speedy trial claim for appeal. We agree.

{54} "It is well-settled law that in order to preserve a speedy trial argument, [the d]efendant must properly raise it in the lower court and invoke a ruling." *State v. Lopez*, 2008-NMCA-002, ¶ 25, 143 N.M. 274, 175 P.3d 942; *State v. Graham*, 2003-NMCA-127, ¶ 29, 134 N.M. 613, 81 P.3d 556 (stating that because the defendant's speedy trial "issue was not properly raised in district court, and [the d]efendant never invoked a ruling, the defendant's speedy trial argument was not preserved" on appeal), *rev'd on other grounds* by 2005-NMSC-004, ¶ 1, 137 N.M. 197, 109 P.3d 285.

{55} Defendant asserted his right to a speedy trial when counsel entered his appearance on April 6, 2011. Defendant also filed a motion to dismiss for a violation of his right to a speedy trial on May 18, 2015. The district court, however, denied Defendant's motion without a hearing because the motion was untimely under the August 28, 2014 scheduling order, which directed that all motions in the case be filed by December 1, 2014. Accordingly, we conclude that Defendant failed to preserve his speedy trial claim for appellate review.

#### IV. CONCLUSION

{56} The judgment and sentence in each of these cases is affirmed.

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

WE CONCUR:  
M. MONICA ZAMORA, Judge  
STEPHEN G. FRENCH, Judge



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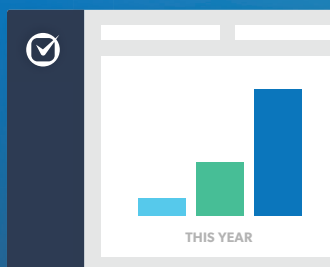


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### Legal Assistant

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## Legal Assistant

Team, Talent, Truth, Tenacity, Triumph. These are our values. (Please read below concerning how to apply.) Legal assistant duties include support to 8 paralegals in the form of drafting basic form letters, scanning, creating mediation/arbitration notebooks, e-filing, compiling enclosures and sending out letters/demand packages, follow up phone calls with clients, providers, and vendors, IPRA requests and monitoring. 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. What it takes to succeed in this position: Organization, decision making, being proactive, ability to work on multiple projects, ability to listen and ask questions, intrinsic desire to achieve, no procrastination, desire to help team and client, willing and glad to help wherever needed, offering assistance beyond basic role, focus, motivation, and taking ownership of role. You must feel fulfilled by the importance of your role in managing and filing documents and data. Obviously, work ethic, character, and good communication are vital in a law firm. 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. 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](http://www.HurtCallBert.com/jobs). Emailed applications will not be considered.

## Paralegal

TriCore Reference Laboratories has an exciting opportunity for a Paralegal at our headquarters in Albuquerque. Empower yourself in this position by working with corporate attorneys and clients. The successful incumbent will have an Associate's degree or certificate in paralegal studies and 5 years' experience in a healthcare setting. View the full Paralegal posting at [tricore.org/careers](http://tricore.org/careers), Job #8316, or contact a Recruiter at 505-938-8888 for more information. TriCore Reference Laboratories is an Equal Opportunity Employer.

## 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](mailto:odewitt@alumni.rice.edu)

### Briefs, Research, Appeals—

Leave the writing to me. Experienced, effective, reasonable. [cindi.pearlman@gmail.com](mailto:cindi.pearlman@gmail.com) (505) 281 6797

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### Office Space Available

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Fully furnished, IT-enabled office space that can grow with your business. Visit our professional office suite located on the 5th floor of the prestigious Albuquerque Plaza office building at 201 Third Street NW. Contact Sandee at 505-999-1726.

## Northeast Heights Office

Professional office available near Academy and Wyoming. Includes high-speed internet, phone, use of high-volume printer/scanner/fax, access to conference room, security, and ample parking for clients. \$550/month. Call, text, or email Mark Allen at 505-750-4190 or [mallen@markallenlawoffice.com](mailto:mallen@markallenlawoffice.com) to inquire.

## Miscellaneous

### Want To Purchase

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

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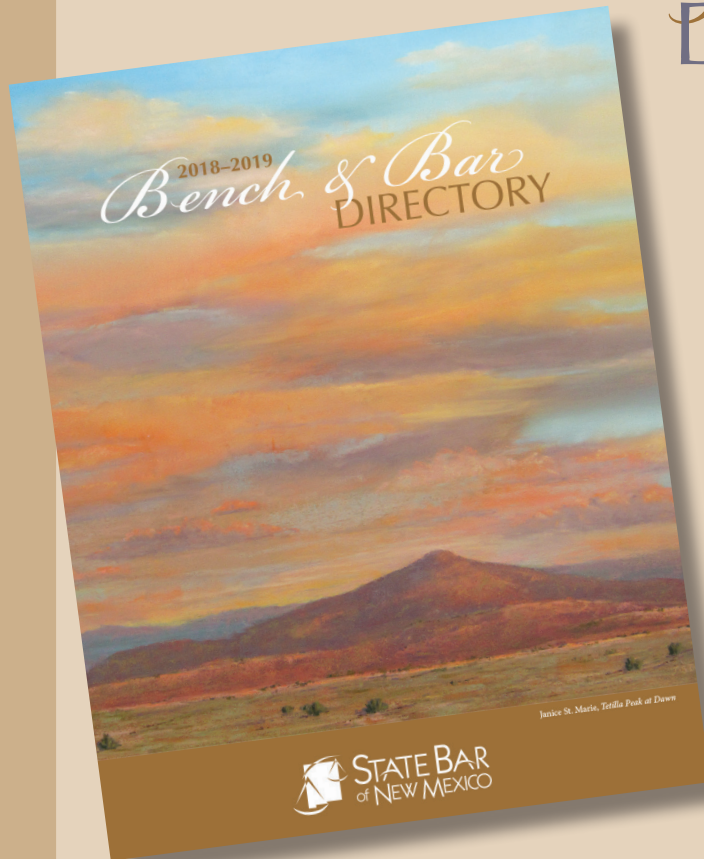
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