

BAR BULLETIN

April 17, 2019 • Volume 58, No. 8



Silence Comes, by Pauline Ziegen (see page 4)

Owen Contemporary

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Spring into
Completing
Your Annual
CLEs!

Your Choice.
Your Program.
Your Bar Foundation.

CLE programming from the Center for Legal Education

How to Practice Series

Estate Planning



Thursday, April 18, 2019

8:30 a.m.-5 p.m.

5.0 G 2.0 EP

Live at the State Bar Center
Also available via Live Webcast!

\$99 Audit/Non-member not seeking CLE credit
\$278 Government and legal services attorneys, Young Lawyers Division and Paralegal Division members
\$309 Standard/Webcast Fee

2019's Best Law Office Technology, Software and Tools- Improve Client Service, Increase Speed and Lower Your Costs



Presented by Baron Henley, Esq., partner, Affinity Consulting Group

Tuesday, April 23, 2019

9 a.m.-4:15 p.m.

5.0 G 1.0 EP

Live at the State Bar Center
Also available via Live Webcast!

\$99 Audit/Non-member not seeking CLE credit
\$251 Government and legal services attorneys, Young Lawyers Division and Paralegal Division members
\$279 Standard/Webcast Fee

Join attorney/legal technology consultant Barron Henley in this program filled with the most up-to-date technology tips and tricks that you can incorporate into your practice immediately. The best of legal technology, practice management, matter management programs for small to medium sized law firms, technology on a budget, and addressing security issues with your clients are just a few of the topics that will be addressed during this program.

Registration and payment for the programs must be received prior to the program date. A \$20 late fee will be incurred when registering the day of the program. This fee does not apply to live webcast attendance.

Employment and Labor Law Legislative Update



Presented by Quentin F. Smith, Sheehan & Sheehan PA

Thursday, April 25, 2019

11:30 a.m.-12:30 p.m.

1.0 G

Live at the State Bar Center
Also available via Live Webcast!

\$39 Audit/Non-member not seeking CLE credit
\$30 Employment and Labor Law section members, government and legal services attorneys, Young Lawyers Division and Paralegal Division members
\$55 Standard/Webcast Fee

The Dam Burst: 2019 Legislative Update – With a new Governor and Democratic control of both chambers, the New Mexico State Legislature had an especially active session that ended on March 16. Smith will provide a comprehensive overview of the employment-related bills that passed and the steps that employers will need to take to comply with the new legislation.

Surviving White Collar Cases— Prosecution and Defense Perspectives



Friday, April 26, 2019

8:25 a.m.-4:45 p.m.

5.5 G 1.5 EP

Live at the State Bar Center
Also available via Live Webcast!

\$99 Audit/Non-member not seeking CLE credit or CPA/CFE who will self-certify CPE credit
\$278 Government and legal services attorneys, Young Lawyers Division and Paralegal Division members
\$309 Standard/Webcast Fee

Got the White Collar willies? Attend this one-day immersion into the world of white-collar cases. Presented in a balanced way with both prosecution and defense perspectives represented, in a multi-professional and collegial atmosphere, these practical sessions are offered by a diverse faculty of prosecutors, defense counsel, ethics professionals and forensic and investigative accounting experts. Learn to follow the money, ethically and effectively.

NEW MEXICO
STATE BAR FOUNDATION
CENTER FOR LEGAL EDUCATION



505-797-6020 • www.nmbar.org/cle

5121 Masthead NE • PO Box 92860, Albuquerque, NM 87199



2019 ANNUAL MEETING

Aug. 1-3, 2019 • HOTEL ALBUQUERQUE at Old Town *and* HOTEL CHACO

WE ARE PROUD TO WELCOME OUR *Keynote Speaker*



Dan Abrams, Chief Legal Affairs Anchor at ABC News and Founder of Abrams Media

Join keynote speaker and Good Morning America legal analyst Dan Abrams as he gives an insider's view of today's hottest cases and the media's effect on them. Jodi Arias, Casey Anthony, Amanda Knox—these are names that we know only because the media decided their trials were newsworthy. How did the attention these cases received affect their outcomes and the general perception of justice in the courts? How has media coverage of legal cases evolved over time? As a lawyer and media insider, Abrams brings a unique and dynamic perspective to this topic. Don't miss his fascinating discussion of the media's impact on how we view the legal system and today's headline cases.

Other featured speakers for this year's Annual Meeting include:

- **President John Adams:** a humorous and inspiring performance about his life and times by George Baker
- **Sanford M. "Sandy" Brook:** a lively one-man play about 20th Century trial lawyer Clarence Darrow
- **Bree Buchanan:** an overview of the nation-wide lawyer well-being movement and strategies for improving competence and fitness to practice
- **Joel Oster:** a riveting and entertaining take on ethics in the courtroom putting attendees in the hot seat

Sponsorships and Exhibitor Booths are available!

Learn how you can support the Annual Meeting and promote your firm and company to our attendees.

Lodging: Rooms start at \$159 at Hotel Albuquerque and \$179 at Hotel Chaco. Reserve your room by July 10.

*Note: We have secured room blocks at both hotels,
but Annual Meeting events will take place at Hotel Albuquerque.*

For more information on speakers, sponsorships/exhibitor booths, lodging and more, visit www.nmbar.org/annualmeeting



RED RAIDER HOSPITALITY LOUNGE

The Texas Tech University School of Law continues to show their support for the State Bar of New Mexico as the proud sponsor of the 2019 Red Raider Hospitality Lounge!



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Ernestina R. Cruz, President-elect
Carla C. Martinez, Secretary Treasurer
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The *Bar Bulletin* (ISSN 1062-6611) is published every other week by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

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Meetings

April

18

Public Law Section Board

Noon, Legislative Finance Committee,
Santa Fe

19

Family Law Section Board

9 a.m., teleconference

23

Intellectual Property Law Section Board

Noon, Peacock Meyers

24

Natural Resources, Energy and Environmental Section Board

Noon, teleconference

24

Senior Lawyers Division Board

3:30 p.m., State Bar Center

25

Trial Practice Section Board

Noon, State Bar Center

26

Immigration Law Section Board

Noon, teleconference

Workshops and Legal Clinics

April

17

Family Law Clinic

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

18

Common Legal Issues for Senior Citizens Workshop Presentation

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

24

Consumer Debt/Bankruptcy Workshop

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

25

Common Legal Issues for Senior Citizens Workshop Presentation

10–11:15 a.m., Campos Senior Center,
Santa Rosa, 1-800-876-6657

May

1

Divorce Options Workshop

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

About Cover Image and Artist: Pauline Ziegen's earliest landscape paintings were done outdoors in Kansas where vast stretches of prairie lead to distant horizons. Representing the unique dichotomy of where the earth seems to meet the sky or the apparent boundary between earth and sky, the horizon is, she says, "an ever-shifting location that you can never reach, yet it is always compelling." At the time, Ziegen's landscapes were representational; however, the plein-air process of capturing elusive light effects was one of the keys to what she does today. Ziegen has been "editing" ever since, creating suggestive abstractions inspired by the landscapes she views from a ridge-top home and studio on the outskirts of Santa Fe. "...abstraction is all about editing and simplifying the visual world into formal elements that become metaphors of emotion," she says. art@owencontemporary.com

Notices

COURT NEWS

Administrative Office of the Courts

Notice of Online Dispute Resolution

The New Mexico Judiciary plans to implement online dispute resolution in debt and money due cases. Courts piloting ODR are: Second Judicial District Court; Bernalillo County Metropolitan Court; district and magistrate courts in Silver City, Deming and Lordsburg; Bayard Magistrate Court in the Sixth Judicial District; and district and magistrate courts in Clovis and Portales in the Ninth Judicial District. The free service allows the parties to negotiate online to quickly resolve debt and money due cases without appearing in court. If a resolution is reached, the ODR system will prepare a stipulated settlement agreement and electronically file it in court. Participation in ODR is required. If no agreement is reached after 30 days, the case will move forward in court. The plaintiff's attorney or a self-represented plaintiff will receive an email notification to begin ODR after the defendant files an answer to the complaint. Additional information about ODR is available on the Judiciary's alternative dispute resolution web page: <https://adr.nmcourts.gov>.

First Judicial District Court Mass Reassignment

Effective April 1, a mass reassignment of all Division VI cases previously assigned to Judge David K. Thomson occurred pursuant to NMSC Rule 23-109, the Chief Judge Rule. Judge Bryan Biedscheid has been appointed by Gov. Michelle Lujan Grisham to Division VI of the First Judicial District and will maintain a Civil Docket. Parties who have not previously exercised their right to challenge or excuse will have 10 days from April 24 to challenge or excuse Judge Bryan Biedscheid pursuant to Rule 1-088.1.

Second Judicial District Court Appointment of Lisa Chavez Ortega-Amended

Gov. Michelle Lujan Grisham announced the appointment of Lisa Chavez Ortega to fill the vacancy of Division XIII of the Second Judicial District Court. Effective April 8, Judge Chavez Ortega was assigned Civil Court cases previously assigned to Judge Valerie H. Huling. Attorneys and members of the

Professionalism Tip

With respect to parties, lawyers, jurors and witnesses:

I will be open to constructive criticism and make such changes as are consistent with this creed and the Code of Judicial Conduct when appropriate.

public will be afforded an opportunity to exercise a peremptory challenge of the newly appointed judicial officer in accordance with the local and Supreme Court rules of civil procedure that applies to district courts.

Appointment of Joshua Andrew Allison

Gov. Michelle Lujan Grisham announced the appointment of Joshua Andrew Allison to fill the vacancy of XXIII of the Second Judicial District Court. Effective April 8, Judge Allison was assigned Civil Court cases previously assigned to Judge C. Shannon Bacon. Attorneys and members of the public will be afforded an opportunity to exercise a peremptory challenge of the newly appointed judicial officer in accordance with the local and Supreme Court rules of civil procedure that applies to district courts.

Appointment of Amber Chavez Baker

Gov. Michelle Lujan Grisham announced the appointment of Amber Chavez Baker to fill the vacancy of XXII of the Second Judicial District Court. Effective March 25, Judge Chavez Baker was assigned Family Court cases previously assigned to Judge Deborah Davis Walker. Attorneys and members of the public will be afforded an opportunity to exercise a peremptory challenge of the newly appointed judicial officer in accordance with the local and Supreme Court rules of civil procedure that applies to district courts.

Third Judicial District Court Volunteer Attorneys Needed at Self Help Center

The Self Help Center at the Third Judicial Court, is currently seeking volunteer attorneys from the Dona Ana County area, to assist with our monthly legal clinics. The Self Help Center hosts a legal clinic every Wednesday from 1-4 p.m. for pro se litigants dealing with issues in family law. Additionally clinics are held on the second and last Tuesday of the month for civil issues. The clinics are set up to assist pro se litigants with legal advice and guidance that is outside the scope of the services the court may provide. The clinics are set up to respect the time of

our volunteers and limit each clinic from seven to ten individuals. If interested in assisting the Self Help Division, contact David D. Vandenberg at lcrdexv@nmcourts.gov or call 575-528-8399.

Sixth Judicial District Court Notice of Right to Excuse Judge

As of March 25, Hon. James B. Foy is now the District Judge for Division III of the Sixth Judicial District Court. Grant County: 50 percent of all pending and reopened criminal and extradition cases previously assigned to the vacant position of Division III shall be reassigned to the Hon. Thomas F. Stewart, District Judge for Division I, and 50 percent shall be reassigned to the Hon. Jarod K. Hofacket, District Judge for Division IV. All pending civil, domestic, emancipation, adoption, miscellaneous sequestered, probate and guardianship/conservatorship cases previously assigned to the vacant position of Division III shall be assigned to the Hon. James B. Foy, District Judge for Division III. All reopened cases of the above case types shall be reassigned fifty percent to the Hon. Thomas F. Stewart, District Judge for Division I, and fifty percent to the Hon. James B. Foy, District Judge for Division III. All pending and reopened domestic violence cases previously assigned to the vacant position of Division III shall be reassigned to the Hon. James B. Foy, District Judge for Division III. All pending and reopened delinquency, youthful offender, competency, abuse and neglect, lower court appeal previously assigned to the vacant position of Division III shall be reassigned to the Hon. Thomas F. Stewart, District Judge for Division I. Hidalgo County: All pending and reopened domestic cases previously assigned to the Hon. Jarod K. Hofacket, District Judge for Division IV, or previously assigned to the vacant position of Division III shall be assigned to the Hon. James B. Foy, District Judge for Division III. All pending and reopened civil, domestic violence, abuse and neglect, adoption and probate cases previously assigned to the vacant position of Division III shall be assigned to the Honorable James B. Foy, District Judge for Division III. All pending and reopened delinquency, youthful offender, criminal, extradition, lower court appeal, and competency cases previously assigned

to the vacant position of Division III shall be assigned to the Hon. Jarod K. Hofacket, District Judge, Division IV. Fifty percent of all reopened sequestered miscellaneous cases shall be reassigned to the Hon. James B. Foy, District Judge for Division III, and fifty percent shall be reassigned to the Hon. Jarod K. Hofacket, District Judge for Division IV. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days to excuse Judge Foy, Judge Hofacket or Judge Stewart.

STATE BAR NEWS

2019 State Bar of New Mexico Annual Awards Call for Nominations

Nominations are being accepted for the 2019 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2018 or 2019. The awards will be presented during the 2019 Annual Meeting, Aug. 1-3 at Hotel Albuquerque at Old Town. View the award descriptions, previous recipients and nomination instructions at www.nmbar.org/AnnualMeeting. The deadline for nominations is May 1. For more information, contact Kris Becker at 505-797-6038.

ADR Committee

ADR Superpower Skills Workshop

The ADR Committee invites State Bar members to a skills workshop for those who are new as well as for those who are experienced with the practice of ADR. It is an opportunity to identify and develop the core skills for success in facilitating communication, collaboration and constructive conflict management. Attendees will work in small groups, with a coach, to experience the profound and positive impact of skillful listening and acknowledgement. Join JoEllen Ransom, Jon Lee and Anne Lightsey from UNM Ombuds for Staff from noon-1 p.m. on April 25 at the State Bar Center for this free workshop. R.S.V.P. to Breanna Henley at bhenley@nmbar.org. Attendees are welcome to join the ADR Committee meeting from 11:30 a.m.-noon in advance of the presentation.

Access to Justice Fund Grant Commission Request for Proposals

The State Bar of New Mexico Access to Justice Fund Grant Commission is pleased to announce that the 2019-20 grant process opened on Feb. 19 at 11 a.m. Applications are due no later than April 19, at noon. The Grant Commission shall be responsible for reviewing the applications and awarding grants to civil legal service organizations consistent with the current State Plan for the Provision of Civil Legal Services to Low Income New Mexicans. For more information on the application process, visit www.nmbar.org/atjfundgrant.

Board of Bar Commissioners Appointments

The Board of Bar Commissioners will make appointments to the groups below. Qualified candidates should send a letter of interest and brief resumé by May 1 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Young Lawyer Delegate to ABA House of Delegates

The BBC will make one appointment of a young lawyer delegate to the American Bar Association House of Delegates for a two-year term, which will begin at the conclusion of the 2019 ABA Annual Meeting in August and expire at the conclusion of the 2021 ABA Annual Meeting. The delegate must be willing to attend ABA mid-year and annual meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar; however, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. Members wishing to serve as the young lawyer delegate to the HOD must have been admitted to his or her first bar within the last five years or be less than 36 years old at the beginning of the term; be an ABA member in good standing throughout the tenure as a delegate; and report to the N.M. YLD Board during the YLD Board's scheduled board meetings throughout the tenure as a delegate.

DNA – People's Legal Services, Inc.

The BBC will make two appointments to the DNA – People's Legal Services, Inc., Board for four-year terms. Active status attorneys in New Mexico may apply.

Civil Legal Services Commission

The BBC will make one appointment to the Civil Legal Services Commission for a three-year term. All members of the

Commission must have experience with the civil legal matters affecting low-income persons. Active status attorneys in New Mexico may apply.

New Mexico Judges and Lawyers Assistance Program Attorney Support Groups

- May 6, 5:30 p.m.
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (The group normally meets the first Monday of the month.)
- May 13, 5:30 p.m.
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- May 20, 5:30 p.m.
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

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

Public Law Section

Cydney Beadles is the 2019 Public Lawyer of the Year

Since 1996, the Public Law Section has presented the annual Public Lawyer Award to lawyers who have had distinguished careers in public service and who are not likely to be recognized for their contributions. The legal community is cordially invited to honor recipient Cydney Beadles at 4:30 p.m. on May 3 at the Capitol Rotunda in Santa Fe. R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Solo and Small Firm Section

Roundtable Discussions in Carlsbad and Farmington

The Solo and Small Firm Section is hosting a Roundtable event in Farmington on May 13. The Roundtable events are gatherings in which attendees discuss practice management and other business trends. For more information, contact Deian McBryde at deian@mcbryledelaw.com or 505-465-9086 or Breanna Henley at bhenley@nmbar.org.

Young Lawyers Division Annual Law Day Call-in Program

Join the Young Lawyers Division to provide free, basic legal information by telephone in celebration of Law Day on Saturday, April 27 from 8:30 a.m.-noon, in Albuquerque and in Farmington. Visit nmbar.org/AskALawyer for more information and to register.

Welcome New Attorneys to the Profession

A new group of young lawyers are being sworn in to the State Bar of New Mexico on April 29. Please join the YLD in welcoming them to the profession at a reception from 5:30-7:30 p.m., April 29, at St. Clair Winery located at 901 Rio Grande Blvd NW B-10 in Albuquerque. Drinks and hors d'oeuvres will be provided. R.S.V.P. at <https://form.jotform.com/sbnm/SwearingInReception>.

UNM SCHOOL OF LAW Law Library Hours Spring 2019

Jan. 14-May 11

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.
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Mexican American Law Student Association Annual Fighting For Justice Banquet

For the last 23 years, MALSA has held an annual banquet honoring an individual or organization that works to advance the cause of justice for the Hispanic/Latino community. The 24th Annual Fighting for Justice Awards Banquet to be held on Saturday, April 20, at the University of New Mexico Student Union Building (SUB), Ballrooms B & C, at 6 p.m. MALSA will be honoring Congresswoman Xochitl Torres Small for her advocacy and community organizing which has had a tremendous impact on her community and the State of New Mexico. Tickets are \$100 per individual or \$900 per table of 10. To learn more about Congresswoman Torres Small and to register for the event, visit <https://www.malsanm.org>.

OTHER BARS Albuquerque Bar Association Secretary Maggie Toulouse Oliver is the Law Day Luncheon Keynote Speaker

The Albuquerque Bar Association Annual Law Day Luncheon registration is now open! Please join us from 11:30 a.m.-1 p.m. on May 1 at the Embassy Suites Hotel located at 1000 Woodward Pl NE in Albuquerque. We are pleased to welcome

Secretary of State Maggie Toulouse Oliver as this year's keynote speaker. Secretary of State Toulouse Oliver has spent her career as a public official working for greater transparency and ethics in government, fair and efficient elections, and increased voter access. First elected in 2016, Secretary of State Toulouse Oliver is focused on providing increased transparency in financial disclosure and campaign finance reporting, modernizing the online campaign finance system, encouraging New Mexicans to get registered and vote, and advocating for good government and stronger ethics legislation. Luncheon tickets are \$40 each, or 10 for \$360. Sponsorships are available. Visit <https://form.jotform.com/sbnm/LawDayLuncheonRegistration> to register and sponsor online or contact bhenley@nmbar.org to submit a check payment.

New Mexico Defense Lawyers Association 2019 Young Lawyers Seminar

Join the New Mexico Defense Lawyers Association for its Young Lawyers Seminar on May 31 at Modrall Sperling in Albuquerque. This half-day program is designed to teach associates and junior partners useful skills they can apply to their daily practice and provide opportunities to network and develop business relationships. Visit www.nmdla.org to register and for more information.

BOARD OF BAR COMMISSIONERS

MEETING SUMMARY

The Board of Bar Commissioners met at the State Bar Center in Albuquerque, N.M., on Feb. 22, 2019. Action taken at the meeting follows.

- Approved the Dec. 13, 2018, meeting minutes as submitted;
- Accepted the 2018 year-end financials for the State Bar and N.M. State Bar Foundation;
- Received the 2018 year-end financials for the Client Protection Fund, Access to Justice Fund and Judges and Lawyers Assistance Program;
- Approved the recurring electronic payment schedule;
- Approved an intercompany payment to the State Bar from the N.M. State Bar Foundation for the shared costs of the organizations;
- Received a contribution/donation request from Cottonwood Classical Preparatory School for their We the People Team to travel to Washington, D.C., to participate in the National Finals and approved a donation in the amount of \$1,000;
- Received a 2019 licensing update; there are currently 594 active members and 461 inactive members outstanding;
- Discussed annual events in bar commissioner districts, which will be coordinated by the bar commissioners in those districts and may be held in conjunction with other events in those districts;
- Discussed Supreme Court board, committee and commission liaisons and whether to request a rule change to make the liaisons voting positions and referred it to the Board's Policy and Bylaws Committee;
- Received an update on the transition to the every other week schedule of the *Bar Bulletin* and asked commissioners to have members contact the State Bar with any comments;
- Approved a member association software evaluation proposal from Light-house;
- Received a recommendation from the Committee on Diversity and Committee on Women in the Legal Profession and staff to proceed with a survey proposal from Latino Decisions to conduct a diversity survey of the membership and approved the recommendations;
- Reported that there is a vacancy in the First Bar Commissioner District, and a notice will be published in the *Bar Bulletin* to fill the vacancy through the end of the year;
- Reported that there is a vacancy on the State Bar's ATJ Fund Grant Commission and a notice will be published in the *Bar Bulletin* to fill the vacancy through the end of the term;
- Approved a proposal from Aiken Printing Co. to print the *Bench & Bar Directory*;
- Received a report and recommendations from the Board's Annual Awards Committee;
- Received a report and recommendations from the Policy and Bylaws Committee and approved the following: 1) amendments to the Health Law Section Bylaws, 2) amendments to the State Bar's Editorial Policy, and 3) a new policy to allow the executive director to waive the late payment penalty on licensing fees;
- Received a report from the Regulatory Committee on Legal Specialization; the committee will study it further and make a recommendation at the May Board meeting;
- Received an update on the ATJ Commission;
- Received an update from the Health Law Section;
- Reported that the Supreme Court approved collaboration with the Judicial Conclave and the State Bar's Annual Meeting scheduled for June 17-20, 2020 in Santa Fe;
- Provided the 2019 Board Meeting dates as follows: May 17, Aug. 1, Oct. 25, and Dec. 11;
- Received the 2019 Supreme Court boards, committees and commissions liaison appointments and the Board's internal committee appointments;
- Reported that the Board will hold a strategic planning retreat in Sept.;
- Approved a dues waiver request; and
- Appointed the 2019 N.M. State Bar Foundation officers as follows: Carolyn A. Wolf, President; Joshua A. Allison, Vice President; and Carla C. Martinez, Secretary-Treasurer.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the May 17 meeting.



Ray, McChristian & Jeans Law Firm is pleased to announce that **Merritt Clements** has joined the firm. Clements is licensed in N.M. and Texas, and his practice includes commercial litigation and personal injury litigation. He is board certified in personal injury trial law by the Texas Board of Legal Specialization and a member of the American Board of Trial Advocates. He appears in the current editions of *Best Lawyers in America* and *Texas Super Lawyers*.



Albuquerque attorney **Tina Muscarella Gooch** of the Sutin Firm has been selected as a Fellow to join the Construction Lawyers Society of America. Gooch has more than 10 years' experience in New Mexico representing a variety of clients in civil and commercial litigation, including in the practice areas of construction law, employment law, surety law, cannabis law and constitutional law. Gooch has significant experience in complex commercial litigation. She has

litigated cases in New Mexico state and federal courts on a variety of issues, including Little Miller Act and Miller Act claims, shareholder disputes and easement disputes, professional liability claims, and personal injury claims. Her litigation experience includes pre-lawsuit investigations, discovery, depositions, motions practice, hearings, trials, and appellate briefing.



Scott D. Gordon has achieved recertification as a civil trial advocate by the National Board of Trial Advocacy. Gordon is a member of Rodey's Litigation Department where he has served as trial attorney in numerous jury and bench trials including trials of discrimination, wrongful termination, breach of contract and personal injury claims. Achieving board certification in the NBTAA is the highest, most stringent honor an attorney can achieve. Only 3 percent

of American lawyers are board certified. Gordon is a member of a very select group of lawyers who have proven the utmost competence in their area of specialty.

Chambers Honors Six at Sutin

Sutin, Thayer & Browne is pleased to announce that the prestigious Chambers and Partners 2019 annual legal directory has recognized the firm and six senior lawyers. The honors underscore the firm's strength in business and corporate law.

The firm itself was honored for its highly regarded work in real estate law, corporate / commercial law and general commercial litigation. Individual honors went to the following:

Anne P. Browne, for corporate/commercial law and real estate law.

Benjamin E. Thomas, for general commercial litigation.

Eduardo A. Duffy, for corporate/commercial law.

Jay D. Rosenblum, for corporate/commercial law.

Robert G. Heyman, for corporate/commercial law.

Suzanne Wood Bruckner, for corporate/commercial tax law..

In Memoriam

Marc Hendricks was a caring son, loving brother, an amazing husband, wonderful friend, a wholly devoted father. He left us too soon and will be greatly missed. Hendricks was born on Sept. 16, 1960 to Jayne and Edward Hendricks. He grew up on a dairy farm in Marengo, Il. His two younger sisters, Darla and Hope, loved having an older brother to offer a helping hand and a fair share of teasing. It was a very loving family. He loved reading, history, gaming and listening to the Beatles. At a young age, he developed a passion for playing tabletop games, which continued throughout his life. He began playing war strategy and role-playing games and had a wonderful group of friends that also loved to game together. He graduated from Marengo High School and went to study Soviet History at Northern Illinois University. He made lasting friendships everywhere he went. After graduating from college, he embarked on student trip to Europe and sat next to Judy Auchter on the flight to Amsterdam. They became great friends. One of Hendricks's friends had teased him that he might meet his wife on this trip, maybe in France or Italy. Maryann Auchter was also on the student tour. It was an amazing trip. Hendricks's parents, grandmothers and sister, Hope, moved to Tucson, Ariz., and once Hendricks graduated from college, he soon followed. The family farm was sold, and they enjoyed the wonderful Arizona weather, often in Ed and Jayne's pool. Hendricks worked as a buyer in the aerospace industry. He was happy to find a game store there and many new friends. In 1987 Hendricks returned to Illinois for one of his favorite gaming conventions, Gen Con, for a reunion with

the group of friends he had met on the Europe trip. Shortly after, Judy moved to Tucson and they were married in 1989. Hendricks decided to go to law school and he and Judy moved to Findlay, Ohio. He received his law degree from Ohio Northern University and was on the Law Review. Together, Hendricks and Judy braved one of the coldest winters in history and they made plans to move back to the southwest shortly after. Hendricks began practicing employment law and then disability law, in Albuquerque. In 1999, Hendricks and Judy were blessed with their beautiful daughter, Anastasia. They met wonderful people in Albuquerque and often went on overseas vacations with a close-knit group of friends. Hendricks had his own law practice in Albuquerque for many years and helped countless disabled people receive their much-needed benefits. One trip to the game store in Albuquerque led to so many wonderful and lasting friendships. Hendricks loved to game, cook, read, brew beer and spend time with his friends and family. He was a dedicated and loving father, and was so proud of his daughter, Anastasia, who is currently attending the University of Toronto. He was so grateful to be a part of such a wonderful family and he cherished his great friends. He was full of love and he will be greatly missed. Hendricks passed away on February 20, after a long battle with cancer. He was surrounded by people who loved him dearly. Hendricks is survived by his parents, Ed and Jayne Hendricks; his sisters, Hope Peters and Darla Smith; his wife, Judy and his daughter, Anastasia.

Warren Foster Reynolds, father, grandfather and great-grandfather passed away peacefully on Jan. 11. Son of Reynolds Wentworth Reynolds and Emily Foster, he was born in Hyde Park, M.A. on March 22, 1928. He joined the Air Force shortly after high school and was stationed at Kirtland Air Force Base in Albuquerque, due to a clerical error that confused Albuquerque with Alamogordo. Because of that clerical error, he met the love of his life, Lucille (Luci) Arellano at a dance at the base. He wooed her persistently, and they were married Dec. 18, 1948. They enjoyed a long and happy life together and celebrated their 70th anniversary in December. After attending college at UNM, Reynolds worked for Conoco Oil Company. The young couple had their first child and lived in various small towns in the southern part of the state, where they added three more children to the family. In 1958, Reynolds decided to go to law school at UNM. With Luci's help, he was able to support his growing family working as many as three jobs at a time while attending law school. He became an attorney in 1961 and practiced law in Albuquerque until 1967, at which time the family moved to Hobbs. He was a practicing attorney for 39 years. After retiring, the couple lived in Belen for ten years and later in Albuquerque. Reynolds was preceded in death by his parents; his brother, Steven; his granddaughter, Emily; his great-grandson, Isaiah; and his son-in-law, Kelly Voris. His survivors include wife, Lucille Reynolds; sister, Priscilla Thomas; son, Reynolds (wife, Mindy); daughter, Dena (husband, Luke Faust); sons, Craig and Richard; and daughter, Rebecca Voris; grandchildren, Caryn (husband, Zach DiCicco), Eric (wife, Rachel), Ben (Venecia), and Nicole Voris (husband, Oliver Endahl); great-grandchildren, Matthew, Nicholas, Jonjon, and Adeline. Reynolds was an avid reader and had many hobbies. He and Luci lived a full and happy life filled with dancing, traveling, and participating in their children's activities. He was known for his work ethic and devotion to his family.

Ethan Samuel Simon, 45, Albuquerque attorney and beloved father, passed away on January 21. He is survived by his children, Joshua, Zoey and Shea Simon; parents, Elisa and Toby Simon; sister, Michelle Simon; and former wife, Nina Simon; as well as nephews, Judah and Jacob Simon; aunt and uncle, Marla and Mitchell Edelstein; and cousins. He was predeceased by his beloved sister, Judith Adina Simon.

Kevin Lynn Wildenstein, 54 passed away Nov. 2, 2018. He was a dear husband to Jo Ann Romero Wildenstein, loving father to sons Fabian and Diego Wildenstein, son to Rudy and Irene Wildenstein and brother to Debbie Wildenstein. He was preceded in death by brother Kelly Wildenstein. Wildenstein graduated from NMSU in 1987 with a degree in Electrical Engineering. He worked for Motorola and Intel Corporation in Arizona prior to finding his true passion in law. He graduated from UNM School of Law in 1994 and practiced as a patent attorney in Albuquerque. Wildenstein was a smart strong person who was fiercely loyal to friends and family members. He took great pride in his work, his children and his family. He enjoyed waking up at the crack of dawn to exercise and work in his yard. He loved cooking and making his wife and children watch endless shows about superheroes and Star Wars. In his own way, he gave us great strength and showed us how to survive. We will miss him terribly, and take comfort in the knowledge that he is now free from his illnesses.

Legal Education

April

- | | | |
|--|---|--|
| <p>18 How to Practice Series: Estate Planning
5.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>23 2019's Best Law Office Technology, Software and Tools- Improve Client Service, Increase Speed and Lower Your Costs
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 Emerging Ethical Issues in the Practice of Law
2.0 G, 1 EP
Webcast/Live Seminar, Albuquerque
Paralegal Division
lsanders@pbwslaw.com</p> |
| <p>18 Changing Minds Inside and Out of the Courtroom
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>24 Identify Torts in A/N Case and Ethics in the Movies
2.0 G, 1.0 EP
Live Seminar, Albuquerque
Advocacy Inc.</p> | <p>29 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>18 Beneficiary Designations in Retirement Accounts: Protecting a Lifetime of Savings
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>25 Employment and Labor Law Legislative Update
1.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 Add a Little Fiction to Your Legal Writing (2017)
2.0 G
Webcast/Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>19 Lawyer Ethics and Investigations for and of Clients
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>25 2019 Health Law Legislative Update
2.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 Ethical Puzzles: The Wrongful Death Act, Negligent Settlements and the Search for Silver Bullets (2018)
3.0 EP
Webcast/Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>22 Advocacy in action Conference
19.1 G
Live Seminar, Albuquerque
New Mexico Coalition of Sexual Assault Programs</p> | <p>26 Undue Influence and Duress in Estate Planning
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 Litigation and Argument Writing in the Smartphone Age (2017)
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>23 Mother Nature and Leases: Drafting Issues to Protect Against Storm and Other Damage
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>26 Veterans disability Law Bootcamp
5.7 G
Live Seminar, Albuquerque
Vet Defender</p> | <p>30 Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice and More
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| | <p>26 Surviving White Collar Cases – Prosecution and Defense Perspectives
5.5 G, 1.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 Tax Pitfalls for the Small Business Attorney
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| | <p>26 Uniform Partition of Heirs Property Act (and Deeds 101)
1.5 G
Live Seminar, Albuquerque
Ghost Ranch, New Mexico
www.nmbar.org</p> | |

- 30 Retain Your Clients: A Roadmap to Effective, Ethical Client Service**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

May

- | | | |
|--|--|---|
| <p>3 The Law of Background Checks: What Clients May/May Not Check
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 Ethics of Shared Law Offices, Working Remotely and Virtual Offices
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>22 How to Practice Series: Divorce Law in New Mexico
4.5 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>3 Animal Law 2019 Regular Session of the New Mexico Legislature
2.0 G
Live Seminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 34th Annual Bankruptcy Year in Review Seminar
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>22 The Lifecycle of a Trial, from a Technology Perspective (2017)
4.3 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>7 Incentive Compensation in Businesses, Part 1
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 Pretrial Practice in Federal Court (2018)
2.5 G, 0.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>22 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>8 Incentive Compensation in Businesses, Part 2
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 Basic Guide to Appeals for Busy Trial Lawyers (2018)
3.0 G,
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>24 Ethical Issues in Contract Drafting
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>9 Drafting Demand Letters
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 Basic Practical Regulatory Training for the Natural Gas Local Distribution Industry
27.5 G
Live Seminar, Albuquerque
Center for Public Utilities NMSU</p> | <p>30 Ethical Issues and Implications on Lawyers' Use of LinkedIn
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>16 Annual Estate Planning
5.0 G, 1.0 EP
Live Seminar, Albuquerque
Wilcox Law Firm</p> | <p>20 Basic Practical Regulatory Training for the Electric Industry
28.5 G
Live Seminar, Albuquerque
Center for Public Utilities NMSU</p> | <p>31 2019 Young Lawyers Seminar
3.0 G
Live Seminar, Albuquerque
New Mexico Defense Lawyers Association</p> |
| <p>16 Annual WCA of NM Conference
8.0 G, 1.0 EP
Live Seminar, Albuquerque
Workers Compensation Association of New Mexico</p> | | |

Opinions

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

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
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Effective March 29, 2019

PUBLISHED OPINIONS

No published opinions

UNPUBLISHED OPINIONS

A-1-CA-35361	State v. T Jaramillo	Reverse/Remand	03/25/2019
A-1-CA-36316	R Casias v. Tax & Rev	Affirm	03/25/2019
A-1-CA-37399	Carrington Mortgage v. J Townsend	Reverse/Remand	03/25/2019
A-1-CA-37465	State v. R Larios	Dismiss	03/25/2019
A-1-CA-37408	Bank of America v. J Roybal	Affirm	03/27/2019
A-1-CA-35889	K Blakely v. Lovelace Hospital	Reverse/Remand	03/28/2019
A-1-CA-36135	State v. G Trujillo	Affirm	03/28/2019
A-1-CA-36803	G Coblenz v. T Batis	Reverse/Remand	03/28/2019

Effective April 5, 2019

PUBLISHED OPINIONS

A-1-CA-35193	State v. K Candelaria	Affirm/Vacate/Remand	04/01/2019
A-1-CA-35225	State v. N Chee	Affirm	04/01/2019

UNPUBLISHED OPINIONS

A-1-CA-35841	State v. P Oliphant	Affirm	04/02/2019
A-1-CA-36874	L Hunt v. St. John Healthcare	Affirm	04/02/2019
A-1-CA-37285	State v. N Riso	Affirm	04/02/2019
A-1-CA-37429	CYFD v. Alexandra C.	Affirm	04/02/2019
A-1-CA-36035	International v. City of Farmington	Affirm/Reverse/Remand	04/03/2019
A-1-CA-34743	State v. E Maes	Affirm	04/04/2019
A-1-CA-35822	“C Plant v. BNSF Railway “	Affirm	04/04/2019
A-1-CA-37183	State of NM ex rel. H Balderas v. M Khalsa	Dismiss	04/04/2019

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

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective April 10, 2019

PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:

There are no proposed rule changes open for comment.

RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2019 NMRA:

Effective Date

Rules of Civil Procedure for the District Courts

- 1-004.1 Guardianship and conservatorship proceedings; process 01/14/2019
- 1-140 Guardianship and conservatorship proceedings; mandatory use forms 01/14/2019
- 1-142 Guardianship and conservatorship proceedings; proof of certification of professional guardians and conservators 07/01/2019

Local Rules for the Sixth Judicial District Court

LR6-213 Electronic filing authorized 09/01/2019

Local Rules for the Twelfth Judicial District Court

LR12-201 Electronic filing authorized 09/01/2019

Local Rules for the Thirteenth Judicial District Court

LR13-208 Electronic filing authorized 09/01/2019

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

From the New Mexico Supreme Court

Opinion Number: 2019-NMSC-008
No. S-1-SC-36508 (filed January 24, 2019)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
NATHANIEL YAZZIE,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Karen L. Townsend, District Judge

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for Petitioner

BENNETT J. BAUR,
Chief Public Defender
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for Respondent

Opinion

Barbara J. Vigil, Justice

I. INTRODUCTION

{1} With this opinion we revisit the circumstances under which an officer may make a warrantless entry into a home under the emergency assistance doctrine.¹ Relying on cases interpreting the Fourth Amendment to the United States Constitution, this Court held in *Ryon* that a warrantless entry is reasonable under the emergency assistance doctrine when (1) law enforcement officers “have reasonable grounds to believe that there is an emergency at hand and an immediate need for assistance for the protection of life or property;” (2) the officers’ primary motivation for the search is a “strong sense of emergency” and not “to arrest a suspect or to seize evidence[;]” and (3) the officers have some reasonable basis, approximating probable cause, to connect the emergency to the area to be searched. See 2005-NMSC-005, ¶ 39.

{2} Since *Ryon* was decided, the United States Supreme Court has clarified that

the emergency assistance doctrine under the Fourth Amendment focuses on the objective reasonableness of the officer’s actions and does not include a subjective component. See *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (“The officer’s subjective motivation is irrelevant.”). Applying the interstitial approach, we hold that an officer’s subjective motivation remains relevant to the reasonableness of a warrantless entry under Article II, Section 10 of the New Mexico Constitution. We further hold that the officer’s warrantless entry in this case was reasonable under the Fourth Amendment and Article II, Section 10. The Court of Appeals having concluded otherwise, we reverse. In doing so, we reiterate our recent holding in *State v. Martinez* that the presence of video evidence in an appellate record does not affect the deference due to a district court’s factual findings at a suppression hearing if those findings are supported by substantial evidence. See 2018-NMSC-007, ¶¶ 18-19, 410 P.3d 186.

II. BACKGROUND

{3} Defendant Nathaniel Yazzie entered a conditional plea of no contest to the offense of attempt to commit negligent child

abuse following the district court’s denial of his motion to suppress. Defendant had moved to suppress all of the evidence gathered after Officer William Temples of the Farmington Police Department entered his unlocked apartment without a warrant in response to a welfare check. Defendant argued in his suppression motion that Officer Temples’ entry violated his right to privacy in his home under the Fourth Amendment and Article II, Section 10. The State responded that Officer Temples’ entry was reasonable to ensure the safety of those inside the apartment, thereby making his actions constitutionally permissible under the emergency assistance doctrine.

{4} The district court held a hearing where it considered the officer’s testimony as well as the lapel video from the night of the incident. The video was not played during the hearing, but the district court reviewed it prior to issuing its letter decision denying the motion to suppress. The letter decision did not include formal, enumerated findings of fact. On review, we will “draw from the record to derive findings based on reasonable facts and inferences.” *State v. Attaway*, 1994-NMSC-011, ¶ 33, 117 N.M. 141, 870 P.2d 103. The record provides the following facts.

{5} Officer Temples was dispatched to Defendant’s residence to conduct a welfare check at 9:43 p.m. on December 5, 2013 after Defendant’s downstairs neighbor had reported a loud “thumping” sound coming from the apartment above. Officer Temples testified that no one answered Defendant’s door after he loudly knocked and announced himself as a police officer over the course of eight to ten minutes. He told the district court that during that time, the only response to his knocking was an infant crying continuously and a young child “hollering, ‘Mommy! Mommy, wake up!’” Officer Temples described the infant’s cry as “a constant cry as if there was nobody caring for the child.” He further testified that the doorknob rattled as though someone was trying, but unable, to open the door from the inside.

{6} Officer Temples explained at the hearing that these observations led him to believe that someone in the apartment was hurt or otherwise incapacitated, leaving the children unattended. He said he thought the children’s mother may have

¹The United States Supreme Court has referred to this doctrine as the “emergency aid exception.” *Michigan v. Fisher*, 558 U.S. 45, 47-48 (2009) (internal quotation marks and citation omitted). Historically, we have used the term “emergency assistance doctrine” to refer to the same constitutional principle. See *State v. Ryon*, 2005-NMSC-005, ¶ 1, 137 N.M. 174, 108 P.3d 1032. We continue use of our prior terminology in this opinion

required aid because “usually when a child . . . asks their mommy to wake up several times, usually Mommy wakes up when she’s sober or uninjured.” Officer Temples testified that he opened the unlocked apartment door to peer inside once he concluded that his assistance was required within. When he did, he observed Defendant and an adult woman lying on the floor of the apartment with two children under six and an infant in the same room.

{7} The lapel video shows Officer Temples knocking six times in the span of roughly six minutes before opening the unlocked apartment door. After his first knock, movement can be heard within, the door-knob rattles, and a child can be heard calling to his or her mother. Moments later, an infant begins to fuss. Officer Temples knocks a second time and someone again rattles the doorknob but gives no additional response. After his fifth unanswered knock, Officer Temples announces that he is an officer of the Farmington Police Department and requests that someone come to the door. The fussing baby is heard again, but no one responds to his request. Officer Temples then says to himself, “Mom and Dad are obviously passed out.” At this point in the video, the baby’s crying increases in volume and tempo. A minute later Officer Temples knocks a sixth time and announces himself again. When he does not receive a response, Officer Temples opens the unlocked door of the apartment. He knocks a seventh time while standing in the doorway. About one minute later, Officer Temples calls for a backup officer and a portable breath test unit (PBT). He then fully enters the apartment, approximately eight minutes after his first knock.

{8} Officer Temples testified that once inside the apartment he performed a sweep of the adjoining rooms of the apartment to ensure officer safety, as well as to see if any other individuals in the apartment required assistance. During the sweep, Officer Temples observed empty alcohol bottles in the kitchen at the top of an open trash can.

{9} In the lapel video, Officer Temples performs a thirty-second sweep of the apartment, shining his flashlight into each of the rooms, including the kitchen. The lapel video shows that after the requested backup officer arrives, the pair of officers physically rouse the adults, question them, and administer the breath tests. They do not call for a medical response unit. Based on the results of the breath tests, they ar-

rest both adults. This sequence of events is reflected in Officer Temples’ arrest report. Defendant was later charged with negligent child abuse contrary to NMSA 1978, Section 30-6-1(D) (2009).

{10} In denying Defendant’s motion to suppress, the district court concluded that the entry was justified under either the community caretaking or emergency assistance doctrines, citing *Ryon*. The district court explained that the entry was permissible because Officer Temples based his decision to enter on “what he was told and what he heard and observed at the apartment,” which gave him “a reasonable concern that a medical emergency existed warranting immediate entry.” The district court also concluded that the safety sweep was appropriate because “[i]t was a very brief inspection and was supported by what the officer observed upon entering the residence.” Finally, the district court found that Officer Temples’ “primary motivation was not criminal investigation but to render aid or protection from harm.”

{11} Following the denial of his motion to suppress, Defendant pleaded no contest to the lesser offense of attempt to commit negligent child abuse, a fourth-degree felony in violation of Section 30-6-1(D). He entered a conditional plea, reserving his right to appeal the denial of the suppression motion.

{12} The Court of Appeals reversed the district court’s denial of the motion to suppress. *State v. Yazzie*, No. 34,537, mem. op. ¶ 2 (N.M. Ct. App. May 11, 2017) (non-precedential). The State petitioned for certiorari to review the issue of whether Officer Temples’ entry and subsequent inspection were lawful under the emergency assistance doctrine. See N.M. Const. art. VI, § 2; NMSA 1978, § 34-5-14(B) (1972); Rule 12-502 NMRA. We granted certiorari and reverse.

III. STANDARD OF REVIEW

{13} “Appellate review of a motion to suppress presents a mixed question of law and fact. First, we look for substantial evidence to support the [district] court’s factual finding, with deference to the district court’s review of the testimony and other evidence presented.” *Martinez*, 2018-NMSC-007, ¶ 8 (alteration in original) (internal quotation marks and citations omitted). “Substantial evidence is relevant evidence that a reasonable mind would accept as adequate to support a conclusion.” *In re Anhayla H.*, 2018-NMSC-033, ¶ 36, 421 P.3d 814 (quoting *State ex rel. Children, Youth & Families Dep’t v. Patricia H.*, 2002-

NMCA-061, ¶ 22, 132 N.M. 299, 47 P.3d 859). Contested facts are reviewed “in a manner most favorable to the prevailing party.” *State v. Rowell*, 2008-NMSC-041, ¶ 8, 144 N.M. 371, 188 P.3d 95. “We then review the application of the law to those facts, making a de novo determination of the constitutional reasonableness of the search or seizure.” *Martinez*, 2018-NMSC-007, ¶ 8 (internal quotation marks and citation omitted). “Although our inquiry is necessarily fact-based it compels a careful balancing of constitutional values, which extends beyond fact-finding, to shape the parameters of police conduct by placing the constitutional requirement of reasonableness in factual context.” *Ryon*, 2005-NMSC-005, ¶ 11 (omission omitted) (internal quotation marks and citation omitted).

{14} After the Court of Appeals decided *Yazzie*, we reaffirmed in *Martinez* that appellate courts must afford a high degree of deference to the district court’s factual findings if supported by substantial evidence. 2018-NMSC-007, ¶¶ 3, 15. In particular, an appellate court must presume that the district court credited an officer’s testimony, even if that testimony is not perfectly aligned with video evidence. See *id.* When video evidence conflicts with other evidence, an appellate court must defer to the district court’s factual findings if supported by evidence in the record. See *id.* ¶ 17. We accord such deference here.

IV. DISCUSSION

{15} This case centers on the reasonableness of Officer Temples’ warrantless entry and search of Defendant’s apartment under the emergency assistance doctrine. The emergency assistance doctrine is an exception to the warrant requirement of the Fourth Amendment. See *Brigham City*, 547 U.S. at 403. It permits law enforcement officers to “enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” *Id.* The emergency assistance doctrine arises from a police officer’s duty as community caretaker to assist those “who are seriously injured or threatened with such injury.” *Id.* This duty is “totally divorced” from law enforcement’s separate goal of gathering evidence and investigating crime. See *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

{16} The “ultimate touchstone” of any Fourth Amendment search and seizure analysis is “reasonableness.” *Brigham City*, 547 U.S. at 403 (internal quotation marks and citations omitted). In assessing

reasonableness, courts must balance the public interest and an individual's right to be free from police interference upon personal liberty. *See State v. Williams*, 2011-NMSC-026, ¶ 10, 149 N.M. 729, 255 P.3d 307. Such balancing requires a close examination of the facts. Defendant challenges the constitutionality of Officer Temples' search under both the Fourth Amendment and Article II, Section 10. We first determine whether the entry and search were reasonable under the Fourth Amendment. If we conclude that Officer Temples' conduct was reasonable under the Fourth Amendment, we then apply our interstitial approach to examine the reasonableness of his actions under Article II, Section 10. *See State v. Gomez*, 1997-NMSC-006, ¶¶ 19-21, 122 N.M. 777, 932 P.2d 1 (adopting the interstitial approach for determining whether a parallel provision of the New Mexico Constitution provides greater protection than its federal counterpart).

A. Reasonableness of the Entry and Search Under the Fourth Amendment

{17} The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. This protection is only conferred when individuals have a reasonable expectation of privacy in the place to be searched or the thing to be seized. *See Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). The parties do not dispute that Defendant had a reasonable expectation of privacy in his home. We agree. *See Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (internal quotation marks and citation omitted)).

{18} As an individual's privacy interests are strongest in the home, warrantless searches of a home are "presumptively unreasonable." *See Brigham City*, 547 U.S. at 403 (internal quotation marks and citation omitted). That presumption can be overcome in certain exigent circumstances where an officer's warrantless entry is justified by a compelling need of law enforcement. *See id.* Acting to provide emergency assistance to "protect or preserve life or avoid serious injury" is such a justification which serves the public interest and

tips the constitutional balance in favor of obviating the warrant requirement. *See id.* (internal quotation marks and citations omitted).

{19} In *Ryon*, this Court adopted a widely-used analysis of the emergency assistance doctrine under the Fourth Amendment. *See* 2005-NMSC-005, ¶¶ 26, 29 ("The emergency assistance doctrine, which may justify more intrusive searches of the home or person, must be assessed separately by a distinct test."). At the time, the United States Supreme Court had acknowledged that a warrantless entry into a home may be justified by the need to render emergency aid, but the United States Supreme Court had not yet articulated the appropriate reasonableness analysis under the emergency assistance doctrine. In *Mincey v. Arizona*, the United States Supreme Court observed that "the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. . . . But a warrantless search must be strictly circumscribed by the exigencies which justify its initiation[.]" 437 U.S. 385, 392-93 (1978) (internal quotation marks and citation omitted).

{20} The *Ryon* Court noted that, following *Mincey*, some courts had adopted a "purely objective test" to assess an entry under the emergency assistance doctrine, but the majority of courts had adopted the test first articulated in *People v. Mitchell*, 39 N.Y.2d 173, 347 N.E.2d 607 (1976) (abrogated by *Brigham City*, 547 U.S. 398). *Ryon*, 2005-NMSC-005, ¶ 29. In addition to assessing whether an officer reasonably believed that entry was necessary to respond to an imminent emergency and gauging whether the search was limited in scope to the emergency which justified the entry, the *Mitchell* test also inquired into an officer's *subjective* beliefs and motivations for the warrantless entry:

First, "the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property." Second, "*the search must not be primarily motivated by intent to arrest or seize evidence.*" Third, "there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched."

Ryon, 2005-NMSC-005, ¶ 29 (alterations and citations omitted) (emphasis added).

{21} This Court recognized that a subjective inquiry is unusual in the Fourth Amendment context but nonetheless adopted the *Mitchell* test in full. *See Ryon*, 2005-NMSC-005, ¶ 33 ("The second part of the three-part *Mitchell* test is more controversial. Federal and state courts, including New Mexico, usually do not consider the subjective intent of an officer in a search and seizure analysis."). In doing so, this Court reasoned that questioning the officer's subjective intent was critical to limiting the application of the emergency assistance doctrine, which could otherwise give law enforcement an easy way around the warrant requirement. *See id.* ¶ 34 ("A subjective test addresses the chief concern raised by a warrantless search purportedly justified by the community caretaker exception or emergency assistance doctrine: the possibility that the police will use the doctrine as a subterfuge or pretext when the real purpose of the search is to arrest a suspect or gather evidence without probable cause."). Mindful that the need to render emergency assistance may arise in the course of a criminal investigation, we clarified that "[a]lthough the police need not be totally unconcerned with the apprehension of suspects or the collection of evidence, the motivation for the intrusion must be a strong sense of emergency[.]" *Id.* ¶ 39.

{22} The year after the *Ryon* decision, the United States Supreme Court ruled in *Brigham City* that an officer's subjective motivation was irrelevant in assessing the reasonableness of an entry under the emergency assistance doctrine. 547 U.S. at 404 ("An action is reasonable . . . , regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively*, justify [the] action." (alteration in original) (internal quotation marks and citation omitted)). Despite that clear direction from the Supreme Court, New Mexico courts continued to use the *Ryon* test in Fourth Amendment cases. Notably, the decisions in cases decided on appeal rested solely on the first prong of the test. *See, e.g., State v. Cordova*, 2016-NMCA-019, ¶¶ 8 n.1, 13, 366 P.3d 270 (concluding that the officers did not have "reasonable grounds to believe" that the defendant was injured, stating that the subjective prong of the *Ryon/Mitchell* test was "immaterial" to the analysis, and noting that the subjective prong was eliminated by the Supreme Court in *Brigham City*); *State v. Trudelle*, 2007-NMCA-066, ¶ 37, 142 N.M. 18, 162 P.3d 173 (stating that

the officers could not “show reasonable grounds to believe there was an emergency requiring immediate assistance for the protection of life or property”); *State v. Baca*, 2007-NMCA-016, ¶ 27, 141 N.M. 65, 150 P.3d 1015 (concluding that the officer lacked “specific and articulable facts” to reasonably conclude there was an emergency at hand and a need for assistance).

{23} We are constrained by the Supreme Court’s precedent in *Brigham City* and therefore eliminate the separate inquiry under *Ryon* into the officer’s subjective intent for the entry and search under the Fourth Amendment. Accordingly, a warrantless entry and search of a home is permitted under the emergency assistance doctrine if the state establishes just two elements. First, “[p]olice must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property[.]” *Ryon*, 2005-NMSC-005, ¶ 39. Second, “there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.” *Id.* This two-part test controls whether Officer Temples’ entry and subsequent search of Defendant’s home was lawful under the emergency assistance doctrine of the Fourth Amendment.

1. Objective reasonableness of the entry

{24} In applying the first step of this analysis, we consider whether the district court’s factual findings were supported by substantial evidence and whether those findings support a conclusion that Officer Temples’ entry was objectively reasonable. An objective review requires us to assess the totality of the circumstances to determine whether a “prudent and reasonable official [would] see a need to act to protect life or property[.]” *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963); see also *Ryon*, 2005-NMSC-005, ¶¶ 30-31 (explaining that “reasonableness is tested objectively under the totality of the circumstances”).

{25} Law enforcement must have “credible and specific information” that a victim is in need of emergency aid before a warrantless entry may be justified under the emergency assistance doctrine. See *Ryon*, 2005-NMSC-005, ¶¶ 42-43. In *Ryon*, officers responded to a “‘911 call welfare check’” about a “‘possible stabbing victim.’” *Id.* ¶ 2. When they arrived at the scene, they learned from the bleeding victim that the perpetrator lived down the street. *Id.*

A dispatch went out to locate the suspect who was thought to be on his way to his residence. *Id.* ¶ 4. As additional officers were en route to the suspect’s home, the dispatcher told them that the suspect might be injured. *Id.* Upon their arrival at the house, the officers noticed that the lights were on and the front door was slightly ajar. *Id.* The officers did not receive a response when they knocked and announced their presence. *Id.* Relying on information that the suspect may be injured and finding it odd that the door would be open in the cold weather, the officers entered the home. *Id.* Inside they observed a bloodied knife in the kitchen sink, the knowledge of which they used to obtain a search warrant for the home. *Id.* ¶ 5.

{26} To aid in its determination of whether the officers’ entry was objectively reasonable, this Court weighed “the purpose and nature of the dispatch, the exigency of the situation based on the known facts, and the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.” *Id.* ¶¶ 32, 43-44 (internal quotation marks and citation omitted). The Court concluded that the known facts—the knowledge that the suspect *may* be injured, the state of the house, and the lack of response at the door—did not point to an imminent emergency and that the officers did not do enough to corroborate the information they were given before entering without a warrant. *Id.* ¶¶ 43-45. The Court noted that the officers did not even know whether the suspect was home, let alone whether he was actually injured. *Id.* ¶ 43.

{27} The State argues that this case is distinguishable from *Ryon* and that Officer Temples’ entry was objectively reasonable as the information available to him caused him to reasonably believe entry was necessary to protect Defendant’s children and give aid to their mother. The State notes that Officer Temples’ reasonable perception of the emergency came into focus with each new fact he learned while standing outside the apartment. At first, Officer Temples knew he was responding to a welfare check based on the neighbor’s report of a loud thumping sound coming from Defendant’s apartment. When Officer Temples arrived at the apartment, the thumping sound had been replaced with the sounds of a small child hollering in an attempt to rouse his or her mother and a baby fussing and then crying continuously. In addition, Officer Temples noticed

the doorknob rattling several times as though someone were attempting to open the door. Crucially, he did not hear the children’s mother—or any adult—moving within the apartment, even though the child was yelling for his or her mother to wake up. The State asserts that each of these observations compounded upon the next to form a sufficient reasonable basis for Officer Temples to conclude that the nonresponsive mother required medical attention and that, due to her condition, the children were left alone in a dangerous situation.

{28} Defendant argues that the facts available to Officer Temples were not enough to support a reasonable belief that a sufficiently compelling emergency existed within the apartment. Defendant focuses primarily on facts that were not present when Officer Temples knocked on the door—facts that would more clearly indicate an emergency. For example, there were no loud noises coming from the apartment when Officer Temples arrived and no sounds to indicate violent behavior inside. Additionally, there were no concerned neighbors gathered outside, no damage to the windows or building to indicate an altercation, and no signs of spilled blood. Furthermore, the children were not wandering alone outside to suggest that they were left unattended. *Contra United States v. Taylor*, 624 F.3d 626, 628 (4th Cir. 2010) (holding that an officer was justified in following a young girl into her home after finding her wandering alone on a busy street). Finally, Defendant argues that the sounds of the children were unremarkable for the time of day when Officer Temples knocked. The small child’s calls to the mother were not extraordinarily loud or severe, and the baby’s crying was likely tied to Officer Temples’ continued knocking. Defendant thus asserts that the known facts were insufficient to support an objectively reasonable belief that a serious emergency was underway. Instead, Defendant argues that Officer Temples was acting on mere conjecture that his assistance was required within the apartment.

{29} We are not convinced by Defendant’s argument that Officer Temples lacked key information to conclude that the children and their mother were in need of immediate aid. Viewing the facts in the light most favorable to the State and drawing all reasonable inferences in support of the district court’s decision, there is substantial evidence to support the district court’s factual findings in this case. In particular,

Officer Temples' first-hand knowledge about the presence of small children—who apparently were unsupervised and unable to rouse their parents—supports the objective reasonableness of his conclusion that he needed to take action to “[protect] life or property.” See *Ryon*, 2005-NMSC-005, ¶ 39.

{30} In reaching this conclusion, we are persuaded by the reasoning in *Taylor*. 624 F.3d at 632, 635. The court in *Taylor* concluded that an officer's actions were objectively reasonable when he accompanied a four-year-old girl into her house after she was found wandering alone on a busy street. *Id.* at 628. Before the officer entered the home, he asked the girl whether anyone was home to care for her. *Id.* at 629. She responded that no one was home and that she had been waiting for the bus to take her to day care. *Id.* The officer yelled “hello” into the home several times as he followed the young girl inside. *Id.* The girl's father responded that he was in a back room. *Id.* When the officer and the girl entered the room, the officer saw a bag of bullets next to the bed. *Id.* The officer proceeded to investigate the father and eventually charged him as a felon in possession of a firearm, a federal offense. *Id.* at 629-30.

{31} The *Taylor* court held that the discovery of the young girl alone on a crowded street constituted an emergency which reasonably justified the officer's entry into the girl's home. *Id.* at 632. It noted that the exigency was not limited to the girl herself but also extended to her father. *Id.* (“[A] child of such tender age wandering alone outside the home raised the real possibility that her caretaker was unconscious or otherwise in need of assistance.”). Because young children are “the most vulnerable members of our society[,]” to find the officer's actions unreasonable “would not be in the interests of small children, would not be in the interests of their parents, and would not be in the interests of the community.” *Id.* at 635; see also *Hunsberger v. Wood*, 570 F.3d 546, 549, 555 (4th Cir. 2009) (holding that a reasonable officer could conclude that entering an unoccupied house was necessary to locate a missing child who may have been inside).

{32} In this case, the district court found that Officer Temples knew the children were left unattended because their mother was unresponsive for several minutes after a neighbor reported hearing a loud thumping coming from the apartment. Indeed, Officer Temples had several pieces

of specific and credible information that, when coupled with reasonable inferences based on his observations, warranted his entry to provide emergency assistance.

{33} Officer Temples' compounding observations formed a reasonable basis for him to conclude that his emergency assistance was required within the apartment. The purpose of the dispatch was to check on the welfare of those within Defendant's apartment. Based on the information from the dispatcher, Officer Temples knew that a neighbor had heard a loud thumping sound minutes before his arrival, but the apartment was silent when he got to the door. The only response he received to his repeated knocking was an infant's cries and a young child's plea to his or her mother to wake up. Unlike the officers in *Ryon*, Officer Temples knew the children were located inside the apartment. *Contra* 2005-NMSC-005, ¶ 43. Furthermore, Officer Temples could reasonably infer that the mother was also in the apartment based on the child's call to her. He then made the rational inference that the mother may be injured or unconscious as he did not hear any adult movement within the apartment in the several minutes he stood outside.

{34} Knowing that the very young children were unattended, Officer Temples had few reasonable alternatives but to open the door and check on the occupants. Entering the apartment was the only feasible way for Officer Temples to corroborate his suspicion that the mother was unconscious. *Cf. id.* (reasoning that officers could have contacted their colleagues at the crime scene, walked around the home, looked in windows, or spoken with the occupants of the other house on the property before entering suspect's home). Officer Temples was the first officer to arrive at the scene. The apartment was not on the ground floor, and it does not appear from the lapel video that there were any windows accessible to Officer Temples. It would have been reasonable for Officer Temples to speak with Defendant's neighbors, but Officer Temples' failure to do so does not necessarily mean that his entry was unreasonable. See *id.* ¶ 32 (“The fact that a different course of action would have been reasonable does not necessarily mean the officer's actions are unreasonable.”). Moreover, the downstairs neighbor had already reported to police the critical fact of the loud thumping coming from the apartment.

{35} We are persuaded by the reasoning in *Taylor* that children deserve society's utmost protection. The very young children apparently left to care for themselves in

this case also raised reasonable concerns about the welfare of their guardians. See *Taylor*, 624 F.3d at 632, 635. Our conclusion about the reasonableness of the entry in this case is based on the totality of the circumstances; no single fact in isolation is sufficient to justify Officer Temples' entry. For example, a baby crying for several minutes at night should not lead a reasonable officer to conclude that it is in emergency distress. Nor does the mere lack of response to an officer knocking at the door create a sufficient reasonable basis for an officer to enter a home out of concern that its occupants may be unable to come to the door. Based on the totality of the circumstances, Officer Temples reasonably perceived that the children were unattended and that their mother may be in need of emergency aid. We therefore conclude that Officer Temples' entry was objectively reasonable under the emergency assistance doctrine.

{36} Before we turn to the second prong of the modified *Ryon* test, we pause to correct the Court of Appeals about the standard of review that must be applied when assessing whether the district court's findings of fact are supported by sufficient evidence. The Court of Appeals improperly rested its decision on an independent review of the lapel video and did not credit Officer Temples' testimony regarding the circumstances that led to his entry. See *Yazzie*, No. 34,537, mem. op. ¶¶ 11-12. For example, the Court of Appeals stated that the sounds of the baby and the child were “intermittent and briefly heard,” *id.* ¶ 12, while Officer Temples testified that the child inside was “hollering” for the mother to wake up and that the baby was crying constantly as though left unattended. This discrepancy in the description of the volume and frequency of the children's noises demonstrates that the Court of Appeals substituted its own view of the evidence and failed to view these facts in the light most favorable to the State as the prevailing party. *Martinez*, 2018-NMSC-007, ¶ 12 (“On appeal, we must review the totality of the circumstances and must avoid reweighing individual factors in isolation. . . . In doing so, we . . . view the facts in the manner most favorable to the prevailing party.” (internal quotation marks and citations omitted)).

{37} Additionally, the Court of Appeals did not appropriately defer to the district court's factual findings. The Court of Appeals' impressions regarding the sounds of the children on the video conflicted with

Officer Temples' testimony at the hearing. When faced with conflicting evidence, the Court of Appeals should have deferred to the district court's finding that Officer Temples' entry was justified based on "what he heard . . . at the apartment." See *Martinez*, 2018-NMSC-007, ¶ 17.

2. Reasonableness of the safety sweep

{38} The second step of the emergency assistance analysis under the Fourth Amendment requires inquiry into whether Officer Temples had "some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched." See *Ryon*, 2005-NMSC-005, ¶ 39. When police officers enter a home under the emergency assistance doctrine, they are not permitted to do "more than is reasonably necessary to ascertain whether someone is in need of assistance . . . and to provide that assistance[.]" *Id.* ¶ 38 (omission in original) (internal quotation marks and citations omitted). This means that the officer must reasonably perceive "a direct relationship between the area to be searched and the emergency." *Id.* (internal quotation marks and citation omitted). A search upon entry must be limited to the "exigencies which justify[ed] its initiation." *Id.* (internal quotation marks and citation omitted). Essentially, this step asks whether the manner and scope of a search following an entry under the emergency assistance doctrine were reasonable. See *United States v. Najar*, 451 F.3d 710, 718 (2006) (explaining that this prong is primarily a question of scope).

{39} In this case, the district court concluded that Officer Temples' safety sweep was appropriate as it was a "brief inspection" supported by Officer Temples' observations upon entering the apartment. There is substantial evidence to support these findings of the district court. First, the record shows that Officer Temples directly connected Defendant's apartment with the emergency at hand. He testified that he entered the apartment to which he was dispatched—the same apartment from which he heard a baby crying and a child attempting to awaken his or her mother.

{40} Next, the evidence shows that the manner and scope of the search were reasonable. The lapel video shows that Officer Temples spent approximately thirty seconds peering into the rooms adjoining the main room. He shined his flashlight into each room, but he did not appear to fully enter the other rooms or disturb any objects within. According to Officer Temples' testimony, the empty alcohol

bottles he observed were in plain view in the kitchen.

{41} Finally, the record supports the conclusion that the sweep was limited to the exigencies that justified the initial entry. Officer Temples testified that he performed the brief safety sweep to ensure officer safety and to ascertain whether any other individuals required assistance. Finding no one in the apartment but the three children and their parents, the lapel video shows that Officer Temples returned to the main room where he remained with the children as he attempted to rouse their parents.

{42} We defer to the district court's findings which we determine to be supported by substantial evidence. Based on those findings, we conclude that Officer Temples' safety sweep was reasonable and limited in scope to the emergency at hand. Cf. *Najar*, 451 F.3d at 720 (concluding that the officers' search was confined "to only those places inside the home where an emergency would reasonably be associated"). We hold that Officer Temples' entry and subsequent search were objectively reasonable and thus permissible under the emergency assistance doctrine of the Fourth Amendment.

B. Interstitial Analysis

{43} Because we conclude in this case that Defendant's right to be free from warrantless police intrusion into his home is not protected by the Fourth Amendment, we proceed to examine his claim under Article II, Section 10. See *Gomez*, 1997-NMSC-006, ¶ 19 ("Under the interstitial approach, th[is] Court asks first whether the right being asserted is protected under the federal constitution. . . . If it is not, then the state constitution is examined").

{44} Defendant asks this Court to depart from federal analysis of the emergency assistance doctrine to find a violation of his right to be free from unreasonable search under Article II, Section 10. We have not adopted a test for the emergency assistance doctrine under our state constitution. See *Ryon*, 2005-NMSC-005, ¶ 6 n.3 (explaining that the discussion in that case was limited to a Fourth Amendment analysis). For this purpose, Defendant requests that we adopt the full, three-part *Ryon* test, including inquiry into the officer's primary, subjective motivations for the warrantless entry. To adopt this inquiry would conflict with federal guidance, however, we may diverge from federal precedent in interpreting our own constitution when we identify a flawed federal analysis,

structural differences between the state and federal governments, or distinctive state characteristics which warrant such departure. See *Gomez*, 1997-NMSC-006, ¶ 19. We consider our distinct heightened preference for warrants and historical view that Article II, Section 10 offers greater protection for individual privacy rights than the Fourth Amendment to be "adequate grounds upon which to depart from federal jurisprudence." *State v. Crane*, 2014-NMSC-026, ¶¶ 15-16, 329 P.3d 689. {45} Article II, Section 10 of the New Mexico Constitution guarantees that "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures[.]" In several instances, New Mexico courts have recognized that this provision provides broader protection of individual privacy rights than the Fourth Amendment. See *State v. Leyva*, 2011-NMSC-009, ¶ 53, 149 N.M. 435, 250 P.3d 861; *State v. Garcia*, 2009-NMSC-046, ¶ 29, 147 N.M. 134, 217 P.3d 1032; see also *Crane*, 2014-NMSC-026, ¶ 16 (holding that Article II, Section 10 offers individuals greater protection than the Fourth Amendment of the right to privacy in their garbage left for collection); *State v. Ochoa*, 2009-NMCA-002, ¶¶ 8, 38, 146 N.M. 32, 206 P.3d 143, *cert. quashed*, 147 N.M. 463, 225 P.3d 793 (holding that pretextual traffic stops violate Article II, Section 10 though such stops are permitted under the Fourth Amendment). Article II, Section 10 confers this broader protection because it "is calibrated slightly differently than the Fourth Amendment." *Levy*, 2011-NMSC-009, ¶ 53 (internal quotation marks and citation omitted). It not only protects individual privacy rights and supports "the integrity of the criminal justice system," but it also serves as the "ultimate regulator of police conduct." See *id.* (internal quotation marks and citation omitted); see also *Attaway*, 1994-NMSC-011, ¶ 22 (requiring that police knock and announce their presence when executing a search warrant).

{46} The regulatory role of Article II, Section 10 supports New Mexico's preference for warrants. See *Crane*, 2014-NMSC-026, ¶ 16 ("The underlying principle upon which the preference for warrants is predicated is that the judicial warrant . . . provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." (alteration, internal

quotation marks, and citation omitted)); see also *Garcia*, 2009-NMSC-046, ¶ 30 (explaining that New Mexico favors warrants and a reasonableness analysis over blanket federal rules). Because the emergency assistance doctrine allows officers to enter a home without a warrant, our interpretation of Article II, Section 10 as the supreme regulator of police conduct requires us to assess an officer's warrantless entry and search under a more stringent standard.

{47} Inquiry into an officer's primary motivation for entry affords individuals broader protection against baseless, warrantless intrusions into their homes. The subjective element of the *Ryon* test provides a judicial sieve through which courts may scrutinize warrantless police action and properly exclude evidence obtained under the guise of emergency response. See *Ryon*, 2005-NMSC-005, ¶ 37 ("[W]e permit the trial court to examine motivation because, in the absence of a warrant, a neutral magistrate has not provided a preliminary review."). As this analysis offers greater protection for individual privacy rights and serves to regulate warrantless police conduct, we consider the full *Ryon* test integral to the rights afforded under Article II, Section 10.

{48} Accordingly, we adopt the complete *Ryon* test to determine under Article II, Section 10 when the emergency assistance doctrine may apply to a warrantless entry and search of a home. For the doctrine to apply: (1) "[p]olice must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property;" (2) "the search must not be primarily motivated by an intent to arrest a suspect or to seize evidence[, and] . . . the motivation for the intrusion must be a strong sense of an emergency;" and (3) "there must be some reasonable basis, ap-

proximating probable cause, to associate the emergency with the area or place to be searched." *Ryon*, 2005-NMSC-005, ¶ 39.

{49} The first and third prongs of the *Ryon* test contemplate the same analysis conducted under the Fourth Amendment; we therefore come to the same conclusions reached above. Under Article II, Section 10, Officer Temples had objectively reasonable grounds to believe there was an emergency that required his immediate assistance to protect Defendant's children and their mother. Additionally, there was a reasonable basis for Officer Temples to associate the emergency with the apartment he ultimately entered and searched. {50} Under the second prong, there is substantial evidence to support the district court's conclusion that Officer Temples' primary motivation for entry was to render aid and protection from harm. Indeed, Officer Temples testified that he was worried about the mother's medical condition when she failed to respond to her child's plea to wake up. He further testified that her lack of response led him to believe that the children had been left unattended. The Court of Appeals did not analyze Officer Temples' primary motivation for entry, but it agreed with the district court that he appeared "genuinely concerned about the welfare of the children." *Yazzie*, No. 34,537, mem. op. ¶ 13.

{51} Defendant asks us to infer that Officer Temples' primary motive was not to render aid and protection but rather to investigate a suspected crime within the apartment. To support this inference, Defendant points to the facts that Officer Temples requested a unit with a PBT and did not call medical responders after entering the residence. The district court concluded that Officer Temples' "primary motivation was not criminal investigation." We will defer to the district court's

decision as it is supported by substantial evidence. The facts relied upon by Defendant urging a contrary conclusion are not sufficient to overcome the standard of review in this case. See *Martinez*, 2018-NMSC-007, ¶ 15 ("An appellate court must indulge in all reasonable inferences in support of the district court's decision and disregard all inferences or evidence to the contrary." (alteration, internal quotation marks and citation omitted)). In sum, Officer Temples' entry and search were reasonable under Article II, Section 10.

V. CONCLUSION

{52} For the foregoing reasons, we reverse the decision of the Court of Appeals. The district court properly denied Defendant's motion to suppress. Because it reversed the district court's denial of the motion to suppress, the Court of Appeals did not reach Defendant's remaining arguments. We remand this case for a determination of any issues remaining on appeal.

{53} **IT IS SO ORDERED.**

BARBARA J. VIGIL, Justice

WE CONCUR:

JUDITH K. NAKAMURA, Chief Justice

**PETRA JIMENEZ MAES, Justice,
Retired**

Sitting by designation

CHARLES W. DANIELS, Justice, Retired

Sitting by designation

GARY L. CLINGMAN, Justice, Retired

Sitting by designation

Certiorari Denied, November 7, 2018, No. S-1-SC-37315

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-003

No. A-1-CA-36241 (filed September 26, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ANTHONY L.,
Child-Appellant.

APPEAL FROM THE DISTRICT OF BERNALILLO COUNTY

William E. Parnall, District Judge

HECTOR H. BALDERAS,
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MAHA KHOURY,
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for Appellee

BENNETT J. BAUR,
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for Appellant

Opinion

M. Monica Zamora, Judge

{1} Child appeals the district court's order granting the State's motion for extension to commence Child's adjudication and his commission of the delinquent act of driving without a valid driver's license. Child contends that: (1) the district court erred by extending the time to commence Child's adjudication; and (2) there was insufficient evidence to support the jury's verdict that he committed the delinquent act of driving without a valid driver's license. We affirm.

BACKGROUND

{2} On September 6, 2016, a delinquency petition was filed alleging that on September 3, 2016, Child had committed the delinquent acts of: (1) leaving the scene of an accident (property damage), contrary to NMSA 1978, Section 66-7-202 (1978); (2) driving without a valid driver's license, contrary to NMSA 1978, Section 66-5-2 (2013); and (3) tampering with evidence (third or fourth degree felony), contrary to NMSA 1978, Section 30-22-5 (2003).

Child was arrested and held in detention until September 7, 2016, when he was conditionally released to New Day Shelter. Child was arrested on October 7, 2016, for violating his conditions of release and held in detention. On October 12, 2016, a notice was issued setting a pretrial conference for October 31, 2016.

{3} On the day of the pretrial conference, the State filed a motion to extend the time limit for the adjudicatory hearing in which it noted that: the matter had been set for an adjudicatory hearing on October 31, 2016; the time limit to commence the adjudicatory hearing was November 7, 2016; and a continuance was necessary in anticipation of a pending community service agency (CSA) assessment and identification of a possible out-of-home placement for Child. At the hearing, Child's attorney opposed the motion, although the district court had stated at the last hearing it would grant an extension and set the adjudication for December. The State noted that the motion was opposed, but left the certification date for providing opposing counsel with a copy of the motion blank. Also on the same date, the district court's order of continuance of the pretrial conference was

filed and reset for November 21, 2016. Opposition to the motion by Child's attorney was noted on that order. The district court order granted the State's motion for extension extending the date to commence the adjudication to December 13, 2016, and a notice of jury trial was issued.

{4} On November 3, 2016, a hearing was held before a special master to address conditions of release and placement options for Child. Child's counsel informed the special master that Open Skies, a CSA, had assessed Child on October 26, 2016, and Amistad Shelter had informed her the day before that they had an opening. Child's counsel also suggested that Child did not need to stay in detention waiting for the Open Skies assessment; however, the Child remained in detention.

{5} On November 21, 2016, Child was conditionally released to Amistad Shelter. On November 23, 2016, Child filed an objection to the extension and request for reconsideration, reversal and dismissal. At a hearing on December 12, 2016, the district court stated that the good cause for extending the time line was because of the district court's busy docket.

{6} After a jury trial, Child was found to have committed the delinquent acts of leaving the scene of an accident and driving without a valid driver's license. A mistrial was declared on the delinquent act of tampering with evidence. The judgment and disposition, for an extended consent decree, was filed on January 23, 2017. Child was placed on probation, under an extended consent decree, for a period not to exceed one year, or through January 22, 2018.¹

District Court Did Not Abuse Its Discretion in Granting an Extension to Commence Child's Adjudication.

{7} The granting of a continuance rests within the sound discretion of the district court. *In re Doe*, 1975-NMCA-108, ¶ 8, 88 N.M. 347, 540 P.2d 827. The standard of review for a motion to continue is abuse of discretion. *Id.* An abuse of discretion occurs when the ruling is "clearly untenable or not justified by reason." *State v. Candelaria*, 2008-NMCA-120, ¶ 12, 144 N.M. 797, 192 P.3d 792 (internal quotation marks and citation omitted). There is no abuse of discretion when there are reasons that both support and detract from a trial court's decision. *State v. Moreland*, 2008-

In the meantime, Child violated his probation agreement and has since entered into another probation agreement for a period of up to one year, which will expire on April 29, 2019.

NMSC-031, ¶ 9, 144 N.M. 192, 185 P.3d 363. Our review looks at the evidence and its inference in the light most favorable to the district court's decision. *Candelaria*, 2008-NMCA-120, ¶ 12.

{8} Appellate courts review interpretations of our Supreme Court rules de novo, *State v. Stephen F.*, 2006-NMSC-030, ¶ 7, 140 N.M. 24, 139 P.3d 184, as well as “the district court’s application of the law to the facts of [the] case.” *State v. Foster*, 2003-NMCA-099, ¶ 6, 134 N.M. 224, 75 P.3d 824. Appellate courts apply the same rules of construction to procedural rules adopted by our Supreme Court as it does to statutes. *Walker v. Walton*, 2003-NMSC-014, ¶ 8, 133 N.M. 766, 70 P.3d 756. We therefore “look first to the plain meaning of the rule” and “refrain from further interpretation when the language is clear and unambiguous.” *State v. Gutierrez*, 2006-NMCA-090, ¶ 7, 140 N.M. 157, 140 P.3d 1106 (alteration, internal quotation marks, and citation omitted). Neither party argues that Rule 10-243 NMRA is ambiguous in the context of the timeliness of the commencement of Child’s adjudication, we therefore apply its plain meaning.

{9} Child argues there was no good cause to extend the adjudicatory time limits, where the State did not explain why it could not try Child within the requisite thirty days. Rather, the State relied on the Child’s placement in detention as a basis for the extension request by depending on an outstanding CSA assessment in anticipation of identifying an out-of-home placement for Child in order to be conditionally released from detention. The State contends that because Child’s parents did not want him in their home, Child’s placement fell to the district court, therefore there was good cause to extend the time limits in order to determine an appropriate placement for Child, based on the CSA’s assessment and recommendations.

{10} The Children’s Code explicitly mandates that Rule 10-243 governs the time limits for the commencement of an adjudicatory hearing. See NMSA, § 32A-2-15 (1993) (“The adjudicatory hearing in a delinquency proceeding shall be held in accordance with the time limits set forth in the Children’s Court Rules[.]”). Rule 10-243 sets forth the time limits for the commencement of an adjudicatory hearing for both children in detention and those children not in detention.

Rule 10-243(A) states, in pertinent part:

A. If the child is in detention, the adjudicatory hearing shall be commenced within thirty (30) days from whichever of the following events occurs latest:

(1) the date the petition is served on the child;

(2) the date the child is placed in detention[.]

B. If the child is not in detention, or has been released from detention prior to the expiration of the time limits set forth in this rule for a child in detention, the adjudicatory hearing shall be commenced within one-hundred twenty (120) days from . . . :

(1) the date the petition is served on the child[.]

For purposes of calculating the time limits for a child in detention, Child and the State are both relying on the date Child was placed in detention, the second time, October 7, 2016. Thus, the time limit for the commencement of the adjudicatory hearing was November 7, 2016.

{11} Rule 10-243(D) states: “*For good cause shown*, the time for commencement of an adjudicatory hearing may be extended by the [district] court, provided that the aggregate of all extensions granted by the [district] court shall not exceed ninety . . . days[.]” (Emphasis added.) The procedure for extensions of time is set out in Rule 10-243(E):

The party seeking an extension of time shall file . . . a motion for extension concisely stating the facts that support an extension of time to commence the adjudicatory hearing. The motion shall be filed within the applicable time limit prescribed by this rule[.] A party seeking an extension of time shall forthwith serve a copy thereof on opposing counsel. Within five . . . days after service of the motion, opposing counsel may file an objection to the extension setting forth the reasons for such objection. . . . If the [district] court grants an extension beyond the applicable time limit, it shall set the date upon which the adjudicatory hearing must commence.

{12} Two purposes of the Children’s Code, NMSA 1978, §§ 32A-1-1 to -25-5 (1993, as amended through 2018), are pertinent to this case: (1) “to provide for the care, protection and wholesome mental

and physical development of children . . . [and a] child’s health and safety shall be the paramount concern[.]”; and, (2) “to provide judicial and other procedures through which the provisions of the Children’s Code are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced[.]” Section 32A-1-3(A), (B). One of the purposes of the Delinquency Act, Sections 32A-2-1 to -33, contained within the Children’s Code, is to “encourage efficient processing of cases[.]” § 32A-2-2(G).

{13} This Court has also recognized a constitutional policy reason for the shorter time limits where a child is in detention—the shorter time limit for a juvenile in detention protects the child’s liberty interest. *State v. Anthony M.*, 1998-NMCA-065, ¶ 9, 125 N.M. 149, 958 P.2d 107. The policy behind this protection is because the state has yet to prove the allegations against the child. *Id.*; see *In re Dominick Q.*, 1992-NMCA-002, ¶ 8, 113 N.M. 353, 826 P.2d 574 (noting that required expedited proceedings for a child in detention “demonstrate[s] a concern by the rulemakers that a child should not be held in detention for a prolonged period at the pre-adjudicatory . . . stage[.] of the proceedings”). If the adjudicatory hearing is not timely, Rule 10-243(F)(2) mandates the dismissal of the case, with prejudice, where the adjudication has not commenced within the requisite time limits.

{14} This case involves a very delicate balancing act in adhering to the purposes behind the Children’s Code and recognizing Child’s right to a timely adjudication. On one hand, it was Child’s unsuccessful discharge from New Day Shelter that resulted in the need for Child’s second detention, resulting in a shorter time limit in which to begin the adjudication. The unsuccessful discharge created an out-of-detention placement problem. It was not until the day of the pre-trial conference, or seven days before the expiration of the time limit that the State requested an extension. The State noted on its motion that the extension was necessary because “[C]hild is held in detention pending CSA assessment and possible placement out of home.” The district court’s order of continuance for the pretrial conference identified the CSA assessment and possible pending placement as grounds for the continuance. The order extending the time limit did not identify any grounds for the extension much less any good cause basis, but it did identify the trial date of December 13, 2016.

So although Child was in detention and time was running, there was still work being done to find him a placement and get him out of detention. Eventually, Child was released to Amistad Shelter on November 21, 2016. As a result, the new time limit to commence his adjudication was one hundred twenty days from September 6, 2016 (the date the delinquency petition was filed), or January 4, 2017. *See* Rule 10-243(B)(1). Two days after Child was released to Amistad Shelter, on November 23, 2016, Child's attorney filed an objection to the State's October 31, 2016 motion for extension.

{15} Child also argues that the district court's crowded docket was not good cause to grant the time limit extension. The State argues that the district court judge's verbal comments during the October 31, 2016 hearing, cannot supersede the formal written order and therefore cannot be the basis for a reversal. During the pretrial conference and again during the December 12, 2016 hearing, the district court noted that the trial date was the earliest available date on its docket. We agree that a court's busy docket cannot take precedence over a child's liberty interests. *See Anthony M.*, 1998-NMCA-065, ¶ 9 (noting shorter time limits for a juvenile in detention protects the child's liberty interest); *In Re Doe*, 1975-NMCA-108, ¶ 11 (stating that the Children's Code intended that there be prompt adjudication of juvenile delinquency cases); *see also State v. Doe*, 1977-NMCA-065, ¶¶ 9-11, 90 N.M. 568,

566 P.2d 117 (holding that a continuance of sixteen days was properly granted for good cause where the district court was in the middle of a jury trial and did not expect to finish in time for the hearing).

{16} Because there was good cause in the record, although not memorialized in the district court's order granting the extension of time limits, we hold that the district court did not abuse its discretion in granting the State's motion for extension of time in which to commence Child's adjudication.

There is Insufficient Evidence to Support Child's Commission of the Delinquent Act of Driving a Motor Vehicle without a Valid Driver's License

{17} Child was charged with driving without having a valid driver's license under Section 66-5-2. Child argues that there is insufficient evidence to prove that he was driving without a valid driver's license on September 3, 2016. Child contends that the State did not prove that he did not hold a valid driver's license at the time; instead, they proved that he did not have a driver's license in his possession at the time. The State agrees. While we are not bound to accept the State's concession, *see State v. Tapia*, 2015-NMCA-048, ¶ 31, 347 P.3d 738 (stating that appellate courts are not bound by the state's concession), we agree that the jury's verdict finding that Child committed the delinquent act of driving without a valid driver's license should be reversed.

{18} The testimony at trial established that Child did not have a license in his possession on September 3, 2016. It is NMSA 1978, Section 66-5-16 (1985, amended 2018) that requires that a licensee have a driver's license in their immediate possession. The jury instruction was also misleading, as it required the jury to find, in part, that Child was not in possession of a valid driver's license, in order to find that he committed the delinquent act of driving a motor vehicle without a valid driver's license. We conclude that there was insufficient evidence to support the jury's verdict finding that Child committed the delinquent act of driving a motor vehicle without a valid driver's license.

CONCLUSION

{19} For the foregoing reasons, we affirm Child's commission of the delinquent act of leaving the scene of an accident, and reverse Child's commission of the delinquent act of driving a motor vehicle without a valid driver's license.

{20} **IT IS SO ORDERED.**

M. MONICA ZAMORA, Judge

WE CONCUR:

STEPHEN G. FRENCH, Judge

HENRY M. BOHNOFF, Judge

Certiorari Granted, December 3, 2018, No. S-1-SC-37343

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-004

No. A-1-CA-35261 (filed September 26, 2018)

CITY OF ALBUQUERQUE
A municipal corporation,
Petitioner-Appellee,
v.
SMP PROPERTIES, LLC. and
R. MICHAEL PACK,
Respondents-Appellants,
and
MODERN WOODMEN OF AMERICA;
SAIA MOTOR FREIGHT LINE, LLC;
UNITED PARCEL SERVICE, INC.;
COUNTY OF BERNALILLO;
TAXATION AND REVENUE
DEPARTMENT FOR THE STATE OF
NEW MEXICO AND ANY AND ALL
UNKNOWN CLAIMANTS FOR
THE PROPERTY INVOLVED,
Respondents.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Nancy J. Franchini, District Judge

ESTEBAN A. AGUILAR,
City Attorney
KEVIN A. MORROW,
Assistant City Attorney
WILLIAM W. ZARR,
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for Appellants

Opinion

Michael E. Vigil, Judge

{1} This is a condemnation case brought by the City of Albuquerque (City) to acquire a thirty-foot wide strip of land to build a road on property operated as a freight truck terminal by tenants. The issues are (1) whether lease payments from a tenant may be considered in computing just compensation when the City's precondemnation actions caused the tenant not to renew its lease with

the property owner and the lease term had ended when the condemnation action was filed; and (2) whether those same actions by the City may give rise to a claim for inverse condemnation and damages. The district court granted the City summary judgment on both questions, and the property owner appeals. After first determining that the property owner has a right to appeal, we conclude that the rulings of the district court were in error and reverse.

BACKGROUND

I. The Hawkins Property and The City's Precondemnation Actions

{2} We refer to the property in question as the Hawkins Property, which is owned by SMP Properties, LLC (SMP) and Michael Pack, the owner and manager of SMP (collectively, Defendants). The undisputed facts are as follows. The Hawkins Property houses a sixty-five-door freight truck terminal on approximately 9.859 acres of land at 3700 Hawkins Street, in Albuquerque, New Mexico. At the pertinent time, SMP leased twenty-nine doors to SAIA Motor Freight Line, LLC (SAIA), a motor trucking company, and thirty-six doors to UPS. SAIA's lease was for a three-year term beginning on March 1, 2003. The lease contained two three-year options to renew, and SAIA exercised both options. Each time the lease was renewed, Thomas Davis, the property manager for SAIA, and Pack first discussed and agreed on any changes they wanted, such as the lease amount. Davis would then draft a letter incorporating the agreed upon changes, and after the letter was reviewed by SAIA's attorneys, it was sent to Pack, who signed the letter on behalf of SMP and faxed it back to Davis. Each letter was considered an addendum to the original lease. The lease with the options ended on February 28, 2012.

{3} Davis testified that because bulk fuel is cheaper than purchased fuel, SAIA embarked on a project to install fuel tanks in a number of its terminals, including its terminal on Hawkins Property. Sometime in mid-2009, he asked Pack if SAIA could install a fuel tank on the facility, and Pack agreed. After securing Pack's permission, Davis started the installation, which was completed in August 2010—during the last lease renewal period and at a cost of \$180,000. SAIA installed two above-ground, 6,000-gallon tanks connected by a transfer pump.

{4} SAIA was willing to spend the \$180,000 in the last lease term because SAIA had every intention of staying on the property. At the time SAIA sought permission from Pack to install the tanks, Pack was aware that SAIA was going to stay for another three years with two additional three-year options. Further, SAIA's policy was not to install a tank at a location where it did not have the ability or intention of staying less than eight years, and SAIA never violated that policy.

{5} In early December 2011, Davis and Pack agreed to renew the lease for another three-year term. Mr. Pack asked Mr. Davis about sending him a letter as he had in the past to memorialize the new lease, and Mr. Davis replied that there was no problem

and that he was having SAIA's attorney review the letter before signing it and sending it as he had in the past. However, the lease extension was never sent. Instead, SAIA, suddenly and without notice, sent SMP a letter on March 30, 2012, terminating its lease and immediately started looking for a new location to operate.

{6} The reason for SAIA's sudden departure was that one day a man from City planning or zoning showed up at the office of SAIA's terminal manager, Kevin Russell, and said the City was going to cut a road through part of the Hawkins Property. Jeffrey Willis, the City's right of way coordinator, said that although he knew who the owner of the property was, he decided not to contact the owner. Instead, he went to the Hawkins Property and informed the tenant about the City's condemnation plan. Russell said the man from the City showed him where the road was going to be cut, and the road was going to go through the property right where SAIA's fuel tanks were located. Moreover, according to Russell, the location of the road prohibited SAIA from operating out of four doors that it needed at the north end of the terminal because the trucks would not have enough room to turn into the doors. Russell called Davis, and told him what the City was doing.

{7} Davis said that Russell was very agitated when he learned of the City's planned condemnation. Davis immediately called Pack who said he was not aware of any condemnation by the City, and this was the first he had heard anything of the sort. The thirty-foot strip to be condemned went right through the middle of the fuel tanks, which required their removal at a cost of \$50,000 to \$60,000. This made SAIA's operation on the Hawkins Property untenable, solidifying SAIA's decision to leave. SAIA remained at the Hawkins Property on a month-to-month basis until it found a new site and vacated the premises on April 30, 2012—two months after the lease expired.

II. The Hawkins Property Condemnation Litigation

{8} The City filed its complaint for condemnation on July 10, 2013, to acquire the thirty-foot strip of land and a construction easement along the northern boundary line of the Hawkins Property to construct a road, together with a jury demand. After the City deposited \$143,850 with the clerk of the district court, which it asserted was just compensation for the taking, the City was granted "full possession and occupancy and

the right to . . . work on the property[.]" with the district court further ruling that "the only remaining issue is the just compensation due to Defendants." Defendants' answer denied that \$143,850 was just compensation, and affirmatively asserted, in part, that the City's condemnation actions proximately caused SAIA not to renew its lease with SMP, resulting in an inverse condemnation and consequential damages in a sum to be proven at trial.

{9} The City filed a motion for summary judgment on two grounds. First, that Defendants' expectation that the SAIA lease would be renewed did not constitute a compensable property right. Associated with this motion, the City also filed two motions in limine: (1) to prohibit Defendants' expert, Brian Godfrey, from including the value of the SAIA lease in his calculation of Defendants' damage claim; and (2) to prohibit Pack as the principal of SMP from testifying on the value of the SAIA lease as an element of damages or the economic loss to the freight truck terminal building, which resulted from losing the SAIA lease. Second, the City contended that its precondemnation actions did not substantially interfere with SMP's use of the Hawkins Property and, therefore, there was no inverse condemnation. The district court granted the City's motions.

{10} The order granting the City's motion for summary judgment was subsequently amended to add that SMP conceded "for purposes of summary judgment only," pursuant to a concurrently filed judgment, that \$149,850 was "just compensation" for the City's taking. The order provided further that SMP made the concession "only for the purpose of obtaining a final judgment, under a full reservation of rights to contest and appeal the [district c]ourt's grant of summary judgment."

{11} A stipulated final judgment for condemnation was filed concurrently with the amended order on the City's motion for partial summary judgment. In the stipulated final judgment for condemnation, the district court made a finding that SMP had fully reserved its rights to appeal from the amended order on the City's motion for partial summary judgment, that the parties had "reached a settlement of the remaining disputes in [the] case[.]" and that judgment should be entered on the stipulation of the parties in favor of SMP in the amount of \$149,850, and in favor of the City condemning and appropriating the thirty-foot wide strip of land from the northern edge of the Hawkins Property.

Judgment was entered accordingly "subject to the reservation of rights to appeal set forth above." Defendants appeal.

DISCUSSION

{12} This appeal raises the following issues: (1) whether an appeal lies from the stipulated final judgment; (2) whether the district court erred in granting the City summary judgment in ruling that the value of the SAIA lease is not an element of damages, and whether as a result, the district court erred in precluding the testimony of Godfrey and Pack; and (3) whether the district court erred in granting the City's motion for partial summary judgment on Defendants' claim for inverse condemnation.

I. Appeal From the Stipulated Final Judgment

{13} In our notice of assignment of this case to the general calendar, we requested that the parties brief the issue of "whether a party may appeal from a stipulated final judgment like the one in this case" in light of *Gallup Trading Co. v. Michaels*, 1974-NMSC-048, ¶¶ 4-5, 86 N.M. 304, 523 P.2d 548, and *Kysar v. BP American Production Co.*, 2012-NMCA-036, ¶ 17, 273 P.3d 867. Whether an order is appealable presents a question of law that we review de novo. *Kysar*, 2012-NMCA-036, ¶ 11.

{14} Generally, "a party cannot appeal from a judgment entered with its consent." *Id.* ¶ 13. The general rule is illustrated by *Gallup Trading Co.*, 1974-NMSC-048, ¶ 5, in which we held that when the defendant consented to the entry of summary judgment against him, he "acquiesced in the judgment and lost his right to appeal." We applied the general rule that

[a] judgment by consent is in effect an admission by the parties that the decree is a just determination of their rights on the real facts of the case had they been found. It is ordinarily absolutely conclusively between the parties, and cannot be appealed from or reviewed on a writ of error.

Id. ¶ 4 (internal quotation marks and citation omitted).

{15} In *Kysar*, we recognized an exception to the general rule prohibiting an appeal from a consent judgment when certain conditions are satisfied. The plaintiffs made several claims against the defendant and demanded a jury. 2012-NMCA-036, ¶ 7. After the jury was chosen, the district court made a ruling that the plaintiffs could not mention certain matters in their opening statement, and the plaintiffs stated

that in light of that ruling, and others made in limine, the plaintiffs were unable to present their case to the jury. *Id.* ¶ 8. After discussion, the district court approved the parties' stipulation that in light of the district court's prior decisions and evidentiary rulings, a reasonable jury would not have an evidentiary basis to find in favor of the plaintiffs on any of their claims, and that the defendant was entitled to judgment as a matter of law. *Id.* ¶ 9. The parties further stipulated that the plaintiffs reserved their right to challenge the district court's decisions and rulings on appeal. *Id.* On appeal, we characterized this order as a "stipulated conditional directed verdict" and held that an appeal will lie from such a stipulated judgment when the following conditions are satisfied:

- (1) rulings are made by the district court, which the parties agree are dispositive; (2) a reservation of the right to challenge those rulings on appeal; (3) a stipulation to entry of judgment; and (4) approval of the stipulation by the district court.

Id. ¶¶ 11-12, 17.

{16} Concluding that *Kysar* is on point, we determine that Defendants reserved their right to appeal from the stipulated final judgment. First, Defendants contend, and the City does not dispute, that the rulings contained in the amended order granting the City partial summary judgment and orders precluding Godfrey and Pack's testimony on the issue of just compensation were dispositive of the case. Specifically, these rulings had the effect of entirely dismissing SMP's claim of inverse condemnation and just compensation in the form of damages to SMP resulting from the company's loss of rental payments from SAIA caused by the City's taking.

{17} Second, Defendants expressly reserved their right to challenge the district court's ruling granting the City partial summary judgment. The stipulated final judgment states that the district court recognizes that SMP "has fully reserved its rights to appeal the [district court's] granting of Petitioner City's [m]otion for [p]artial [s]ummary [j]udgment as set forth in the concurrently filed [a]mended [o]rder on the City's [m]otion for [p]artial [s]ummary [j]udgment[.]" The stipulated final judgment further states that judgment for the award of just compensation is complete, "subject to the reservation of rights to appeal set forth above."

{18} Third, through the stipulated final

judgment, the parties stipulated to the entry of a final judgment in favor of the City's position on the issue of inverse condemnation and just compensation. Fourth, the stipulated final judgment was approved by the district court.

{19} Accordingly, we conclude that the *Kysar* conditions for permitting appeal from a stipulated judgment are satisfied in this case, and we proceed to consider the merits of the appeal.

II. The District Court's Rulings Granting Summary Judgment

A. Standard of Review

{20} The appeal before us stems from the order of the district court granting the City summary judgment. "We review an order granting summary judgment *de novo*." *Santa Fe Pac. Tr., Inc. v. City of Albuquerque (SFPT)*, 2014-NMCA-093, ¶ 16, 335 P.3d 232. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Id.* (internal quotation marks and citation omitted); see Rule 1-056(C) NMRA ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). "Summary judgment is foreclosed either when the record discloses the existence of a genuine controversy concerning a material issue of fact, or when the district court granted summary judgment based upon an error of law." *Vives v. Verzino*, 2009-NMCA-083, ¶ 7, 146 N.M. 673, 213 P.3d 823. New Mexico courts "view summary judgment with disfavor, preferring a trial on the merits." *Little v. Baigas*, 2017-NMCA-027, ¶ 6, 390 P.3d 201 (internal quotation marks and citation omitted); see *Blauwkamp v. Univ. of N.M. Hosp.*, 1992-NMCA-048, ¶ 10, 114 N.M. 228, 836 P.2d 1249 ("Summary judgment is a drastic remedial tool which demands the exercise of caution in its application."). Accordingly, in our review of a summary judgment record, the evidence tendered by parties opposing summary judgment is viewed in the light most favorable to support a trial on the merits. See *Bank of N.Y. v. Reg'l Hous. Auth. For Region Three*, 2005-NMCA-116, ¶ 26, 138 N.M. 389, 120 P.3d 471.

B. Lost Rents as Damages

{21} Defendants contend that the district court erred in ruling that "the value of the SAIA lease is not a compensable element of

damage for a partial taking under NMSA 1978, [Section] 42A-1-26 [(1981)]" and granting the City summary judgment on this claim for damages. Related to this order, the district court also granted the City's motions to exclude testimony of Godfrey, Defendants' expert, and SMP's owner, Pack, on the lost SAIA lease as part of the damages. Defendants contend that these orders were also erroneous and must also be reversed. After first examining the basis for the district court's orders, we explain why the district court erred under the circumstances of this case and reverse. {22} Section 42A-1-26 provides, in pertinent part,

In any condemnation proceeding in which there is a partial taking of property, the measure of compensation and damages resulting from the taking shall be the difference between the fair market value of the entire property *immediately before* the taking and the fair market value of the property remaining *immediately after* the taking.

(Emphasis added.) The district court ruled that the SAIA lease could not be considered in calculating "the fair market value [of the entire SMP property] *immediately before* the taking" because there was no lease between SAIA and SMP when the thirty-foot wide strip was "taken" by the City. (Emphasis added.) The "taking" was either on August 6, 2013, when the preliminary order of entry was granted to the City, or November 15, 2013, when the permanent order of entry was granted to the City. The SAIA lease had already expired on February 28, 2012, and SAIA stayed at the Hawkins Property on a month-to-month basis until it found a new site and vacated the premises two months later on April 30, 2012. This reasoning fails to take into account that there is a disputed issue of fact about whether the City's actions caused SAIA not to renew its lease with SMP, causing damages to the value of SMP's property. The City cannot, consistent with our constitutional takings clause, engage in such precondemnation action which damages the value of property, without paying just compensation for that diminished value when it subsequently condemns the property, notwithstanding the express language of Section 42A-1-26. {23} "Private property shall not be taken or damaged for public use without just compensation." N.M. Const. art. II, § 20. We herein refer to this provision in our

Constitution as the State Takings Clause. The concept of “property” that is protected by the State Takings Clause includes all of the interests included in “the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.” *Primetime Hosp., Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 19, 146 N.M. 1, 206 P.3d 112 (quoting *United States v. Gen. Motors, Corp.*, 323 U.S. 373, 377-78 (1945)). Notably, the State Takings Clause applies when property is “taken or damaged” and therefore provides broader protection than its federal counterpart in the Fifth Amendment, which only applies to property that is “taken.” See U.S. Const. amend. V (providing that “private property [shall not] be taken for public use[] without just compensation”). Finally, we observe that our Supreme Court has directed that the “objective in a condemnation case is to compensate the landowner for damages actually suffered” and that “if loss of value can be proven, it should be compensable regardless of its source.” *City of Santa Fe v. Komis*, 1992-NMSC-051, ¶ 11, 114 N.M. 659, 845 P.2d 753.

{24} With the foregoing principles in mind, we begin our analysis with *City of Buffalo v. George Irish Paper Co.*, 299 N.Y.S.2d 8 (N.Y. App. Div. 1969). That case involved the condemnation of a lot with a five-story building that had been fully occupied until the city publicized plans to condemn the property, notified tenants by letter and telephone that it would soon take the property, and took other actions which caused the owner to lose most of its substantial tenants. *Id.* at 11. The property was subsequently condemned, and the question on appeal was whether the actual rents at the time of trial reflected the true value of the property. *Id.* at 13-14. Citing several cases, the court held that the city should not be permitted to damage and diminish the property’s value and then benefit from the loss it caused by evaluating its value as of the condemnation trial date on the basis of the reduced value. *Id.* at 14. The same court subsequently held that when the appropriating sovereign engages in “affirmative value-depressing acts” that cause tenants to move from property it then condemns, the state “should not be permitted to benefit from any loss sustained by [the owner] as the result of [its] acts[.]” *Niagara Frontier Bldg. Corp. v. State*, 305 N.Y.S.2d 549, 552 (N.Y. App. Div. 1969).

{25} In *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345 (in bank), the court noted that, while the statutory valuation date in a condemnation case in California is when the summons is issued, “a different date may be required in order to effectuate the constitutional requirement of just compensation.” *Id.* at 1349. The court recognized that a condemnee may be required to bear incidental losses as a result of the condemning authority making precondemnation announcements to allow for meaningful public input into condemnation decisions. *Id.* at 1354-55.

However, when the condemner acts unreasonably in issuing pre-condemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated. This requirement applies even though the activities which give rise to such damages may be significantly less than those which would constitute a de facto taking of the property so as to measure the fair market value as of a date earlier than that set statutorily[.]

Id. at 1355. Therefore, the court held, a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value

Id. Addressing damages, the court said that because “rent is an appropriate criterion for measuring fair market value[.]” if rental income is lost as a result of the public authority’s improper conduct, “the anticipated rental income would be diminished and a decline in the fair market value would follow.” *Id.* at 1356.

{26} Alaska and Washington also recognize that when the state’s precondemnation actions effectively deprive the owner of the economic advantages of ownership, such as the right to use and alienate property, “early valuation” of condemned unimproved property is constitutionally required if a four-part test is satisfied. See *Lange v. State*, 547 P.2d 282, 288 (Wash.

1976) (en banc) (“[M]arketability must be substantially impaired and the condemning authority must have evidenced an unequivocal intention to take the specific parcel of land. The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale. Further, the owner must have taken active steps to accomplish this purpose.”); *Ehrlander v. State Dep’t of Transp. & Pub. Facilities*, 797 P.2d 629, 635 (Alaska 1990) (same).

{27} We find the foregoing cases persuasive and in keeping with the State Takings Clause in New Mexico’s Constitution. First, the takings clauses in the California and Alaska constitutions, like New Mexico’s, constitutionally require just compensation to be paid when private property is “taken or damaged” for public use, and it is this broader protection that those courts were construing. See *Klopping*, 500 P.2d at 1349; *Ehrlander*, 797 P.2d at 633. Second, Washington, like New Mexico, applies a broad, expansive concept of “property” in its takings clause. See *Lange*, 547 P.2d at 285 (stating “property” includes not only its ownership and possession, but also includes the “unrestricted right of use, enjoyment and disposal” (internal quotation marks and citation omitted)). Finally, an award of “early valuation” damages in appropriate cases is consistent with our Supreme Court’s directive in *Komis* that when loss of value is proven, “it should be compensable regardless of its source.” 1992-NMSC-051, ¶ 11. The concept of “damage” under the State Takings Clause certainly includes the loss of tenants and a reduction in fair market value resulting from precondemnation conduct by a condemning authority. A condemning authority should not be allowed to engage in deliberate activity causing a reduction in the fair market value of property, and then purchase the same property at the depressed value.

{28} We conclude that a property owner is constitutionally entitled to “early valuation” fair market value damages—that is, fair market value that occurs before the condemnation action is actually filed and the property actually taken—when (1) the condemning authority has, prior to instituting formal condemnation proceedings, evidenced an unequivocal intention to take the specific parcel of land, and (2) the condemning authority’s communication of its intention to third parties or the public in general substantially impacts the fair market value of the property.

{29} For the foregoing reasons, we reverse the district court's order granting the City summary judgment on Defendants' claims for damages resulting from the loss of the SAIA lease, as well as the order prohibiting Godfrey and Pack, from testifying on this element of damages. There are disputed issues of material fact on whether the City engaged in precondemnation conduct that would allow loss of the SAIA lease to be included in the calculation of loss in market value to the Hawkins Property. *Cf. SFPT*, 2014-NMCA-093, ¶ 41 (stating that the city did not "substantially interfere" with landowners' use and enjoyment of its property where it never contacted existing or future tenants); *Joseph M. Jackovich Revocable Tr. v. State Dep't of Transp.*, 54 P.3d 294, 298 (Alaska 2002) (stating that "notifying tenants they would have to vacate" constitutes evidence the state "actively interfered with the beneficial use" of property). This is a damages claim to be decided by the jury.

C. Substantial Interference in Inverse Condemnation

{30} Defendants contend that the district court erred in granting the City's motion for partial summary judgment on their claim for inverse condemnation. Defendants argue that, because there are issues of material fact about whether the City's precondemnation activities constitute substantial interference with their property rights in the Hawkins Property, summary judgment in favor of the City was improper. We agree.

{31} The constitutional protection afforded property ownership by the State Takings Clause is codified in NMSA 1978, Section 42A-1-29(A) (1983), which provides:

A person authorized to exercise the right of eminent domain who has taken or damaged or who may take or damage any property for public use without making just compensation or without instituting and prosecuting to final judgment in a court of competent jurisdiction any proceeding for condemnation is liable to the condemnee . . . for the value thereof or the damage thereto at the time the property is or was taken or damaged[.]

The statute gives express recognition to a cause of action for inverse condemnation. An inverse condemnation claim is available to a property owner when private property has been taken or damaged by a public entity for a public use and the public

entity has not paid just compensation or brought a formal condemnation proceeding. *See Moongate Water Co. v. City of Las Cruces*, 2014-NMCA-075, ¶ 7, 329 P.3d 727; *see also North v. Pub. Serv. Co. of N.M.*, 1983-NMCA-124, ¶ 9, 101 N.M. 222, 680 P.2d 603 (noting that if the government "has taken or damaged property for public use without making just compensation therefor or without initiating proceedings to do so, the property owner has recourse through inverse condemnation proceedings").

{32} Notably, the State Takings Clause and Section 42A-1-29(A) both apply when property is "taken or damaged." Because the concept of "property" that is protected by the State Takings Clause includes all of the interests included in "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it[.]" *Primetime Hosp., Inc.*, 2009-NMSC-011, ¶ 19 (internal quotation marks and citation omitted), in an inverse condemnation case, "an actual physical taking of property is not required[.]" *SFPT*, 2014-NMCA-093, ¶ 27, "it being sufficient if there are consequential damages." *Bd. of Cty. Commr's v. Harris*, 1961-NMSC-165, ¶ 5, 69 N.M. 315, 366 P.2d 710. But not all consequential damages are compensable in an inverse condemnation case. "[I]n order to be compensable, a taking of or damage to property must invade some substantive or intrinsic aspect of a landowner's right to the use and enjoyment of its property. An incidental economic loss is not sufficient." *SFPT*, 2014-NMCA-093, ¶ 30.

{33} In *SFPT* we considered "the question whether pre[.]condemnation publicity and planning can give rise to a cognizable action for inverse condemnation[.]" *Id.* In concluding that such conduct may result in inverse condemnation, we adopted the two-part inquiry established in *Jackovich* to determine if a public entity's precondemnation publicity and planning constitutes a "taking" and therefore gives rise to an inverse condemnation claim. *SFPT*, 2014-NMCA-093, ¶ 37. That inquiry is "(1) whether the government [has] publicly announced a present intention to condemn the property in question; and (2) whether the government [has] done something that substantially interferes with the landowner's use and enjoyment of its property." *Id.* ¶ 25 (alterations, internal quotation marks, and citation omitted).

{34} In *SFPT*, the owner leased approximately 66.26 percent of the leasable space

in its building to a related entity with the same shareholders, directors, and corporate officers. *Id.* ¶ 3. Beginning in 1999 and continuing through 2008, the city of Albuquerque targeted the owner's property for condemnation to build a downtown arena. *Id.* ¶¶ 4-9. Among its actions, the city engaged in extensive planning, issued requests for information from interested developers, issued a request for proposal, approved a memorandum of understanding to finance the project, presented the plan to the city council, and at one time announced that construction on the arena was imminent. *Id.* From 1999 through 2007, local newspapers published several articles about the proposed arena, with many mentioning the owner's property as a potential site for the proposed arena. *Id.* ¶ 10. However, the city council never approved buying or condemning the property or appropriated funds to construct the arena. *Id.* From 2004 to 2008, several parties considered buying or leasing all or part of the owner's property, then declined. *Id.* ¶ 11. Some lost interest in the property because of the city's threatened condemnation, while others had different reasons, and some did not explain why. *Id.* During that same time, the leases with the related entities remained in place. *Id.*

{35} On the basis of the foregoing undisputed material facts and its conclusion that neither prong of the two-part *Jackovich* test was satisfied, the *SFPT* district court granted summary judgment in favor of the city on the owner's inverse condemnation claim. *SFPT*, 2014-NMCA-093, ¶¶ 14, 25. We concluded that the facts satisfied the first part of the *Jackovich* test because the city "intended to condemn the [p]roperty as soon as it was able to obtain financing, an agreement with a developer, and, importantly, approval of everything by the city council." *SFPT*, 2014-NMCA-093, ¶ 39. However, we affirmed the order granting summary judgment, concluding that the owner "failed to establish that the [c]ity's actions substantially interfered with [the owner's] use and enjoyment of the [p]roperty." *Id.* We reasoned that the owner leased approximately 66.26 percent of the leasable space in its building, and the city's planning activities, had no effect on those leases. *See id.* ¶¶ 3, 11, 41. Specifically, while the owner might have leased more space were it not for the city's planning and the attendant publicity, those activities did not cause it to suffer a loss. *See id.* We therefore held that, while the evidence demonstrated that some *potential* tenants

were deterred by the *possibility* of imminent condemnation, this did not rise to the level of an unconstitutional damage or taking of property. *Id.* ¶ 41.

{36} Here, the City conceded, and the district court ruled, that the first element for inverse condemnation adopted in *SFPT* was satisfied. However, the district court ruled that the second element was not. In granting summary judgment in favor of the City, the district court said,

Even if the [district court] were to assume the City's pre[con]demnation activities caused a tenant not to renew their lease, there is no evidence that the City imposed a 'direct restriction on the use of the property' pursuant to the language used in [*SFPT*]. Accordingly, the City is entitled to summary judgment on SMP's inverse condemnation claim.

The language in *SFPT* that the district court referred to was the following: "All government actions will have some incidental economic consequences, and anyone owning property near the site of such activity will bear the risk of those consequences. But unless the government's actions directly restrict the use of that property, the property owner is not entitled to compensation for those actions." *Id.* ¶ 42.

{37} We conclude that the district court's reliance on the foregoing language was misplaced. The language was not necessary to our decision in *SFPT*. Further, on its face, the statement refers to property suffering "some incidental economic consequences" because it is "near the site" of government action, which is not the case here. *Id.* Finally, the statement that the government's actions must "directly restrict the use of that property" requires more than the test we adopted in *SFPT* for an inverse condemnation to result from governmental precondemnation activity. *Id.* Specifically, if governmental activity "substantially interferes with the landown-

ers' use and enjoyment of its property[.]" the result is an inverse condemnation (assuming the first requirement is also satisfied). *Id.* ¶ 25 (alterations, internal quotation marks, and citation omitted). Governmental action that does not "directly restrict" the use and enjoyment of property may, nevertheless, "substantially interfere[]" with the use and enjoyment of property. *Id.* ¶¶ 25, 42.

{38} The test, again, is one of "substantial interference" by the government. Under our standard of review, the summary judgment record shows that the City's right-of-way coordinator went to the Hawkins Property, and knowing he was talking to the tenant and not the owner, told SAIA that the City was going to cut a road through the property in the middle of SAIA's fuel tanks. The fuel tanks, which SAIA paid \$180,000 to install, would have to be removed, and the removal itself would cost \$50,000 to \$60,000. In addition, the location of the road prevented SAIA from using four doors it was leasing. This made SAIA's operation on the Hawkins Property untenable, making it necessary to leave the property without renewing its lease with SMP as previously planned. As a result, when SAIA left, SMP lost a tenant that had intended to lease twenty-nine doors in its freight terminal for an additional nine years.

{39} A jury could find as a matter of fact that the lease was agreed upon and was going to be renewed for an additional nine years, pending completion of the usual paperwork. Under the circumstances, SMP was entitled to have a jury decide whether the City's actions "substantially interfered" with SMP's use and enjoyment of its property, and if so, SMP's damages. See *SFPT*, 2014-NMCA-093, ¶ 41 (stating there was no substantial interference because the city "never contacted existing or prospective tenants"); *Jackovich*, 54 P.3d at 297-98 (noting there was no evidence the state actively interfered with the beneficial use of property by "notifying tenants they

would have to vacate[.]"); *City of Detroit v. Cassese*, 136 N.W.2d 896, 899-900 (Mich. 1965) (concluding that a city sending letters to tenants, causing them to move, falls within the category of acts that constitutes a taking). Unlike *SFPT*, the City's actions did not deter a mere *potential* tenant by the *possibility* of imminent condemnation.

{40} We therefore hold that the district court erred in granting the City partial summary judgment on the issue of substantial interference in Defendants' claim for inverse condemnation. See *San Diego Metro. Transit Dev. Bd. v. Handlery Hotel, Inc.*, 86 Cal. Rptr. 2d 473, 484 (Cal. Ct. App. 1999) (stating that what constitutes a direct and substantial impairment of property rights is a question of fact); *State ex rel. Dep't of Transp. v. Barys*, 941 P.2d 971, 976 (Nev. 1997) (stating that whether there has been unreasonable action by the condemnor is a question of fact), *overruled on other grounds by* *GES, Inc. v. Corbitt*, 21 P.3d 11 (Nev. 2001).

{41} On remand, Defendants are required to prove to the satisfaction of the jury (1) that there was an inverse condemnation under the requirements of *SFPT*; (2) the date of the "taking"; and (3) damages. The damages on this claim may very well duplicate the "early valuation" damages on the City's condemnation claim because the date of the "taking or damage" may be identical under each claim. If both claims are submitted to the jury, Defendants will not be entitled to recover the same damages under both claims.

CONCLUSION

{42} The orders of the district court granting the City summary judgment and prohibiting testimony on damages cause by the loss of the SAIA lease are reversed.

{43} **IT IS SO ORDERED.**

MICHAEL E. VIGIL, Judge

WE CONCUR:

HENRY M. BOHNHOFF, Judge

STEPHEN G. FRENCH, Judge

Certiorari Granted, November 5, 2018, No. S-1-SC-37301

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-005

No. A-1-CA-35790 (filed September 26, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

JAMES EDWARD BARELA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY

James Waylon Counts, District Judge

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for Appellant

Opinion

Daniel J. Gallegos, Judge

{1} Defendant James Edward Barela appeals his conviction for felony battery against a household member, NMSA 1978, Section 30-3-17(A) (2008), asserting that his sentence was improperly enhanced, pursuant to the habitual offender enhancement statute, NMSA 1978, Section 31-18-17(A) (2003). Defendant also argues that the district court erred in denying his motion to dismiss on speedy trial grounds and in refusing to admit extrinsic impeachment evidence at trial. For the reasons that follow, we affirm.

BACKGROUND

{2} Following a physical altercation between Defendant and Ms. Rebecca Gray (Victim), the mother of his son, the State indicted Defendant for one count of child abuse, one count of false imprisonment, and one count of battery against a household member. Immediately prior to trial, Defendant pleaded no contest to a count of felony battery against a household member. Following trial, a jury convicted Defendant of false imprisonment but acquitted him of the child abuse count. The

district court sentenced him to one and a half years incarceration for each count. Further, based on a prior felony conviction, the district court imposed a one-year habitual offender enhancement for each count, resulting in a five-year sentence. Defendant then appealed to this Court.

DISCUSSION

A. Habitual Offender Enhancement

{3} Defendant, a three-time domestic violence offender, pleaded no contest to, and was convicted of, felony battery against a household member, contrary to Section 30-3-17(A), which provides, “[w]hoever commits three offenses of battery against a household member . . . when the household member is a spouse, a former spouse, a co-parent of a child or a person with whom the offender has had a continuing personal relationship is guilty of a fourth degree felony.” Based on a prior felony conviction for false imprisonment, Defendant’s sentence was subsequently enhanced by one year, pursuant to Section 31-18-17(A), which provides that a person convicted of a noncapital felony “who has incurred one prior felony conviction . . . is a habitual offender and his basic sentence shall be increased by one year.” Defendant argues that under the reasoning set forth in

State v. Anaya, 1997-NMSC-010, 123 N.M. 14, 933 P.2d 223, the district court erred in applying the habitual offender enhancement to his conviction because the felony battery against a household member statute is self-enhancing. To resolve this issue, we must engage in statutory interpretation. {4} Statutory interpretation is a matter of law that is reviewed de novo. *State v. Rapchack*, 2011-NMCA-116, ¶ 8, 150 N.M. 716, 265 P.3d 1289. Our goal when interpreting statutes is to give effect to the intent of the Legislature by applying the plain meaning of the words in the statute unless doing so would lead to an absurd or unreasonable result. *Id.*

{5} We thus begin with the plain meaning of the statutes at issue. Section 30-3-17(A) provides that a defendant who commits three offenses of battery against a specific subset of household members “is guilty of a fourth degree felony.” Section 31-18-17(A) provides for a one-year enhanced sentence when a person with one prior felony conviction is subsequently convicted of a noncapital felony. Based on the language in these statutes, there does not appear to be any basis for concluding that the district court erred in enhancing Defendant’s fourth-degree felony battery on a household member conviction by one year based on his prior felony conviction for false imprisonment.

{6} As stated above, however, Defendant argues that the district court’s imposition of the habitual offender enhancement was improper under *Anaya*. In *Anaya*, our Supreme Court addressed whether a felony driving while intoxicated (DWI) conviction was subject to the habitual offender enhancement. 1997-NMSC-010, ¶¶ 26-36. The Court ultimately concluded that it was not, reasoning that the “insurmountable ambiguity” as to whether the Legislature intended for the habitual offender enhancement to apply to fourth-time or more DWI offenders required application of the rule of lenity. *Id.* ¶¶ 32, 35.

{7} *Anaya* was context-specific and much of our Supreme Court’s analysis with respect to “insurmountable ambiguity” was based on the language of the DWI statute at issue in that case, NMSA 1978, Section 66-8-102(G) (1994). We are not convinced that the DWI statute’s ambiguity should be automatically imported to the domestic violence statute at issue here. Instead, we must construe Section 30-3-17(A) on its own terms. And in so doing, we do not see the same sort of ambiguity that was present in *Anaya* that would lead us to apply the rule of lenity.

{8} Of particular note, in *State v. Begay*, our Supreme Court clarified that “[its] holding in *Anaya* rested not on a concern that the Legislature did not intend to create two enhancements for the same crime, but rather a concern that the Legislature did not intend to have a fourth or subsequent DWI offense considered a felony for purposes of the habitual offender statute.” 2001-NMSC-002, ¶ 9, 130 N.M. 61, 17 P.3d 434. Our Supreme Court also stressed its continued belief “that the Legislature did not intend to punish fourth-time or more DWI offenders in the same manner as other fourth-degree felons.” *Id.* ¶ 10 (alteration, internal quotation marks, and citation omitted). The question for us, then, is whether, given the plain language of Section 30-3-17(A) and Section 31-18-17(A), there is a countervailing basis for concluding that the Legislature did not intend to punish someone who repeatedly (three times) battered an intimate household member in the same manner as other fourth-degree felons. For the following reasons, we answer the question in the negative.

{9} First, our Supreme Court’s analysis in *Anaya* largely turned on the fact that both the DWI statute, which falls within the Motor Vehicle Code and has its own separate, intricate sentencing scheme, *see* § 66-8-102(E)-(L), and the habitual offender statute were silent as to the applicability of the habitual offender enhancement on felony DWI offenses. *See Anaya*, 1997-NMSC-010, ¶ 31 (“The [L]egislature’s silence in both Section 31-18-17 and Section 66-8-102(G), is the strongest evidence that the [L]egislature *did not intend* the habitual offender sentences in Section 31-18-17 to apply to felony DWI.”). In contrast, the felony battery against a household member statute at issue in this case falls within the Criminal Code. And it is clear that the habitual offender statute is specifically applicable to persons convicted of noncapital felony offenses within the Criminal Code. *See* § 31-18-17(A) (indicating that the habitual offender enhancement applies to “[a] person convicted of a noncapital felony in this state whether within the Criminal Code . . . or the Controlled Substances Act . . . or not[.]”). Therefore, not only are we not dealing with legislative silence, as the Court was in *Anaya*, but we are instead dealing with express statutory language indicating a legislative intent that the habitual offender enhancement apply to felonies under the Criminal Code.

{10} Second, the Court in *Anaya* con-

cluded that there was ambiguity with respect to whether the Legislature intended to punish fourth-time or more DWI offenders in the same manner as other fourth-degree felons, based in part on the fact that (1) the DWI offenses were non-violent offenses, and (2) Section 66-8-102(G) used the word “jail” instead of “prison.” *Anaya*, 1997-NMSC-010, ¶¶ 29, 33, 34. According to *Anaya*, these facts evinced—at least somewhat—that the Legislature intended to treat a DWI felon differently than a typical felon. *Id.* ¶ 33. We have neither of those concerns here. There is no mention of “jail” within Section 30-3-17, nor are we dealing with a nonviolent offense.

{11} Thus, given the explicit application of the habitual offender enhancement to convicted felons under the Criminal Code, as well as the lack of countervailing indicia within either statute at issue, we do not see any ambiguity with respect to whether the Legislature intended to treat a serial domestic batterer (of a particular subset of close, intimate individuals) as a typical fourth-degree felon. In the absence of ambiguity, applying the rule of lenity is inappropriate. *See State v. Edmondson*, 1991-NMCA-069, ¶ 12, 112 N.M. 654, 818 P.2d 855 (stating that the rule of lenity is reserved “for those situations in which a reasonable doubt persists about a statute’s intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute” (emphasis, internal quotation marks, and citation omitted)). Consequently, based on the plain language of the statutes at issue, we conclude that the one-year habitual offender enhancement of Defendant’s fourth-degree felony battery on a household member sentence was proper as a matter of law.

B. Speedy Trial

{12} Defendant was arrested on February 20, 2014, indicted on March 12, 2014, and scheduled to stand trial on August 21, 2014. On August 20, 2014, Defendant filed a motion to continue his trial. The motion was granted, and nine days later, Defendant made a pro forma demand for speedy trial. Defendant’s trial was scheduled and rescheduled on the court’s trailing docket three times; first in November 2014 when it came up ninth on the docket, then in February 2015 when it came up fifth on the trailing docket, and again in May 2015 when it came up fifth on the docket. Then on August 13, 2015, the day trial was scheduled to begin, the State filed a

motion to continue the trial because it was unable to locate Victim, a key witness in the case. Defense counsel concurred with the motion, and the district court granted the continuance. On October 2, 2015, Defendant filed a motion to dismiss the case for violation of his speedy trial rights. The district court denied Defendant’s motion to dismiss, finding that the case was of intermediate complexity; that the delay was caused by Defendant’s delay, the State’s delay, and the court’s schedule; and that the prejudice to Defendant was not so great as to require dismissal. Defendant’s trial commenced on November 23, 2015. On the second day of trial, defense counsel renewed her motion to dismiss on speedy trial grounds, but the district court declined to revisit its prior ruling on the matter.

{13} Both the Federal Constitution and the New Mexico Constitution guarantee an accused the right to a speedy trial, recognizing “a societal interest in bringing an accused to trial and . . . [in] preventing prejudice to the accused.” *State v. Brown*, 2017-NMCA-046, ¶ 12, 396 P.3d 171 (alteration, internal quotation marks, and citation omitted). When reviewing a district court’s speedy trial decision, we weigh and balance de novo four factors, derived from *Barker v. Wingo*, 407 U.S. 514, 529-30 (1972): “(1) the length of delay, (2) the reasons for the delay, (3) the defendant’s assertion of his right, and (4) the actual prejudice to the defendant that, on balance, determines whether a defendant’s right to a speedy trial has been violated.” *State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499, 212 P.3d 387 (internal quotation marks and citation omitted). In doing so, “[w]e defer to the district court’s factual findings.” *State v. Ochoa*, 2017-NMSC-031, ¶ 4, 406 P.3d 505.

1. Length of Delay

{14} We begin by determining whether the length of delay is presumptively prejudicial—if it is, a speedy trial analysis is warranted. *State v. Serros*, 2016-NMSC-008, ¶ 22, 366 P.3d 1121 (noting that the length of delay, the first factor in speedy trial analysis, “acts as a triggering mechanism for considering the four *Barker* factors if the delay crosses the threshold of being ‘presumptively prejudicial,’ and it is an independent factor to consider in evaluating whether a speedy trial violation has occurred”). A delay is presumptively prejudicial if it extends beyond one year for a simple case, fifteen months for an intermediate case, and eighteen months

for a complex case. *Garza*, 2009-NMSC-038, ¶ 2. “In determining what weight to give the length of any delay, we consider the extent to which the delay stretched beyond the presumptively prejudicial period.” *State v. Lujan*, 2015-NMCA-032, ¶ 11, 345 P.3d 1103. Greater delays will potentially weigh more heavily against the state, and delay amounting to little more than the minimum needed to trigger a speedy trial analysis will not weigh heavily in a defendant’s favor. *Id.*

{15} We defer to the district court’s finding that the case was of intermediate complexity and should have been brought to trial within fifteen months. *See Ochoa*, 2017-NMSC-031, ¶ 15 (deferring to district court’s complexity finding and parenthetically noting that “the complexity of the case is best determined by the district court, which must consider both the nature and complexity of the crime”). We also note that Defendant’s appellate argument that the case should have been considered simple is undeveloped, and we decline to address it. *See State v. Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (noting that this Court does not review unclear or undeveloped arguments).

{16} Defendant was arrested on February 20, 2014, and his trial began on November 23, 2015, resulting in a delay of twenty one months and three days. Because the allowable fifteen month period for cases of intermediate complexity was exceeded by six months, the delay was presumptively prejudicial and weighs slightly against the State. *See State v. Montoya*, 2011-NMCA-074, ¶ 17, 150 N.M. 415, 259 P.3d 820 (concluding that a six month delay beyond the presumptive threshold weighed slightly against the state in a case of intermediate complexity).

2. Reason for Delay

{17} The next consideration, the reason for the delay, “may either heighten or temper the prejudice to the defendant caused by the length of the delay.” *Garza*, 2009-NMSC-038, ¶ 25 (internal quotation marks and citation omitted). There are three types of delay attributable to the state, each carrying varying weight in a reviewing court’s analysis. *Serros*, 2016-NMSC-008, ¶ 29. The first type is “a deliberate attempt to delay the trial in order to hamper the defense,” which is weighed heavily against the state. *Id.* (alteration, internal quotation marks, and citation omitted). The amount of weight we assign against the state for the second

type of delay—“negligent or administrative delay”—is “closely related to the length of delay[.]” *Garza*, 2009-NMSC-038, ¶ 26; *see id.* ¶ 29 (identifying “burdens on the criminal justice system, such as overcrowded courts, congested dockets or the unavailability of judges” as negligent or administrative delay (citation omitted)). Finally, where the delay is due to “a valid reason, such as a missing witness,” it is often “inevitable and wholly justifiable[.]” and we therefore balance the reasonableness of the state’s efforts to move a case toward trial against the perils of conducting a trial “whose probative accuracy the passage of time has begun by degrees to throw into question.” *Id.* ¶ 27 (internal quotation marks and citations omitted).

{18} There were four discernable periods of delay in this case: the delay between arrest and the first trial setting, the delay that occurred between Defendant’s continuance and the next scheduled trial date, the delays that occurred as a result of the court’s busy docket, and the delay that occurred as a result of the State’s continuance. The initial delay from February 20, 2014 to August 20, 2014, occurred as the case was proceeding normally toward trial, and as such, amounts to a neutral delay that does not weigh against either party. *See Brown*, 2017-NMCA-046, ¶ 19 (concluding that the amount of time a case “was proceeding normally toward trial” does not weigh against either party). Defense counsel’s request for a continuance on August 20, 2014, pushed the trial setting back to November 3, 2014, and this seventy-five day delay, being the result of Defendant’s motion, is weighed slightly against Defendant. *See Serros*, 2016-NMSC-008, ¶ 29 (acknowledging that delay caused by the defense is weighed against the defendant). The delay between November 3, 2014 and August 13, 2015, was caused by the district court’s trailing docket, and was consequently the result of administrative or negligent delay that weighs slightly to moderately against the State. *See Garza*, 2009-NMSC-038, ¶ 29 (identifying “congested dockets or the unavailability of judges” and “administrative burdens on the criminal justice system” as negligent delay weighed against the state). The delay between August 13, 2015 and November 23, 2015, was due to the State’s request for a continuance. However, because defense counsel concurred with the motion and because continuances caused by the unavailability of a witness are considered valid reasons for delay, the delay is neutral

and does not weigh against either party. *See id.* ¶ 27; *see also Serros*, 2016-NMSC-008, ¶ 29.

{19} In summary, Defendant was subjected to approximately nine months of neutral delay, two and a half months of delay attributable to himself, and approximately nine months of delay weighed against the State. The delay that occurred outside the fifteen month deadline for cases of intermediate complexity stemmed from administrative delay in the form of an overburdened court docket and valid delay in the form of a missing witness. On balance, this factor weighs slightly against the State.

3. Defendant’s Assertion of His Speedy Trial Rights

{20} In assessing whether Defendant asserted his right to a speedy trial, we look to the timing of the assertion and the manner in which the right was asserted, according weight to the “frequency and force of the defendant’s objections to the delay.” *Garza*, 2009-NMSC-038, ¶ 32 (internal quotation marks and citation omitted). While a failure to assert the right does not amount to waiver, we may consider “the timeliness and vigor with which the right is asserted.” *Id.* “Pro forma assertions are sufficient to assert the right, but are given little weight in a defendant’s favor[.]” and a defendant’s assertion of the right can be weakened by acquiescence to the delay. *Ochoa*, 2017-NMSC-031, ¶¶ 41-42.

{21} Defendant submitted two pro forma assertions of his right—each through different attorneys—at the beginning of his case. Defendant also asserted his right through a motion to dismiss one month before trial, almost five months after the presumptively prejudicial period had begun, and again during trial. While these facts would normally be sufficient to weigh this factor at least slightly in Defendant’s favor, we also note that his assertions of his right were somewhat mitigated by his “acquiescence to, and responsibility for,” some periods of delay. *State v. Samora*, 2016-NMSC-031, ¶ 20, 387 P.3d 230. However, because Defendant’s requested continuance occurred at the beginning of the case, and given the single instance of Defendant’s concurrence with the State’s continuance request, we conclude that this prong indeed weighs slightly in Defendant’s favor.

4. Prejudice

{22} We analyze prejudice according to three overarching interests: (1) preventing oppressive pretrial incarceration, (2)

minimizing anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired. *Garza*, 2009-NMSC-038, ¶ 35. “[A] defendant must show particularized prejudice of the kind against which the speedy trial right is intended to protect.” *Id.* ¶ 39. “[W]e recognize that the criminal process inevitably causes anxiety for defendants, but we focus only on undue prejudice.” *State v. Castro*, 2017-NMSC-027, ¶ 27, 402 P.3d 688.

{23} Defendant argues that because his case was delayed beyond the fifteen month period allowable for cases of intermediate complexity, prejudice may be presumed under *Garza*. We disagree. Though *Garza* did acknowledge that, “if the length of delay and the reasons for the delay weigh heavily in [the] defendant’s favor and [the] defendant has asserted his right and not acquiesced to the delay,” a court may conclude the defendant’s right have been violated without a showing of prejudice, *Garza*’s holding remains clear—a defendant must make a showing of “particularized prejudice” to succeed on speedy trial grounds. 2009-NMSC-038, ¶ 39.

{24} The length of, and reasons for, delay do not weigh so heavily in Defendant’s favor as to allow for the presumption of prejudice that he seeks. Defendant’s trial took place only six months past the fifteen months allowed, and the majority of the delay was either valid, due to a missing witness, or negligent, due to administrative difficulties in scheduling. Defendant’s general assertion that he was prejudiced by his inability to “work or live his daily life” is insufficient to establish the “particularized prejudice” required under this factor. Aside from this assertion, Defendant has put forth no further argument or evidence to demonstrate he suffered prejudice as a result of the six month delay, and we therefore cannot conclude that Defendant’s right to a speedy trial was violated. We affirm the district court’s denial of Defendant’s motion to dismiss for violating his speedy trial rights.

C. Admission of Victim’s Letters

{25} Defendant argues that the district court erred in refusing to admit letters written by Victim as prior inconsistent statements at trial, contending that the letters were admissible for impeachment purposes under Rule 11-613(B) NMRA. “We examine the admission or exclusion of evidence for abuse of discretion, and the trial court’s determination will not be disturbed absent a clear abuse of that discretion.” *State v. Stanley*, 2001-NMSC-037,

¶ 5, 131 N.M. 368, 37 P.3d 85. “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the [district] court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason.” *Id.* (internal quotation marks and citation omitted).

{26} Rule 11-613(B) governs the admissibility of extrinsic evidence of a prior inconsistent statement. “Extrinsic evidence of a witness’s prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires.” Rule 11-613(B). Clarifying the proper application of this rule, our Supreme Court in *State v. Astorga* explained the meaning of inconsistency as used to describe a prior statement: “the question is not whether the witness denies—or even recalls—having made the prior statement. . . . The question, instead, is simply whether the substance of the witness’s trial testimony is inconsistent with the prior statement.” 2015-NMSC-007, ¶¶ 39-40, 343 P.3d 1245 (citations omitted). *Astorga* also clarified, however, that the admission of impeachment evidence under Rule 11-613(B) is “subject to the district court’s broad discretion under Rule 11-403 [NMRA].” *Astorga*, 2015-NMSC-007, ¶ 40. Rule 11-403 provides the court with authority to “exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

{27} The district court allowed defense counsel to use the content of the letters Victim wrote to impeach her if she presented inconsistent testimony but not as substantive evidence, and allowed defense counsel to question her regarding her motivations for testifying, particularly with regard to any perceived pressure from the State, reasoning that both were relevant to her credibility. Because it allowed defense counsel to explore the content of the letters through cross-examination, the district court ruled that the letters would not be admitted into evidence. During cross-examination, Victim admitted that she wrote the letters and testified at length about their content and her reasons for writing them. Defense counsel was able to quote portions of the letters verbatim and emphasize inconsistencies between

her trial testimony and statements made in the letters.

{28} Though the letters apparently did contain information that contradicted Victim’s testimony at trial, Defendant’s cross-examination of Victim revealed those contradictions and inconsistencies. As such, admission of the letters themselves would be cumulative, and it was within the district court’s discretion to refuse to admit them. See Rule 11-403 (allowing exclusion of evidence that needlessly presents cumulative evidence); *State v. Gallegos*, 2007-NMSC-007, ¶ 26, 141 N.M. 185, 152 P.3d 828 (holding that an appellate court will affirm the district court’s decision if it is right for any reason and does not prejudice the parties); see also *Astorga*, 2015-NMSC-007, ¶ 44 (noting, after conducting harmless error analysis, affirmance based on Rule 11-403 would also be proper under the right for any reason doctrine).

{29} Alternatively, even if the district court erred in refusing to admit the letters, such error was harmless. In assessing harmless error, “we look to whether there is a reasonable probability that the error affected the verdict[,]” and the defendant bears the burden of demonstrating that he or she was prejudiced by the error. *Astorga*, 2015-NMSC-007, ¶ 43. Because the letters and their contents, including contradictions with Victim’s testimony, were thoroughly explored by defense counsel during cross-examination, and Defendant does not point with any particularity to information contained in the letters that was not revealed through cross-examination, Defendant has failed to demonstrate the prejudice necessary for reversal under a harmless error analysis.

CONCLUSION

{30} For the foregoing reasons, we affirm.

{31} **IT IS SO ORDERED.**

DANIEL J. GALLEGOS, Judge

I CONCUR:

HENRY M. BOHNHOFF, Judge

JULIE J. VARGAS, Judge (concurring in part, dissenting in part).

VARGAS, J. concurring in part, dissenting in part.

{32} I concur in the majority opinion with respect to its decision of the speedy trial and evidentiary issues raised in Defendant’s appeal. I cannot, however, concur in its decision that the district court

properly enhanced his sentence, pursuant to Section 31-18-17(A).

{33} Our Supreme Court applied the rule of lenity in *Anaya*, when it found an insurmountable ambiguity as to the intended scope of the habitual offender sentencing enhancement statute and the felony DWI statute. The Court in *Anaya* considered whether Section 66-8-102, which penalized up to three DWI convictions as misdemeanors and subsequent DWI convictions as felonies, was self-enhancing so that applying a habitual offender enhancement to a felony DWI conviction would constitute an impermissible double enhancement. *Anaya*, 1997-NMSC-010, ¶ 27. The *Anaya* Court took note of the absence of any reference between the applicable DWI statute and habitual offender sentencing provision. *Id.* ¶¶ 27, 29, 31-32. Applying that rule, the Court concluded that the DWI statute is “a self-enhancing provision” that “changes the classification of a criminal act which . . . has been a misdemeanor into a felony for sentencing purposes only[,]” and reasoned that because a fourth DWI conviction is not an element of felony DWI, it therefore “cannot be sentenced as a felony for all purposes, including habitual offender sentencing.” *Id.* ¶ 33.

{34} I find the Legislature’s intention regarding the application of a sentence enhancement to Section 30-3-17 to be similarly unclear. When the Legislature’s intent is not clear from the plain language of a statute, we employ other methods of statutory construction. Indeed, “[u]nless the [L]egislature’s intention to apply an enhanced sentence is clear, we presume that the [L]egislature did not intend an enhancement.” *Anaya*, 1997-NMSC-010, ¶ 30.

{35} Given the highly punitive nature of the habitual offender statute, it cannot apply absent clear evidence that the Legislature intended such a result. *See id.* ¶ 31. When the Legislature enacted Section 30-3-17, elevating a third conviction for battery against a household member to a felony, it did so without including any reference to the habitual offender sentencing statutes or clarifying its intentions regarding the application of the enhancement, notwithstanding our Supreme Court’s reliance on the Legislature’s silence as grounds for its holding in *Anaya* and its invitation to the Legislature to clarify its intent. *See* 1997-NMSC-010, ¶ 35; *id.* ¶ 31 (“The [L]egislature’s silence in both Section 31-18-17 and Section 66-8-102(G), is the

strongest evidence that the [L]egislature *did not intend* the habitual offender sentences in Section 31-18-17 to apply to felony DWI.”); *see also State v. Begay*, 2001-NMSC-002, ¶ 9, 130 N.M. 61, 17 P.3d 434 (emphasizing that the Legislature did not act to clarify its intentions following issuance of *Anaya*, concluding legislative intent therefore “remains uncertain[,]” and applying rule of lenity). As such, I find no evidence that the Legislature intended the habitual offender enhancement to apply to a conviction for felony battery of a household member. Instead, the Legislature’s action of enacting Section 30-3-17 approximately a decade after our Supreme Court decided *Anaya* without referencing an intent to enhance the punishment for felony battery on a household member strongly suggests the Legislature did not intend the habitual offender enhancement to apply to convictions under Section 30-3-17(A). *See State v. Marquez*, 2008-NMSC-055, ¶ 7, 145 N.M. 1, 193 P.3d 548 (stating that the courts presume the Legislature is aware of existing law when enacting a statute); *Begay*, 2001-NMSC-002, ¶ 6 (opining that if the Legislature had intended to subject the felony to further enhancement by the aggravation statute, it would have stated that intention expressly). Given the absence of any clear intent in the plain language of the statutes, I see similar ambiguity regarding the scope of the enhancement’s applicability as the Court did in *Anaya*, requiring us to apply the rule of lenity.

{36} The State argues that because the language of Section 30-3-17(A) requires more than a predetermined number of prior convictions by also requiring that a third offense be committed against certain individuals listed in the statutory definition of a “household member,” it is distinguishable from the self-enhancing provision recognized in *Anaya*. The individuals listed in Section 30-3-17(A), however, are all included in the broad statutory definition of “household member.” *Compare* NMSA 1978, Section 30-3-11(A) (2010, amended 2018) (defining household member), *with* Section 30-3-17(A) (limiting crime to offenses against a “spouse, former spouse, a co-parent of a child, or a person with whom the offender has had a continuing personal relationship”). Section 30-3-17(A) therefore does not require proof of any additional elements outside those required to obtain a conviction for misdemeanor battery on a household member, and its limitation of scope only becomes relevant

during sentencing in determining whether the battered household member qualified to elevate the battery to a felony, much as the number of prior battery convictions are used to elevate the current conviction to a felony.¹ The Legislature’s decision to limit the applicability of Section 30-3-17(A) to household members with an intimate relationship to the defendant is evidence of a desire to provide those individuals with greater protection rather than an intent to expand its scope for sentencing purposes.

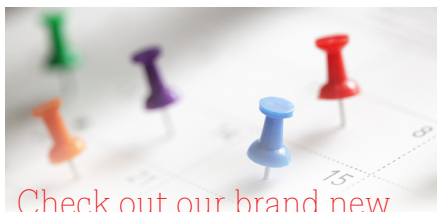
{37} Furthermore, I am not convinced by the majority’s rationale that enhancement is appropriate under the circumstances of this case because Section 31-18-17 contains “express statutory language indicating a legislative intent that the habitual offender enhancement apply to felonies under the Criminal Code.” Section 31-18-17(A) provides that, “[a] person convicted of a non-capital felony in this state *whether within the Criminal Code . . . or the Controlled Substances Act . . . or not* who has incurred one prior felony conviction . . . is a habitual offender and his basic sentence shall be increased by one year.” In support of its argument that express statutory language indicating legislative intent is set out, the majority relies on the fact that Section 31-18-17(A) specifically mentions the Criminal Code. By its plain language, however, Section 31-18-17 applies to any noncapital felony, regardless of where it is found in our statutes—whether “within the Criminal Code . . . or not.” Section 31-18-17(A). I do not see how the broad language of Section 31-18-17(A) resolves the ambiguity between the two statutes.

{38} Finally, I am not persuaded by the majority’s differentiation of *Anaya* based on the fact that the battery statute does not mention “jail.” While the *Anaya* Court found the mention of “jail” to be additional evidence that the Legislature did not intend for the habitual offender enhancement to apply to felony DWI, it was the Legislature’s silence that was “the strongest evidence that the [L]egislature *did not intend* the habitual offender sentences in Section 31-18-17 to apply.” *Anaya*, 1997-NMSC-010, ¶ 31.

{39} I would apply the reasoning set forth in *Anaya*, hold that Section 30-3-17(A) is a self-enhancing statute that cannot be subject to an habitual offender enhancement under Section 31-18-17 and continue to encourage legislative clarification.

JULIE J. VARGAS, Judge

¹The State does not argue or suggest that the number of prior convictions is a required element of the offense under Section 30-3-17(A).



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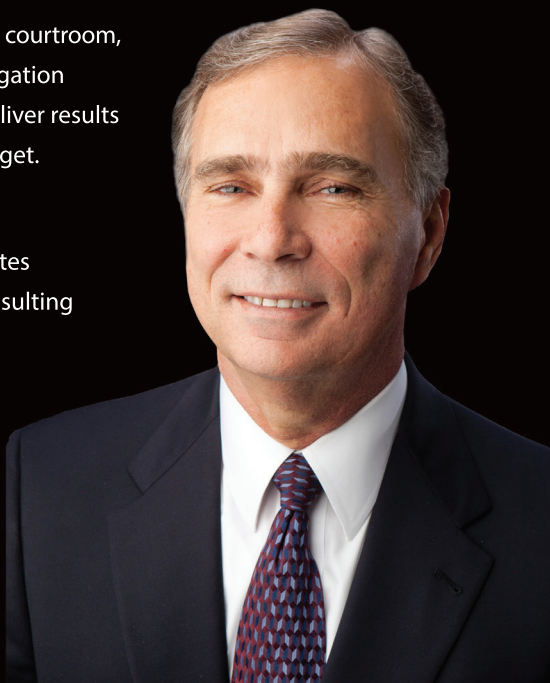
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Multi-state firm with an Albuquerque office is seeking an associate attorney with 3 or more years' experience, to represent lenders in a residential mortgage foreclosure practice. We seek a candidate who has experience with title, mediations, bankruptcy and civil litigation. Please send a letter of interest, salary range, and resume if interested to DNesbitt@tblaw.com or Tiffany & Bosco, P.A., 1700 Louisiana Blvd. NE, Albq 87110.

Domestic Relations Hearing Officer Family Court

The Second Judicial District Court is accepting applications for a full-time, term At-Will Domestic Relations Hearing Officer in Family Court (position #10106574). This position is under the supervision of the Presiding Family Court Judge. Applicant will be assigned a child support caseload. May also be assigned caseloads to include domestic relations and domestic violence matters consistent with Rule 1-053.2. Qualifications: J.D. from an accredited law school, New Mexico licensed attorney in good standing, minimum of (5) years of experience in the practice of law with at least 20% of practice having been in family law or domestic relations matters, ability to establish effective working relationships with judges, the legal community, and staff; and to communicate complex rules clearly and concisely, respond with tact and courtesy both orally and in writing, extensive knowledge of New Mexico and federal case law, constitution and statutes; court rules, policies and procedures; manual and computer legal research and analysis, a work record of dependability and reliability, attention to detail, accuracy, confidentiality, and effective organizational skills and the ability to pass a background check. SALARY: \$48.53 hourly, plus benefits. Send application or resume supplemental form with proof of education and writing sample to the Second Judicial District Court, Human Resource Office, P.O. Box 488 (400 Lomas Blvd. NW), Albuquerque, NM 87102. Applications without copies of information requested on the employment application will be rejected. Application and resume supplemental form may be obtained on the NM Judicial Branch web page at www.nmcourts.gov. CLOSES: April 26, 2019 at 5:00 p.m. EOE. Applicants selected for an interview must notify the Human Resource Division of the need for an accommodation.

Associate Litigation Attorney Santa Fe and Albuquerque

Regional litigation firm with offices in Colorado and New Mexico seeks attorney with 2 - 6+ years of litigation experience, preferably in one or more of the following practice areas: consumer finance, creditors' rights, mortgage lending and servicing, foreclosure, real estate, title, and/or bankruptcy. Candidates should possess strong research and writing skills, have significant courtroom experience, and be well-versed in all local civil rules and practices in New Mexico. We offer competitive benefits and salary, including performance-based bonuses. Please submit your résumé and writing sample to rweiman@msa.legal, and indicate your preferred office location (Albuquerque or Santa Fe).

Legal Counsel and Government Relations Specialist

Provides proactive legal services and legal advice to the Superintendent and/or staff relating to the operations and policies of the District. Minimum Requirements: Juris Doctorate from an accredited law school. Must be admitted and in good standing to practice law in the State of New Mexico. Knowledge of state and federal laws relating to school districts in New Mexico. Preferred Requirements: General knowledge of contract law preferred, plus an understanding of school board policies and union negotiation experience for Collective Bargaining Agreements. Active law practice in school employment law. SPED law experience also preferred. Knowledge/Skills and Abilities: Must have the ability to evaluate pertinent facts and evidence in the analysis of legal issues; interpret and apply laws, rules, regulations; conduct legal research; organize work, set priorities, and meet deadlines; communicate effectively with personnel in all levels of the organization, orally and in writing. Must be able to perform word processing and internet research. Apply on our website at www.sfps.info and attach resume. If you have any questions, please send an email to: sfpsrecruiting@sfps.k12.nm.us or call 505-467-2008. Santa Fe Public Schools, 2516 Cerrillos Rd., Santa Fe, NM, 87505.

Family Law Attorney – Experienced or New

Is the law firm you work for helping you be the best attorney you can be? The Law Office of Dorene A. in Albuquerque seeks attorneys with, or without experience. If you have experience with divorce, custody, wills & estates, elder law or kinship/guardianship - consider a firm that works hard and smart, with weekends free and no work during vacations! If you possess civil, prosecutorial, or criminal experience - consider family law. Much of your experience is directly transferrable. All you need is a passion to learn. If you are new in your career - we provide high intensity training and mentorship. Join a firm that fosters learning and work alongside a seasoned attorney. Just bring your energy and enthusiasm. Competitive Base Salary (no percentage or commissioned pay), Bonuses, Health/Dental, Profit sharing, 401k, Flex work. Applicants must be in good standing with NM Bar. Call Dorene in complete confidence to discuss the possibilities. 505-253-0950.

Chief Deputy District Attorney and a Deputy District Attorney

Immediate opening for a Chief Deputy District Attorney and a Deputy District Attorney with the Sixth Judicial District Attorney's Office. Salary depends on experience, w/ benefits. Please send resume to Francesca Estevez, District Attorney, FMartinez-Estevez@da.state.nm.us Or call 575-388-1941.

Attorney Advisor

The Office of Medicare Hearings and Appeals (OMHA), is a component of HHS, is looking for energetic, enthusiastic, and knowledgeable employees who want to support the OMHA mission of adjudicating Medicare claims in a fair and timely manner. OMHA's mission is to be a responsible forum for fair, credible and timely decision-making through an accomplished, innovative and resilient workforce. Each employee makes a difference by contributing to shaping American health care. <https://www.usajobs.gov/GetJob/ViewDetails/529494000>. Department: Department of Health And Human Services Agency: Office of the Secretary of Health and Human Services. Number of Job Opportunities & Location(s): Many vacancies – Albuquerque, NM. Salary: \$51,675.00 to \$67,174.00 / Per Year Series and Grade: GS-0905-09. Open Period: 04/03/2019 to 09/30/2019. Position Information: Excepted Service Permanent - Full Time Who May Apply: United States Citizens. Interested applicants must apply for these vacancies through USAJOBS. You can click on the highlighted link above to access this specific job on USAJOBS. Please be sure to read the entire job announcement to ensure that you submit a complete application and nothing is missed. Legal Assistant vacancy announcements are being prepared for USAJOBS and will be posted in the very near future. However, if you would like to view OMHA's current vacancies posted on USAJOBS, please use the following link to access our vacancies: <https://www.usajobs.gov/Search/?k=OMHA>

New Mexico Court of Appeals Chief Appellate Attorney

The Chief Appellate Attorney is a high-level, vital part of the Court of Appeals. The Chief Appellate Attorney expertly manages a team of staff attorneys that advise the judges on substantive and procedural aspects of cases before the Court. The position is essential to the timely resolution of appellate cases in the State of New Mexico and serves as a member of the Court's management team. Frequent travel between the Court's offices in Albuquerque and Santa Fe is required. Superior legal ability and knowledge of constitutional, federal and state law are critical as well as excellent supervisory skills. Minimum requirements are 7 years in the practice of law, including appellate law, 3 years of which must have been as a supervisor. More extensive experience is highly desired. Current pay range is \$32,578 - \$55,590 per hour. More information is available at www.nmcourts.gov/careers. Send cover letter and resume to: AOC, Attn: Nathan Hale, aocneh@nmcourts.gov, 237 Don Gaspar, Room 25, Santa Fe, NM 87501.

Associate Attorney

Atkinson, Baker & Rodriguez, P.C. is an aggressive, successful Albuquerque-based complex civil commercial and tort litigation firm seeking an extremely hardworking and diligent associate attorney with great academic credentials. This is a terrific opportunity for the right lawyer, if you are interested in a long term future with this firm. A new lawyer with up to 3 years of experience is preferred. Send resumes, references, writing samples, and law school transcripts to Atkinson, Baker & Rodriguez, P.C., 201 Third Street NW, Suite 1850, Albuquerque, NM 87102 or e_info@abrfirm.com. Please reference Attorney Recruiting.

Personal Injury Attorney

Get paid more for your great work. Salary plus incentives paid twice a month. Great benefits. Outstanding office team culture. Learn more at www.HurtCallBert.com/attorneyjobs. Or apply by email Bert@ParnallLaw.com and write "Apples" in the subject line.

Law Office Openings

IMMEDIATE opportunities in a busy downtown Albuquerque Real Estate Law Office. Current needs include: 1 Paralegal; 1 Legal Assistant; 2 File Clerk/Receptionist; 1 Part-time Bookkeeper. Send your resume to: Steven@BEStaffJobs.com

F/T Paralegal

F/T paralegal needed for fast paced family law office. Excellent computer skills, ability to multitask and being a good team player are all required. Spanish speaking preferred. Pay DOE. Fax resume: 242-3125 or mail: Law Offices of Lynda Latta, 715 Tijeras Ave. NW, 87102 or email: holly@lyndalatta.com No calls.

Full-Time Legal Assistant

Small busy law firm seeking experienced, full-time Legal Assistant, knowledge of Microsoft Word necessary. Two (2) years' experience required. Salary negotiable. Send Resume to Alegras Lucero, 1225 Rio Grande Blvd. NW, Albuquerque, NM 87104, Fax to (505) 266-4330 or email to alucero@michaeldanoff.com.

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Litigation Paralegal (IRC71905)

Los Alamos National Laboratory, one of the leading research institutions in the world, is seeking a Paralegal to provide professional support to attorneys and staff in its Litigation Management Group. The primary responsibility for this position will be to support attorneys in all aspects of case management. The qualified candidate should have experience in fact checking, proofreading, research, document review and analysis, discovery, and document and database management systems, along with five years of experience as a litigation paralegal in a law office or similar setting. For a complete job description, and to apply, visit lanl.jobs and search via Req. ID: "IRC71905" For specific questions regarding the status of this job, call Antoinette Jiron at (505) 665-0749. Los Alamos National Laboratory is an EO employer – Veterans/Disabled and other protected categories. Qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, sexual orientation, gender identity, disability or protected veteran status

Legal Assistant/ Legal Secretary

Solo practitioner seeking an experienced, professional, full-time legal assistant. Practice focuses on probate litigation, guardianships, and elder law, but handles a few personal injury cases as well. Experience in those areas preferred. The ideal candidate will be proficient in Word, Outlook, QuickBooks, Odyssey and electronic case filing. The ideal candidate will possess above-average writing and speaking skills. Duties will include answering multiple telephone lines, scheduling appointments, filing, client billing, drafting correspondence, and general office administration. Position offers a very pleasant working environment. Competitive salary, depending upon experience. While this is not an entry-level position, exceptional candidates without experience would be considered. Please send a cover letter and resume to ben@benhancoclaw.com.

Paralegal

Litigation Paralegal with minimum of 3- 5 years' experience, including current working knowledge of State and Federal District Court rules, online research, trial preparation, document control management, and familiar with use of electronic databases and related legal-use software technology. Seeking skilled, organized, and detail-oriented professional for established commercial civil litigation firm. Email resumes to e_info@abrfirm.com or Fax to 505-764-8374.

Paralegal

Hinkle Shanor, LLP's Santa Fe office is seeking a paralegal to join its medical malpractice defense team. 3-5 years litigation experience is preferred, but not required. Ideal candidates will have experience in medical negligence matters, including preparation of medical chronologies and summaries. Past experience in civil practice handling pre-trial discovery through trial preparation is also a plus. Undergraduate degree or paralegal certificate is preferred, but work experience may be considered in lieu thereof. Competitive salary and benefits; all inquiries will be kept confidential. Please e-mail resume resumes to gromero@hinkle-lawfirm.com and ztaylor@hinklelawfirm.com.

Member Services Program Assistant

The State Bar of New Mexico seeks a Member Services Program Assistant for its Member Services Department for up to 25 hours per week. The Member Services Department provides administrative support to the volunteer-driven sections, divisions, and committees of the State Bar of New Mexico. The Member Services Program Assistant will assist the Member Services Program Manager in providing administrative and event support to these groups. The successful applicant must be able to work as part of a team and have excellent project management, communication skills (both written and verbal), and customer service and computer skills including proficiency with Microsoft Word, Excel, and Outlook. Experience with survey and advertising software (SurveyMonkey and ConstantContact, or similar) is a plus. Prior work experience in the legal environment is not necessary. Compensation \$14.00-\$15.00 per hour DOE. Please email cover letter and resume to hr@nmbar.org. Best consideration date: 4/5/19; position open until filled. EOE.

Escrow Processor

Face paced title company looking for talent just like you! We are now hiring for escrow processor positions. Responsibilities include working with real estate brokers, lenders and attorneys to acquire and organize all necessary documents needed for closing. Prepare and distribute title company closing documents. Preparation and disbursement of funds. Requirements: Basic computer skills, Ability to multi-task, detail oriented, problem solving skills and an ability to thrive under pressure. Previous real estate, legal or accounting experience a plus. Full Benefits EOE. Send resume to Julie Buckalew at Julie.buckalew@stewart.com

Position Announcement Legal Assistant 2019-02

The Federal Public Defender office for the District of New Mexico is accepting applications for a Legal Assistant position to be stationed in Albuquerque. Federal salary and benefits apply. Minimum qualifications are high school graduate or equivalent and at least three years legal secretary experience, federal criminal experience preferred. Starting salary ranges from a JSP-6 to JSP-8, currently yielding \$38,016 to \$46,786 annually depending on experience. This position provides secretarial and clerical support to the attorneys and staff utilizing advanced knowledge of legal terminology, word and information processing software. Legal Assistants must understand district and circuit court rules and protocols; edit and proofread legal documents, correspondence, and memoranda; transcribe dictation; perform cite checking and assemble copies with attachments for filing and mailing. Duties also include screening and referring telephone calls and visitors; screening incoming mail; reviewing outgoing mail for accuracy; handling routine matters as authorized; assembling and attaching supplemental material to letters or pleadings as required; maintaining calendars; setting appointments as instructed; organizing and photocopying legal documents and case materials; and case file management. Backing up and covering for other legal assistants and the receptionist is a mandatory component of this position. The ideal candidate will have a general understanding of office confidentiality issues, such as attorney/client privilege; the ability to analyze and apply relevant policies and procedures to office operations; exercise good judgment; have a general knowledge of office protocols and secretarial processes; analyze and recommend practical solutions; be proficient in WordPerfect, Microsoft Word and Adobe Acrobat; have the ability to communicate effectively with assigned attorneys, other staff, clients, court agency personnel, and the public; and have an interest in indigent criminal defense. Must possess excellent communication and interpersonal skills, and be self-motivated while also excelling in a fast paced team environment. Spanish fluency a plus. Selected applicant will be subject to a background investigation. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C. ' 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. Position subject to the availability of funds. In one PDF document, please e-mail your resumé with cover letter and 3 references to: Melissa Read, Administrative Officer; FDNM-HR@fd.org. Must be received no later than 4/30/2019. Only those selected for an interview will be contacted. No phone calls.

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Miscellaneous

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

Searching for a Will

Searching for a will for Adeline Garcia Minchow. If found, please contact Michael Hughes at Silva & Hughes, PC 505-246-8300 or mhughes@silvalaw-firm.com.

Official Publication of the State Bar of New Mexico

BAR BULLETIN

2019 ADVERTISING SUBMISSION DEADLINES

Starting in January, the *Bar Bulletin* will publish every other week on Wednesdays.

Submission deadlines are also on Wednesdays, two weeks prior to publishing by 4 p.m. Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.

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

The 2019 publication schedule can be found at
www.nmbar.org/BarBulletin.



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