Official Publication of the State Bar of New Mexico

Bar Bulletin

May 1, 2019 • Volume 58, No. 9

ExcavationIV, by *Martha Rea Baker* Owen Contemporary

Inside This Issue

CLE programming from the Center for Legal Education

The Center for Legal Education had a successful 2018 continuing education season due in large part to the enthusiasm, hard work, and drive of our sections, divisions, and committees.

Thank you for serving your membership and legal community!

In 2018, the Center for Legal Education developed a new "Lunch Box" CLE series. Contact CLE if you would like a one- or two-hour program that:

- Offers a CLE at significantly reduced price to only your members
- Encourages membership enrollment
- Highlights discrete topics in your specific area of law
- Allows membership to earn extra CLE outside of annual institutes

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Special thanks to the following three sections that piloted this series and provided three to five extra credits in the compliance year!

- ✧ Animal Law Section
- ✧ Immigration Law Section
- ✧ Real Property, Trust and Estate Section

New Mexico State Bar Foundation
Center for Legal Education

LinkedIn

505-797-6020 • www.nmbar.org/cle

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

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About Cover Image and Artist: Martha Rea Baker was born in Corsicana, Texas and raised in Clinton, M.S. She attended the University of Mississippi and the University of California at Santa Barbara, graduating form UCSB with a BA in English Literature in 1965. Baker lived in Plano, Texas with her husband, Bill Baker, and their three sons for 40 years before relocating to Santa Fe, in Dec. of 2006. She studied art design and drawing at the University of Dallas in Dallas, Texas and portfolio printmaking for 10 years at Collin College in Plano, Texas. Baker also enjoyed art foreign studies in Greece, Italy, Russia, France and the Czech Republic. https://owencontemporary.com

Notices

Court News

Second Judicial District Court

Children's Court Abuse and Neglect Brown Bag

The Second Judicial District Court Children's Court Abuse and Neglect Brown Bag will be held at noon on May 17 in the Chama Conference Room at the Juvenile Justice Center, 5100 2nd Street NW, Albuquerque. Attorneys and practitioners working with families involved in child protective custody are welcome to attend. Call 505-841-7644 for more information.

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 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.

U.S. District Court, District of New Mexico

Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of U. S. Magistrate Judge Stephan M. Vidmar is due to expire on Dec. 26, 2019. The U. S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term. The duties of a magistrate judge in this court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be addressed as follows: U.S. District Court, ATTN: Magistrate Judge Merit Selection Panel c/o Human Resources – CONFIDENTIAL, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102. Comments must be received by June 10.

Proposed Amendments to Local Rules of Civil Procedure

Proposed amendments to the Local Rules of Civil Procedure of the U. S. District Court for the District of New Mexico are being considered. A "redlined" version(with proposed additions underlined and proposed deletions stricken out) and a clean version of these proposed amendments are posted on the court's website at www.nmd.uscourts.gov. Members of the Bar may submit comments by email to kelsie_kloepfer@nmd.uscourts.gov or by mail to U.S. District Court, Clerk's Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, Attn: Kelsie Kloepfer, no later than May 31.

Professionalism Tip

With respect to other judges:

I will be courteous, respectful and civil in my opinions.

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.

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.

The Board Governing the Recording of Judicial Proceedings
A Board of the Supreme Court of New Mexico

Expired Court Reporter Certifications

The following list includes the names and certification numbers of those court reporters whose New Mexico certifications expired as of Dec. 31, 2018.

Name	CCR CCM No.	City, State
Albarez, Angela	516	Lawndale, CA
Angwin, Andrea	500	Corrales, NM
Badar, Laureen	179	Surprise, AZ
Danner, Lisa	257	Santa Fe, NM
Fernandez, Elizabeth	415	Oxnard, CA
Hurst-Waitz, Elizabeth	99	Albuquerque, NM
Julian, Kimberly	241	Midland, TX
Lester, Linda	303	Pecos, TX
Lunsford, Peggy	203	Albuquerque, NM
Montgomery, Shayna	522	Glendale, AZ
Levin, Melvyn	302	Raleigh, NC
Scotson-Tairua, Kaylene	138	Green Valley, NSW
Smith, Suzan	97	Albuquerque, NM
Trattel, Deborah	153	deceased
Townsend, Kathy	23	deceased
Potts, Jerry	149	deceased

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.

Other Bars

Albuquerque Lawyers Club

Monthly Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its final lunch meeting of the 2018-19 season, featuring Day Hochman, Esq., state representative from N.M. House District 15. The lunch meeting will be held at noon, May 8 at the Albuquerque Country Club, located at 601 Laguna Blvd, SW Albuquerque. **Note the change in location and date**. Cost is free to member and $30 for non-members. For more information, email ydennig@Sandia.gov.

New Mexico Criminal Defense Association

Litigating in the 21st Century CLE

Digital evidence is well known for its effectiveness at damaging the defense, but what if there was a way to turn that around? "Litigating in the 21st Century" will show what evidence to focus on gathering for attorney defense and how to keep the government's out at trial, update on State and Federal search and seizure of data, explain the Foreign Intelligence Surveillance Act, and more. Stay sharp in this electronic age and reservea spot. NMCDLA members, families and friends are invited to the annual membership party and silent auction on June 7. Visit www.nmcdla.org to join NMCDLA and register.

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.

Other News

Temple Beth Shalom

Canadian Supreme Court Justice Rosalie Abella and Professor Irving Abella

Justice Rosalie Abella, the first Jewish woman to sit on Canada's Supreme Court, and Professor Irving Abella, her husband and a historian of Jewish life in Canada, are coming to Santa Fe's Temple Beth Shalom to offer their scholarly and personal perspectives on Canada's resistance to Jewish immigrants attempting to escape persecution before and during World War II. The program, which is free and open to the public, will start at 4 p.m., May 4, at Temple Beth Shalom, 205 E. Barcelona Rd., Santa Fe. For more information visit www.sftbs.org, call 505-982-1376 or email info@sftbs.org.

Albuquerque Law-La-Palooza

Help us address the needs of low-income New Mexicans

The Second Judicial District Pro Bono Committee is hosting Law-La-Palooza, a free legal fair, from 3-6 p.m., May 2, at the Alamosa Community Center 6900 Gonzales RD SW, Albuquerque. The legal fair will be first-come, first-served, Spanish language interpreters will be available. Looking for attorneys who practice in the following areas to give consults: divorce, creditor/debtor, powers of attorney, custody, child support, public benefits, landlord/tenant, kinship/guardianship, unemployment, bankruptcy, wills and probate, personal injury, contracts, immigration, problems with the IRS, SSI/SSDI, visitation, name change. To register visit http://bit.ly/2GhlbJa. For questions or more information, contact C. Tattiana Kinahan at 505-814-5033 or to TattianaK@nmlegalaid.org.

N.M. Workers' Compensation Administration

Request for Comments

The acting director of the Workers' Compensation Administration, Verily A. Jones, is considering the reappointment of Judge Leonard Padilla to a second five-year term pursuant to NMSA 1978, §52-5-2 (2004). Judge Padilla's term expires on Aug. 31. Anyone wishing to submit written comments concerning Judge Padilla's performance may do so until 5 p.m., June 3. All written comments submitted per this notice shall remain confidential. Comments may be addressed to WCA Acting Director Verily A. Jones, P.O. Box 27198, Albuquerque, NM 87125-7198; or faxed to 505-841-6813.

Legal Education

May

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

3 **Animal Law 2019 Regular Session of the New Mexico Legislature**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **Incentive Compensation in Businesses, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **Incentive Compensation in Businesses, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Drafting Demand Letters**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Annual Estate Planning**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
Wilcox Law Firm

16 **Annual WCA of NM Conference**
8.0 G, 1.0 EP
Live Seminar, Albuquerque
Workers Compensation Association of New Mexico

17 **Ethics of Shared Law Offices, Working Remotely and Virtual Offices**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

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

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

20 **Basic Practical Regulatory Training for the Natural Gas Local Distribution Industry**
27.5 G
Live Seminar, Albuquerque
Center for Public Utilities NMSU

20 **Basic Practical Regulatory Training for the Electric Industry**
28.5 G
Live Seminar, Albuquerque
Center for Public Utilities NMSU

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

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

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

24 **Ethical Issues in Contract Drafting**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **Ethical Issues and Implications on Lawyers' Use of LinkedIn**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

31 **2019 Young Lawyers Seminar**
3.0 G
Live Seminar, Albuquerque
New Mexico Defense Lawyers Association

The New Mexico State Bar Foundation announces a *Cuba* CLE Trip with Cuban Cultural Travel and CLE Abroad

Nov. 8-12, 2019

Highlights:

- Thought provoking lectures from Cuban attorneys and scholars
- Private dance performance by Habana Compas dance company
- Visit to the home of Ernest Hemingway
- Enjoy a musical performance by the Havana Youth Orchestra
- Panoramic tour of Havana Vieja

Cost Per Person

Hotel Nacional: $2,980 (double occupancy) or $3,325 (single occupancy)

Casa Particular: $2,495 (double occupancy) or $2,855 (single occupancy)

Price includes accommodations, daily breakfast, most lunches and dinners, airport transfer to/from Havana airport, admission to museums, air-conditioned transportation, Cuban tourist card/visa and more.

Save the Date!

Registration is open! Deposits due by July 8.
www.nmbar.org/cubatrip

New Mexico State Bar Foundation
Center for Legal Education

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Opinions

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

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

Effective April 12, 2019

PUBLISHED OPINIONS

No published opinins

UNPUBLISHED OPINIONS

A-1-CA-35546	State v. K Krohn	Reverse/Remand	04/08/2019
A-1-CA-37705	State v. T Yazzie	Affirm	04/08/2019
A-1-CA-36197	R Barrozo Jr v. Albertsons	Reverse/Remand	04/09/2019
A-1-CA-37220	Lovelace Health v. J Barncastle	Affirm	04/09/2019
A-1-CA-37177	State v. R Urquidi-Castillo	Affirm	04/11/2019

Effective April 19, 2019

PUBLISHED OPINIONS

No published opinins

UNPUBLISHED OPINIONS

A-1-CA-35854	State v. R Parra	Affirm	04/15/2019
A-1-CA-37386	LSF9 Master v. N Wils	Reverse/Remand	04/15/2019
A-1-CA-37622	State v. F Martinez	Affirm	04/15/2019
A-1-CA-37671	State v. J Gonzales	Affirm	04/15/2019
A-1-CA-37761	State v. W Davis	Affirm	04/15/2019
A-1-CA-34520	State v. D Aguilar	Affirm	04/16/2019
A-1-CA-35839	San Juan v. KNME-TV	Affirm/Reverse/Remand	04/16/2019
A-1-CA-36488	M Kakuska v. Roswell Schools	Affirm	04/16/2019
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A-1-CA-36456	S Kaufman v. UNM Hospital	Affirm	04/17/2019
A-1-CA-37565	C Saddler v. A Bannister	Affirm	04/17/2019
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A-1-CA-36497	State v. D Sanchez	Affirm	04/18/2019
A-1-CA-37092	State v. Savannah S.	Affirm	04/18/2019
A-1-CA-37246	State v. C Heh	Affirm	04/18/2019
A-1-CA-37557	State v. D Crosby	Affirm	04/18/2019

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

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

CLERK'S CERTIFICATE OF ADMISSION

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CLERK'S CERTIFICATE OF NAME AND ADDRESS CHANGE

As of April 1, 2019:
Hon. Brittany Maldonado Malott
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Effective April 15, 2019:
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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective May 1, 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

Civil Forms

4-999 Notice of hearing and rights 01/14/2019

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.

Before the Disciplinary Board of the Supreme Court of the State of New Mexico

In the Matter of Jon C. Fredlund, Esq.

Disciplinary No. 2018-09-4415

An Attorney Licensed to Practice Law before the Courts of the State of New Mexico

Formal Reprimand

You are being issued this Formal Reprimand pursuant to a *Conditional Agreement Admitting the Allegations and Consenting to Discipline* which was approved by a Hearing Committee and a Disciplinary Board Panel.

In 2017, you filed a *Notice of Appeal* in the Fifth Judicial District Court, yet as trial counsel you failed to file *Defendant-Appellant's Docketing Statement* in a timely manner. The Court of Appeals filed an *Order to Show Cause Why Sanctions Should Not Be Imposed* directing you to file the required docketing statement, serve the same on the District Court, and respond to the Court of Appeals in writing within fifteen (15) days. You failed to comply with the Court of Appeals' directives, and an *Order to Show Cause In Person* was filed and personally served upon you. You were to appear before the Court of Appeals but failed to do so. The Court of Appeals held you in civil contempt.

It is notable that Court of Appeals was forced to use an alternate e-mail address for you – other than your official address of record – to inform you of the requirement pursuant to Rule 17-202 NMRA to update your current contact information, including your e-mail address, with the New Mexico Supreme Court. This communication also instructed you to correct your e-mail address in File & Serve. You ignored this directive of the Court of Appeals even until the filing of disciplinary charges against you.

An *Order for Civil Contempt* and Bench Warrant were issued against you. The *Order for Civil Contempt* was mailed to you due to your e-mail official address remaining undeliverable. The *Order of Civil Contempt* sanctioned you and directed you to (a) contribute $350.00 to the Road Runner Food Bank, (b) reimburse the Court of Appeals $100.00 for the cost of scheduling and holding the April 19, 2018 hearing, and (c) file an affidavit with the Court of Appeals no later than 20 days from the date of the *Order*, attaching a copy of the payment to the Road Runner Food Bank.

While you timely submitted your *Affidavit of Compliance by Jon Fredlund* regarding the payment to the Road Runner Food Bank, you met none of the other directives of the Court of Appeals. A *Second Order from Appearance Hearing* was issued by the Court of Appeals and it was only after the extreme efforts of the Court of Appeals to obtain your compliance that you ultimately met the directives of the Court of Appeals.

While the failures in the one matter might have not resulted in public discipline in light of circumstances in your practice, the Office of Disciplinary Counsel determined that your inaction was not limited to the 2017 matter. The Office of Disciplinary Counsel informed you that The New Mexico Supreme Court entered a *Dispositional Order of Reversal* in 2018 based in part on your ineffective representation of a client, Mr. Pinon. You had filed a *Notice of Appeal* in this matter in 2008 as well as a *Defendant-Appellant's Docketing Statement* stating in pertinent part, "Undersigned counsel shall serve as appellate counsel." You were paid $2,000.00 for your representation in the appeal. You then took no further action on the appeal resulting in a *Notice Proposed Summary Disposition* and a *Memorandum Opinion* stating in whole, "Summary affirmance was proposed for the reasons stated in the calendar notice. No memorandum opposing summary affirmance has been filed, and the time for doing so has expired. Affirmed. IT IS SO ORDERED." Mr. Pinon filed *pro se* a Request for a copy of the Court of Appeals Memorandum Opinion, followed by a *Motion for Reconsideration of Sentence*. An *Order* was entered denying the *Motion for Reconsideration of Sentence* without a hearing which prompted Mr. Pinon to file a *pro se Petition for Writ of Habeas Corpus*. A follow-up *Amended Petition for Writ of Habeas Corpus* was filed on Mr. Pinon's behalf by the Assistant Public Defender in the Post-Conviction Habeas Unit. The *Order Granting (In Part) Petition for Writ of Habeas Corpus* states in pertinent part,

> Attorney Jon C. Fredlund rendered per se ineffective assistance of counsel on Petitioner's direct appeal by failing to file **any** pleadings (memorandum in opposition to calendar notice, motion for rehearing, or petition for certiorari) on his behalf in NMCA No. 28,307 and by failing to include all plausible claims raised in the District Court in the Docketing Statement (or by moving to amend the Docketing Statement); (emphasis in original)

While none of the filings noted in the Court's ruling are mandatory, when representing a client on appeal some action is required of that representation beyond the filing of a Notice of Appeal and Docketing Statement, even if only to return fees paid and/or inform the client that no further action is warranted.

Your conduct violated the following Rules of Professional Conduct: Rule 16-101, by failing to provide competent representation to your client; Rule 16-103, by failing to represent your client diligently; Rule 16-302, by failing to expedite litigation; and Rule 16-804(D), by engaging in conduct that was prejudicial to the administration of justice.

Although you have substantial experience in the practice of law, an aggravating factor, you fully cooperated in this disciplinary proceeding, you had no prior discipline and you had other penalties and sanctions imposed against you – all of which are mitigating factors.

You are hereby formally reprimanded for these acts of misconduct pursuant to Rule 17-206(A)(5) of the Rules Governing Discipline. The formal reprimand will be filed with the Supreme Court in accordance with 17-206(D), and will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. In addition, in accordance with Rule 17-206(D), the entire text of this formal reprimand will be published in the State Bar of New Mexico Bar Bulletin.

Dated: April 19, 2019

The Disciplinary Board of the New Mexico Supreme Court

By

Cynthia A. Fry, Esq.
Board Chair

From the New Mexico Supreme Court

NO. S-1-SC-37561 (filed April 8, 2019)

INQUIRY CONCERNING A JUDGE
JSC Inquiry No. 2018-031
IN THE MATTER OF
HON. STEVE GUTHRIE
Otero County Magistrate Court

ORDER AND PUBLIC CENSURE

WHEREAS, this matter came on for consideration by the Court upon a petition to accept a stipulation agreement and consent to discipline between the Judicial Standards Commission and Respondent, Hon. Steve Guthrie.;

WHERAS, in the stipulation agreement, Respondent admits to the following acts:

(1) Respondent and his wife, Kim Guthrie, were next door neighbors with Leticia Coyazo and Ysidro "Chico" Coyazo for many years. In Judge Guthrie's opinion, the conflict emanated from the Coyazo grandchildren's bouncing basketballs on the public sidewalk outside the Coyazo home. In the Coyazos' opinion, the conflict began when Judge Guthrie parked his vehicle in front of the Coyazo home to prevent the Coyazos' grandchildren from playing basketball. The dispute surfaced episodically and resulted in the Coyazos filing several police reports, and resulted in the Guthries' decision to permanently move from their residence in October 2018;

(2) On October 13, 2017 and April 20, 2018, Respondent parked his personal vehicle in front of his next door neighbor Leticia Coyazo's home to prevent Ms. Coyazo's grandchildren from playing basketball;

(3) On November 15, 2017, Respondent told Leticia Coyazo words to the effect, "If I hear the basketball bounce one more time I am going after Chico's disability." Ysidro "Chico" Coyazo is Leticia Coyazo's husband and a disabled veteran who receives a monthly disability check. Ms. Coyazo considered this a threat and called the Alamogordo Police Department. Alamogordo Police Officer Mauricio Puente responded to the call. Respondent was interviewed and told Officer Puente, "what he meant about going after Ms. Coyazos [sic] retirement was that he was going to report her husband to the authority [sic] because her husband was doing things he is not supposed to be doing while on retirement/disability.";

(4) On April 20, 2018, Respondent parked his vehicle in front of Leticia Coyazo's home, eleven (11) feet away from a fire hydrant in violation of Alamogordo City Ordinance 12-6-1.1 which requires vehicles to be parked fifteen (15) feet away from a fire hydrant. Alamogordo Police Officer Edgar Soto was dispatched to the Coyazo home, measured the distance between the truck bumper and the fire hydrant which was only eleven (11) feet, and ran the license plate of the vehicle which returned as registered to Respondent. Officer Soto instructed Respondent to move his vehicle and Respondent complied;

(5) On July 6, 2018, Leticia Coyazo called police officers to file a complaint against Respondent's wife, Kim Guthrie, for spraying water at Ms. Coyazo's video surveillance cameras. While Alamogordo Police Officer Marcelino Esquero was conducting his investigation, he witnessed Respondent mimicking playing a violin and heard Respondent state, "Its [sic] against the law to water on Fridays [sic].";

(6) A sign was posted on the Guthrie home which read, "All cameras are fake do you think I would spend money to watch you LOL $$$$ LOL." Leticia Coyazo believes the Guthries' sign was in response to Ms. Coyazo's installation of video surveillance cameras outside her home, and subsequent to the Guthries' installation of video surveillance cameras outside their home; and

(7) Respondent met with Acting Alamogordo Police Chief Roger Schoolcraft at the Alamogordo Police Station, explained his issue with the Coyazos' grandchildren and told Chief Schoolcraft words to the effect that "police officers are not doing enough about the noise.";

WHEREAS, in the stipulation agreement, Respondent does not contest that the Commission has sufficient facts and evidence to prove by clear and convincing evidence that he engaged in willful misconduct by committing the acts enumerated above, and that he violated the Code of Judicial Conduct Rules 21-101 and 21-102 NMRA;

WHEREAS, the stipulation agreement provides that Respondent consents to the imposition of a public censure as discipline and to its publication in the New Mexico *Bar Bulletin*; and

WHEREAS, in light of the foregoing, and the Court having determined that acceptance of the stipulation agreement and consent to discipline is in the best interests of the judiciary and the public and being sufficiently advised, Chief Justice Judith K. Nakamura, Justice Barbara J. Vigil, Justice Michael E. Vigil, Justice C. Shannon Bacon, and Justice David K. Thomson concurring;

NOW, THEREFORE, IT IS ORDERED that the petition is GRANTED and this PUBLIC CENSURE is issued to Respondent, Hon. Steve Guthrie.; and

IT IS FURTHER ORDER that this matter is UNSEALED under Rule 27-104(B) NMRA.

IT IS SO ORDERED.

WITNESS, the Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 8th day of April, 2019.

Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico

From the New Mexico Supreme Court

NO. S-1-SC-37568 (filed April 8, 2019)

INQUIRY CONCERNING A JUDGE
JSC Inquiry No. 2018-020
IN THE MATTER OF
HON. ALBERT J. MITCHELL, Jr.
Tenth Judicial District Court

ORDER AND PUBLIC CENSURE

WHEREAS, this matter came on for consideration by the Court upon a petition to accept a stipulation agreement and consent to discipline between the Judicial Standards Commission and Respondent, Hon. Albert J. Mitchell, Jr.;

WHERAS, in the stipulation agreement, Respondent admits to the following facts:

(1) On or about January 8, 2018, Respondent met privately with County Manager Richard Primrose following a meeting of the Quay County Commissioners; and

(2) At the private meeting with the County Manager on January 8, 2018, Respondent expressed his displeasure with the vote of the County Commissioners concerning security of the Quay County Courthouse;

WHEREAS, in the stipulation agreement, Respondent denies that he engaged in willful misconduct regarding political influence, but Respondent does not contest that the Commission has sufficient facts and evidence to prove the following conduct occurred at the private meeting with the County Manager on January 8, 2018:

(1) Respondent made statements indicating he had the Governor's ear and could call on her to line-item veto capital outlay funds for Quay County if the court security measures Respondent wanted were not met;

(2) Respondent made statements indicating that if the court security measures Respondent wanted were not met, a prominent legislator could take the Quay County court's security measures into his own hands and pass a law to provide the measures Respondent believed were necessary for the courthouse; and

(3) Respondent made statements indicating that if any of a number of specific options concerning court security were implemented, Respondent would not follow through with notifying the Governor about Quay County's failure to implement the court security measures. The manner in which Respondent presented the options to the County Manager on January 8, 2018, was suggestive of a threat and the possibility of putting Quay County in jeopardy of not receiving capital outlay funds;

WHEREAS, in the stipulation agreement, Respondent acknowledge that the facts support a conclusion that he violated the Code of Judicial Conduct;

WHEREAS, the stipulation agreement provides that Respondent knew or should have known that his actions were clearly a failure to be patient, dignified, and courteous. *See* Rule 21-208(B) NMRA;

WHEREAS, the stipulation agreement provides that Respondent's statements created an appearance of impropriety and could be perceived as an abuse of the prestige of judicial office, which reflects negatively upon the independence, integrity, and impartiality of, and respect for, the judiciary. *See* Rules 21-102 and 21-103 NMRA;

WHEREAS, the stipulation agreement provides that Respondent consents to the imposition of a public censure as discipline and to its publication in the New Mexico *Bar Bulletin*; and

WHEREAS, in light of the foregoing, and the Court having determined that acceptance of the stipulation agreement and consent to discipline is in the best interests of the judiciary and the public and being sufficiently advised, Chief Justice Judith K. Nakamura, Justice Barbara J. Vigil, Justice Michael E. Vigil, Justice C. Shannon Bacon, and Justice David K. Thomson concurring;

NOW, THEREFORE, IT IS ORDERED that the petition is GRANTED and this PUBLIC CENSURE is issued to Respondent, Hon. Albert J. Mitchell, Jr.; and

IT IS FURTHER ORDER that this matter is UNSEALED under Rule 27-104(B) NMRA.

IT IS SO ORDERED.

WITNESS, the Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 8th day of April, 2019.

Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico

From the New Mexico Supreme Court

Opinion Number: 2019-NMSC-009
No: S-1-SC-37227 (filed February 7, 2019)

UNITE NEW MEXICO,
HEATHER NORDQUIST,
ELECT LIBERTY PAC,
LIBERTARIAN PARTY OF NEW MEXICO,
and REPUBLICAN PARTY OF NEW MEXICO
Petitioners,
v.
MAGGIE TOULOUSE OLIVER,
Secretary of State of New Mexico
Respondent.

ORIGINAL PROCEEDING

CARTER B. HARRISON IV
PEIFER, HANSON & MULLINS, P.A.
Albuquerque, New Mexico

CHRISTOPHER SAUCEDO
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GINGER GRIDER, REP. PAUL BANDY, REP. JIMMIE C. HALL, REP. JAMES TOWNSEND, REP. GREG NIBERT, REP. RICKY L. LITTLE, REP. BOB WOOLEY, SENATOR STUART INGLE, SENATOR MARK MOORES, SENATOR CLIFF PIRTLE, SENATOR STEVEN P. NEVILLE, SENATOR WILLIAM E. SHARER, SENATOR WILLIAM PAYNE, SENATOR CARROLL H. LEAVELL, SENATOR JAMES P. WHITE, SENATOR GAY G. KERNAN, SENATOR CANDACE GOULD, SENATOR RON GRIGGS, SENATOR WILLIAM F. BURT, SENATOR CRAIG W. BRANDT, COMMISSIONER WILL CAVIN, COMMISSIONER ROBERT CORN, KEITH RIDDLE, KEITH MANES
Amicus Curiae

Dr. Gavin Clarkson, Pro-Se
Las Cruces, New Mexico

Opinion

Judith K. Nakamura, Chief Justice

{1} The Secretary of State (Secretary) sought to reinstate straight-ticket voting in the November 2018 general election. A coalition of voters, political parties, and political organizations (Petitioners) filed a petition for writ of mandamus asking this Court to order the Secretary to stop and make no further efforts to reinstate the straight-ticket option on grounds that she does not possess authority to do so. We agree with Petitioners. Whether straight-ticket voting shall once more be a ballot option in general elections in New Mexico is a policy question for our Legislature. The Legislature cannot delegate election policy determinations. The Secretary's efforts to reinstate straight-ticket voting without legislative approval violates separation of powers principles and is unlawful. The petition for writ of mandamus is granted.[1]

I. DISCUSSION

{2} "The New Mexico Constitution gives this Court the power to issue writs of mandamus 'against all state officers.'" *State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶ 12, 145 N.M. 563, 203 P.3d 94 (citing N.M. Const. art. VI, § 3). The Secretary is a "state officer." *Id.* We have exercised our "original jurisdiction in mandamus in instances where a petitioner sought to restrain one branch of government from unduly encroaching or interfering with the authority of another branch in violation of Article III, Section 1 of our state constitution." *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55. This case presents this exact circumstance. Petitioners ask us to restrain the Secretary, an executive branch official, from encroaching upon the authority of the legislative branch to make the election laws.

{3} Petitioners contend that the Secretary cannot reinstate straight-ticket voting in the general election because only the Legislature may decide this question and that the Legislature has already decided that straight-ticket voting *shall not* be available to voters in the general election. The

[1]We announced this unanimous decision after deliberation following oral argument. This opinion memorializes and more thoroughly explicates the basis for our ruling.

Secretary responds that "the New Mexico Legislature has never prohibited the inclusion of a straight-party voting option on the ballot," and that the Legislature "left this option, like other options involved in formatting the ballot, to be determined by the [Secretary]." She emphasizes that "the Election Code quite clearly gives the [Secretary] discretion on the formulation of the ballot" and directs us to NMSA 1978, Section 1-10-12(F) (2009) which provides that "[p]aper ballots shall: . . . be in the form prescribed by the [Secretary]."

{4} The Secretary's arguments require us to examine (A) whether the Legislature may delegate to the Secretary the authority to decide whether to include the straight-ticket option on ballots in the general election, (B) the rich and complex history of straight-ticket voting in New Mexico, and (C) the text and history of Section 1-10-12(F).[2]

A. Separation of Powers and Nondelegation

{5} The Secretary's position in this case is *not* that the Legislature decided that the straight-ticket option should be included on the ballot in the upcoming general election and delegated to her the task of implementing this policy choice. Rather, she contends that the Legislature intended "to allow the [Secretary], in the exercise of her discretion, to decide whether to include a straight-party voting option on the uniform ballot." It is her position that the Legislature delegated to her the threshold determination of whether to embrace straight-ticket voting at all. This claim is highly problematic.

{6} The New Mexico Constitution grants to each of the three branches of state government distinct and exclusive powers. N.M. Const. art. III, § 1. ("The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted."). The Constitution further provides that "[t]he [L]egislature . . . shall regulate the manner, time and places of voting" and "shall enact such laws as will secure the secrecy of the ballot and the purity of elections and guard against the abuse of elective franchise." N.M. Const. art. VII, § 1(B). This language vests our Legislature with plenary authority over elections, an authority limited only by the Constitution itself. *See Chase v. Lujan*, 1944-NMSC-027, ¶ 24, 48 N.M. 261, 149 P.2d 1003 ("[E]xcept as prohibited, the [L]egislature has plenary power to regulate the manner of voting . . . ."); *see also People's Constitutional Party v. Evans*, 1971-NMSC-116, ¶ 10, 83 N.M. 303, 491 P.2d 520 ("Elections of necessity must be organized and controlled to protect the right of suffrage, secrecy of the ballot, and against confusion, deception, dishonesty and other possible abuses of the elective franchise. The Legislature is charged with the duty of enacting laws to accomplish the purity of elections and protect against abuses."); *City of Raton v. Sproule*, 1967-NMSC-141, ¶ 76, 78 N.M. 138, 429 P.2d 336 ("We are of the opinion that our constitution expressly contemplates and directs that the legislature shall provide the proper machinery for conducting elections for different purposes").

{7} It is well understood that straight-ticket voting has meaningful impact on elections. *See* Erik J. Engstrom and Jason M. Roberts, *The Politics of Ballot Choice*, 77 Ohio St. L.J. 839, 839-41, 864-65 (2016) (discussing attempts in several states to impose or abolish straight-ticket voting and observing that "ballot laws have become a new weapon in the quest for political power" and that, "in almost all cases, the actors who advocate for changes to the form of the ballot pursue changes that are likely to strengthen their hold on political power"). Whether to include the straight-ticket option in elections is a policy decision of some magnitude.

{8} "The nondelegation doctrine limits, but does not completely prevent, the Legislature from vesting a large measure of discretionary authority in administrative officers and bodies." *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 41, 140 N.M. 77, 140 P.3d 498. "The Legislature may not vest unbridled or arbitrary authority in an administrative body . . . and must provide reasonable standards to guide it." *Id.* This is because "[l]egislative power cannot be delegated, and the Legislature cannot confer upon any person, officer, or tribunal the right to determine what the law shall be. This is a function which the Legislature alone is authorized under the Constitution to exercise." *State v. Spears*, 1953-NMSC-033, ¶ 10, 57 N.M. 400, 259 P.2d 356 (quoting *State v. Briggs*, 77 P. 750, 750 (Or. 1904)). This is not to say, of course, that the Legislature is precluded from delegating the implementation of a legislatively determined "scheme, policy, or purpose[.]" *Cobb*, 2006-NMSC-034, ¶ 41. This form of delegation is common in our modern, regulatory state. *See generally* 1 Jacob A. Stein, et al., *Administrative Law*, § 3.03[5], at 128-42 (2013). Rather, what the Legislature cannot do is delegate the right to determine, in the first instance and wholesale, what that scheme, policy, or purpose will be. *See Yakus v. United States*, 321 U.S. 414, 426 (1944) ("Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose . . . .").

{9} The Secretary's position in this case is precisely what the nondelegation doctrine forbids—that the Legislature delegated to her the authority to make the binary choice of whether to embrace straight-ticket voting or not. In other words, to decide what the election law shall be. The Legislature cannot delegate this authority, and to conclude otherwise would result in a violation of the separation of powers. Our review of the history of straight-ticket voting in New Mexico assures us that our Legislature has never delegated this authority to the Secretary.

B. History of Straight-Ticket Voting in New Mexico

{10} There are three facets to the history of straight-ticket voting in New Mexico: (1) our Legislature's former authorization of straight-ticket voting in general elections and its practice of carefully articulating how voters may exercise this ballot option, (2) the emergence and repeal of a statute requiring the straight-ticket option be included on emergency paper ballots, and (3) the introduction of voting machines in New Mexico and the passage and subsequent repeal of a statute requiring those machines to have straight-ticket

[2]We do not address Petitioners' claim that the Secretary was required to initiate rulemaking proceedings to reinstate straight-ticket voting. This claim is moot given our conclusion that only the Legislature may reinstate straight-ticket voting. We also do not address Petitioners' contention that the Secretary's attempts to reinstate straight-ticket voting infringes upon their constitutional rights. Petitioners have abandoned this contention.

voting capability. We address each of these matters separately. We begin at a period of time before straight-ticket voting appeared in our Election Code.

1. Straight-ticket voting in general elections

{11} In 1852, the Territorial Legislature passed an enactment that authorized the Governor to "prepare proper forms for the uniform and proper conducting of all elections to be conducted and held under the laws of this Territory[.]" 1882 General Laws of N.M., § 64 (Act of January 9, 1852). The act required the "secretary of the Territory" to "have all such forms . . . printed and distributed, as occasion may require." *Id.* This enactment appears in the 1884 Compiled Laws of New Mexico with minimal alteration. Section 1182, C.L. 1884. The 1884 compilation also includes a provision specifying that "[a]ll votes shall be by ballot, each voter being required to deliver his own vote by person" and that "[e]ach ticket shall be numbered and the number placed opposite the name of the voter[.]" Section 1142, C.L. 1884.

{12} In 1891, the Territorial Legislature passed an enactment that provided additional, specific guidance regarding ballots. 1891 N.M. Laws, ch. 85, § 2. The enactment mandated that

> all tickets or ballots used at any general election held in this Territory shall be printed on plain white paper, three inches in width and eight inches in length, or within one quarter of an inch of that size. No such ticket or ballot shall have any mark or number or designating device on the back so that its character may be known when folded.

Id. This enactment appeared in the 1897 Compilation of the Territorial Laws. Section 1634, C.L. 1897. As before, the 1897 compilation also included the provision authorizing the Governor to prepare the "proper forms" for elections. Section 1673, C.L. 1897.

{13} By the time of the 1915 compilation (after New Mexico had become a state), the provision authorizing the Governor to "prepare proper forms" was no more. Our Legislature expanded its treatment and control over ballots considerably. Ballots were now addressed in several different articles and sections within a chapter of our laws dedicated entirely to elections. *See generally* §§ 1976-2080, C.L. 1915. Each section included a heading generally stating that section's purpose.

{14} One section, entitled "Ballots—How furnished—Form[,]" specified that " [e]very ballot printed under the provision of this article shall be headed by the name and emblem of the political party by whom the candidates whose names appear on the ballots were nominated, and each of said ballots shall contain only the names of the candidates nominated by said party." *Id.* § 1993. Another section entitled "Ballots—Size—Contents—False headings, etc." restated the requirements that ballots "be printed on plain white paper, three inches in width and eight inches in length, or within one quarter of an inch of that size." *Id.* § 1994. Two other sections entitled "Candidates—Filing list—Names on ballots" and "Emblem" addressed the supremacy of the official ballot and gave instructions as to how the emblems of political parties were to be submitted. *Id.* §§ 1995, 1996.

{15} In 1927, a comprehensive set of provisions expressly designated as an "Election Code" was passed for the first time. 1927 N.M. Laws, ch. 41, §§ 101-321. The 1927 Election Code significantly increased legislative control over the ballot. Provisions within that code specified that ballots must be printed on "good quality of plain white paper, and all printing thereon shall be in black ink." *Id.* § 306(1). The code also specified the font types for the ballot: "nonpareil caps" for the varying offices at stake in the election and a font "not smaller than brevier nor larger than small pica caps" for candidate names. *Id.* § 306(4). Most crucially, the code expressly embraced straight-ticket voting as a ballot option, incorporated a ballot-design scheme predicated upon the availability of the option, and included instructions for voters specifying how the option could be utilized. *Id.* §§ 306, 311.

{16} Section 306 of The 1927 Election Code specified that "[t]he names of all candidates of any party shall be printed on the ballot in the column under the party name and emblem of such party." *Id.* § 306(3). It further specified that the ballot must include "a circle three-fourths of an inch in diameter under the emblem of each party and a one-quarter inch square opposite and to the right of the name of each candidate." *Id.* § 306(4). A pictorial representation of a sample ballot—showing how these symbols should appear—was included at Section 306(9). *See* app. A, fig. 1. Voting instructions prepared by the Legislature and included in The 1927 Election Code made clear to voters that marking the circle, the square, or both had consequence. *See* 1927 N.M. Laws, ch. 41, §§ 306, 311, 312; *see also* app. A, fig. 2.

{17} One set of instructions to be printed on the back of each ballot, instructed voters as follows:

> Mark with pen and ink or indelible pencil a cross in the ○ under the party name and emblem of the party for all or most of whose candidates you wish to vote, and if you wish to vote for any candidate other than a candidate whose name appears in the column under such ○ mark a cross in the first ○ to the right of the name of the candidate in any other column for whom you wish to vote. . . . If you do not wish to make a cross in any circle you may make a cross in the first ○ to the right of the name of each candidate or person for whom you wish to vote.

Id. § 306(9); *see also id.* § 312 (stating how "Electors shall vote" and providing a similar account of how the straight-ticket option could be utilized).

{18} A second set of instructions were to be printed by the Secretary and delivered to county clerks who were in turn directed to hang the instructions in voting booths and "elsewhere in or about the polling place." *Id.* § 311. These instructions differed only slightly from those that were to appear on the back of ballots and included the following description of how voters could exercise the straight-ticket option: "If you wish to vote a straight party ticket, make a cross in the circle under the party name and emblem of such party, and your vote will be considered as cast for every candidate named under such party name." *Id.* The second set of instructions went on to specify how a voter could exercise the straight-ticket option and also simultaneously vote for candidates of another party.

> 4. If you wish to vote a straight party ticket with the exception of one or more of the candidates of said party you may make a cross in the ○ under the party name and emblem of such party, and then make a cross in the first ○ to the right of the name of the candidate in any other column for whom you wish to vote[.]

Id. Finally, the second set of instructions explained how a voter could decline to utilize the straight-ticket option: "If you do not make a cross in the ○ under any party

emblem you may then make a cross in the first ○ to the right of the name of each candidate for whom you wish to vote[.]" *Id.*

{19} The 1927 Election Code also referred to straight-ticket voting in provisions addressing how election judges should count votes. *Id.* §§ 314, 319. These provisions suggested the following method:

> 22. The election judges and clerks may use any practical method for counting and tallying the ballots. The following method is recommended as best calculated to facilitate said counting and tallying:
>
> Upon opening the ballot box, the judges of election shall first unfold all of the ballots and place them in separate piles as follows: Straight Republican; Straight Democrat; Scratched ballots with cross in the circle under the Republican emblem; Scratched ballots with cross in the circle under the Democratic emblem; and in a fifth pile place all other scratched ballots. Then count the Straight Republican ballots and enter the number so counted on the first line of the first tally sheet in the poll book in which they are tallying the vote. This number should be written in the column under the name of each of the Republican candidates on the first line. When the Straight Republican ballots have been counted, tie them into a separate package and keep them in a safe place.
>
> In the same way, enter on the first line of the tally sheet the number of Straight Democratic ballots in the column under the name of each of the Democratic candidates. Then tie these ballots into a package with the ballots already counted.

Id. § 319.

{20} The 1927 Election Code was compiled at Chapter 41 in the 1929 Compilation, at Chapter 56 in the 1941 Compilation, and at Chapter 3 in the 1953 Compilation. The 1927 Election Code eventually became simply the "Election Code." NMSA 1941, §§ 56-101 (1942). Each compilation—1929, 1941, and 1953—includes the straight-ticket-voting provisions discussed. NMSA 1953, §§ 3-3-7, -12, -13, -20 (1953); NMSA 1941, §§ 56-306, -312, -313 (1941); NMSA 1929, § 41-306 (1929). No meaningful changes were made to those provisions until 1969.

{21} In 1969, our Legislature repealed Article 3 of the Election Code, the section that included the provisions dealing with straight-ticket voting. 1969 N.M. Laws, ch. 240, § 451. Simultaneously, the Legislature enacted a new Article 12 which included a section addressing the "Marking" of the "Paper Ballot." 1969 N.M. Laws, ch. 240, § 255. One provision within that article specified that

> The voter in preparing a paper ballot in a general election shall:
>
> A. if he wishes to vote a straight party ticket, mark a cross (X) in the circle beneath the name of the party and his vote shall be considered as having been cast for every candidate named on the ticket of that party on the ballot, unless he also votes for one or more candidates in some other column or for some person whose name is not printed on the ballot[.]

1969 N.M. Laws, ch. 240, § 255(A). Subsections (B) and (C) explained how a voter could utilize the straight-ticket option and still vote for candidates in the party for which he did not wish to vote straight ticket and how the voter could decline to utilize the straight-ticket option. 1969 N.M. Laws, ch. 240, § 255(B), (C). This provision was codified at NMSA 1953, Section 3-12-19 (1969 Pocket Supp.).

{22} In the wake of the 1969 amendments to the Election Code, Section 3-12-19 was the only provision addressing straight-ticket voting in general elections that remained within the article of the Election Code entitled "Conduct of Elections," the article where provisions authorizing straight-ticket voting in general elections had always been placed. The voting instructions and the provision explaining how election judges should count votes—both of which included express references to straight-ticket voting—were gone.

{23} In 1977, Section 3-12-19 was repealed along with several other provisions within Chapter 3, Article 12 of the Election Code. 1977 N.M. Laws, ch. 222, § 103. Following the repeal of Section 3-12-19, the Election Code no longer included a provision expressly authorizing straight-ticket voting in general elections.

{24} Despite the absence of a provision expressly authorizing straight-ticket voting in general elections, legislators made six attempts to prohibit straight-ticket voting as a ballot option in general elections between 2001 and 2007. S.B. 52, 48th Leg., 1st Sess. (N.M. 2007); S.B. 106, 47th Leg., 1st Sess. (N.M. 2005); S.B. 837, 46th Leg., 1st Sess. (N.M. 2003); S.B. 147, 46th Leg., 1st Sess. (N.M. 2003); S.B. 293, 45th Leg., 1st Sess. (N.M. 2001); S.B. 183, 45th Leg., 1st Sess. (N.M. 2001). None of these bills passed.

{25} In 2008, the Secretary of State's office created regulations governing how ballots with inconsistent markings shall be counted in the event of an election recount. 1.10.23.12 NMAC (11/03/2008). These regulations operate from the presumption that straight-ticket voting is a lawfully permitted feature in general elections. The regulations state, among other things, that a straight-ticket vote for both parties shall be treated as an invalid vote, 1.10.23.12(I) NMAC, and a straight-ticket vote for both parties and then also for an individual candidate shall be treated as a vote for the individual candidate. *Id.* These regulations remain in the New Mexico Administrative Code today.

{26} Between 2011 and 2013, legislators three times attempted to mandate that the straight-ticket option be available to voters in general elections. *See* S.B. 276, 51st Leg., 1st Sess. (N.M. 2013); S.B. 218, 50th Leg., 2nd Sess. (N.M. 2012); S.B. 582, 50th Leg., 1st Sess. (N.M. 2011). None of these bills passed.

2. Straight-ticket voting and emergency paper ballots

{27} The same year our Legislature repealed the provision expressly authorizing straight-ticket voting in general elections (1977), it enacted a provision that explained to voters utilizing "emergency paper ballot[s]" how they could exercise the straight-ticket option. 1977 N.M. Laws, ch. 222, § 56. Emergency-paper-ballot voters were instructed to "mark a cross (X) in the circle beneath the name of the party . . . ." *Id.* Doing so ensured that their "vote shall be considered as having been cast for every candidate named on the ticket of that party on the ballot[.]" *Id.* These instructions mirrored those given to all voters during the time that straight-ticket voting was authorized in general elections.

{28} This enactment concerning straight-ticket voting and emergency ballots was compiled at NMSA 1953, Section 3-12-87 (1976-77 Interim Supp.). In 1978, Section 3-12-87 was recompiled as Section 1-12-53. *See* Parallel Table. In 1979, the Legislature amended Section 1-12-53 to permit voters utilizing emergency paper ballots to

"mark" their ballot with a "check ( )" as an alternative to the "cross (X)" beneath the party name for which the voter wished to cast a straight-ticket vote. 1979 N.M. Laws, ch. 57, § 3. In 2005, several bills were proposed to eliminate the straight-ticket option on the emergency ballot. *See* S.B. 106, 47th Leg., 1st Sess. (N.M. 2005); S.B. 678, 680, 718 & 735, 47th Leg., 1st Sess. (N.M. 2005); H.B. 362, 47th Leg., 1st Sess. (N.M. 2005); H.B. 1063, 47th Leg., 1st Sess. (N.M. 2005); H.B. 1064, 47th Leg., 1st Sess. (N.M. 2005). These efforts were successful and the straight-ticket option was removed from Section 1-12-53. 2005 N.M. Laws, ch. 270, § 74. After 2005, Section 1-12-53 provided only that "[t]he voter in preparing an emergency paper ballot in a general election shall mark the ballot in accordance with the instructions for that ballot type." NMSA 1978, § 1-12-53 (2005). In 2009, Section 1-12-53 was repealed altogether. 2009 N.M. Laws, ch. 150, § 37.

3. Straight-ticket voting and voting machines

{29} In 1951, the Legislature passed a multi-section enactment permitting the use of voting machines. 1951 N.M. Laws, ch. 192, §§ 1-24. The first section of this enactment directed the Secretary to form a committee with four individuals appointed by the Governor to "study, examine and approve voting machines for use in the State of New Mexico." 1951 N.M. Laws, ch. 192, § 1. The act also included a section addressing the required specifications for voting machines. *Id.* § 2. It specified that "[n]o voting machine shall be approved by the committee unless it shall satisfy" a list of specific criteria designated as Subsections (a) through (h). *Id.* Subsection (h) specified that the machine had to "permit each voter, at other than primary elections, to vote a straight party ticket in one operation, and, in one operation, to vote for all the candidates of one party for presidential electors." *Id.* § 2(h). The machine voting enactment was subsequently codified at NMSA 1953, Sections 3-4-1 to -25 (1951) and the provision requiring voting machines to have straight-ticket capability appeared at Section 3-4-2(h) (1951).

{30} In 1969, Sections 3-4-1 to -25 were repealed. 1969 N.M. Laws, ch. 240, § 451. Our Legislature simultaneously enacted a new version of the voting machine act at Sections 3-9-1 to -13. 1969 N.M. Laws, ch. 240, §§ 187-195; *see* NMSA 1953, §§ 3-9-1 to -13 (1969). Section 3-4-2(h) (requiring voting machines to have straight-ticket capability) now appeared at Section 3-9-5(H). 1969 N.M. Laws, ch. 240, § 187; *see also* NMSA 1953, § 3-9-5(H) (1969).

{31} In 1976, the authority to approve voting machines was given to the "[S]ecretary of [S]tate." 1976 N.M. Laws, ch. 5, § 4; NMSA 1953, § 3-9-5 (1976). In 1978, Section 3-9-5 was recompiled as Section 1-9-4. NMSA 1978, § 1-9-4 (1978). In 1991, the Legislature specified that the "machine" contemplated by the voting machine act was a "lever-type voting machine." 1991 N.M. Laws, ch. 106, § 1. In the wake of all these changes, Section 1-9-4(H) provided that "[n]o lever-type voting machine shall be approved by the secretary of state unless: . . . H. it permits each voter, at other than primary elections, to vote a straight party ticket in one operation[.]" NMSA 1978, § 1-9-4 (1991). In 2001, Section 1-9-4 was repealed along with several other provisions dealing with voting machines, 2001 N.M. Laws, ch. 233, § 16, thus removing any reference to straight-ticket voting from the voting machine act.

{32} In the same 2001 bill repealing Section 1-9-4, the Legislature passed enactments ushering in the era of "voting systems." *See generally* 2001 N.M. Laws, ch. 233, §§ 1-15. Voting systems are "a combination of mechanical, electromechanical or electronic equipment, including the software and firmware required to program and control the equipment, that is used to cast and count votes[.]" 2001 N.M. Laws, ch. 233, § 1(B). The Legislature crafted a set of "standards" voting systems must meet. *Id.* §§ 10-11. Straight-ticket capability was not one of those standards. In 2006, the Legislature passed enactments requiring all precincts in New Mexico to utilize "voting systems," and requiring those voting systems to "use a paper ballot on which the voter physically or electronically marks the voters' choices on the ballot itself[.]" 2006 N.M. Laws, ch. 43, §§ 1-2. And with this, our election laws came full circle in some sense.

4. Analysis of This History

{33} For the fifty years between 1927 and 1977, our Legislature not only expressly approved straight-ticket voting in general elections but, for the bulk of this time, gave exceedingly specific instructions about how voters could vote straight ticket. The 1977 repeal of the law expressly authorizing straight-ticket voting in general elections, as well as the disappearance of the voting instructions and the instructions to the election judges expressly referring to straight-ticket voting, cannot be overstated.

{34} The provisions that continued after 1977 and that referred to straight-ticket voting did not clearly state that straight-ticket voting was authorized in general elections, as had been the case for the past half century. Rather, these provisions only made straight-ticket voting available for emergency-ballot voters and mandated that voting machines have straight-ticket voting capability. These provisions do not have the same clarity or functional significance of the former statutes that so clearly mandated that straight-ticket voting be an option in general elections. The straight-ticket provisions in the machine voting and emergency ballot context were repealed in 2001 (voting machines) and 2005 (emergency ballots), after which legislators attempted both to prohibit and reinstate straight-ticket voting in general elections. *Supra*, ¶¶ 24, 26. It is entirely unclear what authority served as the basis for the Secretary's 2008 regulations which appear to assume that straight-ticket voting continued to be a ballot option in general elections despite the fact that, as of 2005, straight-ticket voting was no longer a feature of any kind in our election laws.

{35} In sum, we see nothing in this history that suggests that our Legislature ever intended to give authority to the Secretary to decide whether straight-ticket voting shall be an option to voters in general elections. To the contrary, this history indicates that our Legislature understands that it alone possesses authority to decide whether and under what circumstances straight-ticket voting should be available in general elections. Nothing in the text or history of Section 1-10-12(F) causes us to doubt this conclusion.

C. Section 1-10-12(F)

{36} Section 1-10-12, entitled "Paper ballots; general requirements[,]" states that Paper ballots shall:

A. Be numbered consecutively;
B. Be uniform in size;
C. Be printed on good quality white paper;
D. Be printed in plain black type;
E. Have the precinct numbers printed on each paper ballot; and
F. Be in the form prescribed by the secretary of state.

The origin of this provision can be traced back to 1891 when the Territorial Legislature first specified that ballots be printed on "plain white paper" and be a certain uniform size. 1891 N.M. Laws, ch. 85, § 2.

The source of the specific language utilized by our Legislature in Section 1-10-12 can be traced to two separate statutes: NMSA 1953, Section 3-10-7 (1969) and NMSA 1953, Section 3-10-10 (1969). *See* 1969 N.M. Laws, ch. 240, §§ 202, 205.

{37} Section 3-10-7 was entitled "Ballots—Paper—General requirements" and provided as follows:

> Paper ballots used in the primary and general elections shall:
>
> A. Be numbered consecutively for each precinct beginning with number one. The number shall be printed in the upper right-hand corner of the ballot with a diagonal perforated line so placed that the portion of the ballot bearing the number in the upper right-hand corner may be readily and easily detached from the paper ballot;
>
> B. Be uniform in size;
>
> C. Be printed on good quality white paper;
>
> D. Be printed in plain black type;
>
> E. Have all words and phrases, except the names of the candidates, printed in their proper place; and
>
> F. Have the precinct number printed on each ballot.

Section 3-10-7 (1969) and Section 1-10-12 (2009) differ only slightly: Section 3-10-7(A) was more specific than Section 1-10-12(A); Section 3-10-7(E) was not carried over into Section 1-10-12; Section 3-10-7(F) exists at Section 1-10-12(E); and Section 3-10-7 did not include the language "be in the form prescribed by the secretary of state" as in Section 1-10-12(F) . This "form prescribed" language came from Section 3-10-10.

{38} Section 3-10-10 was entitled "Ballots—Paper—Form for general election." It stated that "[p]aper ballots used in the general election shall be in the form prescribed by the [S]ecretary of [S]tate and shall conform to" four requirements none of which need be discussed in any detail here. Section 3-10-10 (1969).

{39} Both Sections 3-10-7 and 3-10-10 were repealed in 1977 along with many other sections of Chapter 3, Article 10 governing "Ballots and Ballot Labels." 1977 N.M. Laws, ch. 222, § 103. Simultaneously, the Legislature enacted a new Section 3-12-78 entitled "Emergency Situations—Emergency Paper Ballots—General Requirements[,]" 1977 N.M. Laws, ch. 222, § 47; *see* NMSA 1953, § 3-12-78 (1977), and a new Section 3-12-80 entitled "Emergency Situations—Emergency Paper Ballots—Form for General Election." 1977 N.M. Laws, ch. 222, § 49; *see* NMSA 1953, § 3-12-80 (1977). Section 3-12-78 (1977) was nearly identical to Section 3-10-7 (1969) except that Section 3-12-78 applied to "emergency paper ballots." Section 3-12-80 (1977) was nearly identical to Section 3-10-10 (1969) except that it too applied to "emergency paper ballots."

{40} In 1978, Section 3-12-78 was recompiled as Section 1-12-44 and Section 3-12-80 was recompiled as Section 1-12-46. In 2009, Section 1-12-44 was amended and recompiled as the present Section 1-10-12. 2009 N.M. Laws, ch. 150, § 10. Simultaneously and in the same bill, Section 1-12-46 was repealed. 2009 N.M. Laws, ch. 150, § 37.

{41} As a consequence of the 2009 amendments, Section 1-10-12 no longer governed or addressed emergency ballots. It concerned paper ballots and included the language as we know it today. In effect, the provision reverted to the purpose it originally had in 1969 with an essential added feature: it specified that paper ballots shall "be in the form prescribed by the secretary of state." NMSA 1978, § 1-10-12 (2009).

{42} This history does not suggest, as the Secretary argues, that our Legislature meant to empower her to decide whether straight-ticket voting shall be available to voters in general elections when it gave her the authority to prescribe the form of the ballot. Since 1927, our Election Code has addressed whether and under what circumstances straight-ticket voting shall be available to voters in general elections in an article of our Election Code initially entitled the "Calling and Conduct of Elections" and later simply the "Conduct of Elections." 1927 N.M. Laws, ch. 41, §§ 302-21 (Calling and Conduct of Elections); NMSA 1929, §§ 41-301 to -360 (1929) (same); NMSA 1941, §§ 56-301 to -362 (1941) (same); NMSA 1953, §§ 3-31 to -40 (1953) (same); NMSA 1953, §§ 3-12-1 to -16 (1969) (Conduct of Elections). The statutes that would eventually become Section 1-10-12 were originally codified at Article 10, an article addressing "Ballots and Ballot Labels." NMSA 1953, § 3-10-1 to -15 (1969). As the statutes that would later become Section 1-10-12 came into existence at a time when a section in an entirely different article provided for straight-ticket voting in general elections, we can deduce that the origins of Section 1-10-12 had nothing whatsoever to do with straight-ticket voting. *See* Norman J. Singer and J.D. Shambie Singer, 1A *Sutherland Statutes and Statutory Construction*, § 28.11, at 637 (7th ed. 2009) ("[I]n the construction of a particular code section, attention should be given to the entire chapter, or even the entire code, to determine the purpose and objective of the [L]egislature in organizing the material. Under some circumstances the placement or rearrangement of code sections may be helpful to determine proper construction of the statute." (footnotes omitted)).

{43} It is true that from 1977 until 2009 the emergency ballot iterations of Section 1-10-12 were codified within the Conduct of Elections article. But after 2009, Section 1-10-12 once again moved back to Article 10 of the Election Code. The significance of this move—out of and away from the article where the statutes authorizing straight-ticket voting in general elections were generally housed—suggests that Section 1-10-12 is not a provision that was ever intended to authorize the Secretary to decide questions relating to straight-ticket voting. We are assured of the correctness of this conclusion by a plain language analysis of Section 1-10-12.

{44} Section 1-10-12(F)'s directive that the ballot "be in the form prescribed by the secretary" is preceded by Subsections (A) through (E). The nature of Subsections (A) through (E) give us insight into the meaning of Subsection (F). *See* NMSA 1978, § 12-2A-20(A)(2) (1997) ("[T]he meaning of a general word or phrase following two or more specific words or phrases may be limited to the category established by the specific words or phrases."); *State v. Office of Pub. Def. ex rel. Muqqddin*, 2012-NMSC-029, ¶ 29, 285 P.3d 622 ("The rule of *ejusdem generis* requires, that where general words follow an enumeration of persons or things of a particular and specific meaning, the general words are not construed in their widest extent but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned." (internal quotation marks and citation omitted)).

{45} Subsections (A) through (E) state that ballots shall be numbered, shall be uniform in size, shall be printed on quality white paper, shall be printed in plain black type, and shall have precinct numbers printed upon them. Section 1-10-12(A)-(E). These provisions all address the technical formatting of ballots. This indicates that the term "form" in Section 1-10-12(F)

is correctly construed as delegating to the Secretary authority only over the technical aspects of ballots. This is a limited power as many of the technical, formatting aspects of the ballot are specified by statute. *See generally* NMSA 1978, §§ 1-10-1 to -14 (1969, as amended through 2017). As we noted earlier in this opinion, whether straight-ticket voting shall be an option on ballots in general elections is not a technical formatting question. It is a question of significant substance over which Section 1-10-12 gives the Secretary no authority.

II. CONCLUSION

{46} Our Legislature cannot delegate to the Secretary unfettered authority to decide whether the straight-ticket option shall appear on ballots in the general election. The history of straight-ticket voting in general elections in New Mexico shows that the Legislature never delegated or attempted to delegate this authority to the Secretary. This conclusion is hardly surprising given the fact that whether straight-ticket voting shall be a ballot option in a general election is a meaningful policy question and not a mere technical, ballot-formatting matter. Our review of the history of straight-ticket voting also reveals that our Legislature removed any reference to straight-ticket voting in our Election Code. This can only be interpreted as a decision to remove the option from the ballot.

{47} The petition is granted and the writ of mandamus issued.

{48} IT IS SO ORDERED.

JUDITH K. NAKAMURA, Chief Justice

WE CONCUR:

BARBARA J. VIGIL, Justice

PETRA JIMENEZ MAES, Justice, Retired
Sitting by designation

CHARLES W. DANIELS, Justice, Retired
Sitting by designation

BRETT R. LOVELESS, Judge
Sitting by designation

Certiorari Denied, December 11, 2018, No. S-1-SC-37328

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-006

No. A-1-CA-35904 (filed October 4, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JUAN TRINIDAD SANCHEZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Briana H. Zamora, District Judge

HECTOR H. BALDERAS,
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for Appellant

Opinion

Julie J. Vargas, Judge

{1} The opinion filed October 3, 2018, is hereby withdrawn, and this opinion is filed in its stead. Defendant Juan Trinidad Sanchez appeals the district court's enhancement of his sentence for felony escape from a community custody release program (CCP) under NMSA 1978, Section 30-22-8.1 (1999). We conclude that Defendant's sentence was not improper because: (1) the felony escape from CCP statute allows for an elevated degree of offense based on a prior felony charge irrespective of whether the defendant is ultimately convicted of the felony; (2) the Legislature did not contemplate a prior felony conviction in assigning the punishment for felony escape from CCP, and (3) the escape from CCP statute and the habitual offender enhancement statute serve different purposes. We affirm Defendant's sentence as consistent with the plain language of the statutes as well as case law recognizing the difference between enhancements based on prior convictions and elevated degrees of offense based on prior charges.

BACKGROUND

{2} Defendant was convicted of felony possession of a controlled substance and was subsequently committed to CCP. Two weeks after being committed to CCP Defendant cut off his ankle monitor, failed to respond to messages from monitoring officers, and was subsequently taken into custody. A grand jury indicted Defendant for escape from CCP. The State charged Defendant with felony escape from CCP because the possession charge, for which Defendant was committed to CCP, was also a felony, and a jury found him guilty. The State then sought to enhance Defendant's felony escape conviction by eight years pursuant to the habitual offender statute, asserting that Defendant had three or more prior felony convictions, one of which was his conviction for possession of a controlled substance (felony possession). [1]The district court found Defendant was a habitual offender, and enhanced his sentence for felony escape by eight years. This appeal followed.

DISCUSSION

{3} Defendant argues that his conviction for felony possession was impermissibly used twice during sentencing: first to elevate the degree of the escape charge to a felony, and then again as a prior felony conviction for purposes of the habitual offender enhancement. We must therefore decide whether a felony charge that ultimately results in a conviction and gives rise to a felony escape conviction under Section 30-22-8.1 can then be used as a prior felony conviction for a habitual offender enhancement of the felony escape sentence. Much of the case law on this issue contains ambiguous or vague language, including references to felonies, rather than convictions, and punishments, as opposed to sentences or increased degrees of an offense. We are nonetheless able to discern two distinct lines of case law: those analyzing statutes, which require proof of a prior felony conviction or proof of a defendant's status as a felon, and those analyzing statutes that do not. For the reasons that follow, we believe this case belongs in the latter category.

A. Sentencing Framework

{4} "In New Mexico, the court's sentencing authority is limited by statute[, and t]he [L]egislature must give express authorization for a sentence to be imposed." *State v. Lacey*, 2002-NMCA-032, ¶ 5, 131 N.M. 684, 41 P.3d 952 (citation omitted). "We review issues of statutory interpretation de novo." *State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317. When interpreting a statute, we seek to give effect to the Legislature's intent, and do so by looking first to the plain meaning of the statute's language. *State v. Nieto*, 2013-NMCA-065, ¶ 4, 303 P.3d 855. If the language of the statute "is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *State v. Johnson*, 2001-NMSC-001, ¶ 6, 130 N.M. 6, 15 P.3d 1233.

{5} The Criminal Sentencing Act, NMSA 1978 Section 31-18-12 to -26 (1977, as amended through 2016), grants courts the authority to sentence "all persons convicted of a crime under the laws of New Mexico." Section 31-18-13(A). Pursuant to the habitual offender statute contained within the Criminal Sentencing Act, the extent to which a defendant's sentence can be enhanced depends on the number of the defendant's

[1]Defendant does not contest the existence or use of the other prior felony convictions, and they are not relevant to the issue on appeal.

prior felony convictions. *See* § 31-18-17(C) (providing that a person convicted of a felony within the Criminal Code who has incurred three or more qualifying prior felony convictions may be characterized as a habitual offender "and his basic sentence shall be increased by eight years"). Despite the habitual offender statute's statement of broad applicability to "all persons convicted of a crime," our courts have recognized certain exceptions to its broad application. *State v. Peppers*, 1990-NMCA-057, ¶ 28, 110 N.M. 393, 796 P.2d 614.

{6} The case law recognizing these exceptions all involve the improper use of a prior conviction, either to support an element of a subsequent conviction and an enhancement under the habitual offender statute or to stand as the basis for two separate enhancements. For example, in *State v. Keith*, 1985-NMCA-012, ¶¶ 3, 11, 102 N.M. 462, 697 P.2d 145, we held that a prior armed robbery conviction could not be used to elevate a defendant's subsequent armed robbery conviction from a second degree to a first degree felony and then further enhance the defendant's sentence under the habitual offender statute. Then, in *State v. Haddenham*, 1990-NMCA-048, ¶ 21, 110 N.M. 149, 793 P.2d 279, we held that a prior felony conviction could not be used to satisfy an element of a felon in possession of a firearm conviction, and also be used to enhance the defendant's sentence under the habitual offender statute. Finally, in *Lacey*, 2002-NMCA-032, ¶¶ 15-16, this Court held that a prior felony trafficking conviction could not be used to elevate a subsequent trafficking conviction from a second to first degree felony, and then be used to enhance the defendant's sentence for conspiracy to commit a first degree felony.

{7} Each of these cases follow the analytical framework set out in *Keith*, where this Court began with the language of the statutes and, perceiving a general "reluctance to allow stacking of enhancements directed at similar purposes[,]" concluded that where a general statute—in these cases, the habitual offender enhancement statute—is in conflict with a more specific one, "the specific [statute] is construed as an exception to the general statute." 1985-NMCA-012, ¶¶ 6, 9. *Keith* referred to our policy of strictly construing highly penal statutes and the rule of lenity in reaching its holding. *Id.* ¶¶ 10-11. *Haddenham* largely followed the same approach, again finding a common purpose between the statutes at issue and referencing the rule of lenity. 1990-NMCA-048, ¶¶ 14, 20. *Haddenham* also refined the analysis by emphasizing the importance of legislative intent in considering prior convictions as part of a subsequent conviction: "Where the legislative intent is to permit the use of the same facts to impose an enhanced sentence, the legislation must clearly so indicate." *Id.* ¶ 20. It is *Lacey*, however, that truly solidified the importance of gleaning legislative intent from the language of the statute by drawing a clear distinction between crimes that require a prior felony conviction, either as a basis for enhancement or factual element, and those that do not. 2002-NMCA-032, ¶ 14. In addition to considering the common purpose of the statutes at issue and acknowledging the rule of lenity, the *Lacey* court analyzed the issue that is the crux of an analysis under *Keith* and its progeny: "if a prior felony conviction is already taken into account in determining the punishment for a specific crime, the [L]egislature, unless it clearly expresses otherwise, does not intend that [the prior felony conviction] also be used to enhance the conviction under the habitual offender statute." *Lacey*, 2002-NMCA-032, ¶¶ 6, 7, 9 (citing *Peppers*, 1990-NMCA-057, ¶ 30, for the proposition that *Keith* and *Haddenham* "both derive from a reasonable assumption about legislative intent").

{8} While *Keith*, *Haddenham*, and *Lacey*, analyze statutes where the Legislature specifically contemplated the existence of a prior felony conviction in setting the punishment for the offense, *Peppers* involved a statute that based the punishment for the offense on a prior felony *charge*. 1990-NMCA-057, ¶ 25 (citing NMSA 1978, Section 31-3-9 (1999)). *Peppers* used the Legislature's language requiring a charge, rather than conviction, to distinguish the case from *Keith* and its progeny in two ways. First, this Court noted that the failure to appear statute applies not only to persons who had been convicted, but also those whose trial is still pending. *Peppers*, 1990-NMCA-057, ¶ 32 ("To prove the offense of failure to appear, the state need not establish that the defendant was convicted of or committed the offense for which the defendant was on trial."). As such, the *Peppers* court reasoned that, unlike in *Keith* and *Haddenham*, the Legislature could not have considered a prior felony conviction in determining the punishment for failure to appear, because a prior felony conviction was not required under the failure to appear statute:

> When the [L]egislature set the penalty for failure to appear at trial, it could not have assumed that the person who had failed to appear would be convicted at the trial. On the contrary, the [L]egislature should have presumed the innocence of an individual facing trial. . . . In trying to discern legislative intent, we should not presume that the [L]egislature set the penalty for failure to appear on the assumption that a person accused of a crime has actually committed the crime.

Peppers, 1990-NMCA-057, ¶¶ 31-33. Second, the *Peppers* court pointed out that because the statute required proof of a charge and not a conviction, the defendant's prior felony conviction was not used to prove the offense of failure to appear. *Id.* ¶ 32. Based on the language of the statute requiring a charge, and not a conviction, in determining the degree of offense, *Peppers* allowed the defendant's failure to appear sentence to be enhanced under the habitual offender statute.

B. Escape From CCP Under Section 30-22-8.1

{9} Keeping in mind the distinction between prior felony charge and prior felony conviction set forth in *Peppers* and *Lacey*, we look to the language of the statute at issue here. Section 30-22-8.1(A) defines escape from CCP as "a person, excluding a person on probation or parole, who has been lawfully committed to a judicially approved [CCP], including a day reporting program, an electronic monitoring program, a day detention program or a community tracking program, escaping or attempting to escape from the [CCP]." Escape from CCP can either be a misdemeanor or felony, depending on whether the person was committed to the program pursuant to a misdemeanor charge or a felony charge. Section 30-22-8.1(C) ("Whoever commits escape from [CCP], when the person was committed to the program for a felony charge, is guilty of a felony."). Commitment to CCP is not reserved for defendants who have already been convicted; an individual can be placed in CCP prior to having been convicted of the crime for which he or she is charged. *Cf. State v. Duhon*, 2005-NMCA-120, ¶ 11, 138 N.M. 466, 122 P.3d 50 (concluding that the defendant, placed on house arrest pending trial, was subject to prosecution for escape from CCP under Section 30-22-8.1); *State v. Guillen*, 2001-NMCA-079, ¶ 11, 130 N.M. 803, 32 P.3d 812 (same).

{10} The exceptions to application of the habitual offender statute set forth in *Keith*, *Haddenham*, and *Lacey*, do not apply here, as there is no dual use of a prior conviction or factual predicate. Much like the failure to appear statute in *Peppers*, the plain language

of the escape statute makes it clear that the Legislature requires proof of different facts for an escape from CCP conviction than it does for a habitual offender enhancement. *See* 1990-NMCA-057, ¶ 32. For a defendant to be found guilty of felony escape from CCP the state must show that a felony charge led to the defendant's commitment to the program, Section 30-22-8.1(C), while a habitual offender enhancement requires that the state show that the defendant had three or more prior felony convictions. Section 31-18-17(C). Defendant's status as a felon, particularly his conviction for felony possession, is not an element of his conviction for escape from CCP, *see* § 30-22-8.1 (requiring felony charge), and merely served to place him in the CCP from which he subsequently escaped. As such, his prior felony possession conviction is sufficiently removed from his felony escape sentence as to allow for a habitual enhancement under our double-enhancement analysis. *See State v. Najar*, 1994-NMCA-098, ¶ 4, 118 N.M. 230, 880 P.2d 327 (affirming the habitual offender enhancement of escape from an inmate-release program as based on separate facts from the conviction itself).

{11} By basing the degree of the escape on the degree of the prior *charge*, the plain language of Section 30-22-8.1 is clear that whether the accused is convicted of the prior felony is immaterial. *See Peppers*, 1990-NMCA-057, ¶ 33. Although Defendant here was convicted of the felony possession charge that gave rise to his commitment to the CCP, that fact does not alter our analysis under the plain language of Section 30-22-8.1. Whether a defendant is convicted of a charge or not, does not alter the statutory language establishing the degree of the charge, regardless of the conviction. *See State v. Almanzar*, 2014-NMSC-001, ¶ 14, 316 P.3d 183 ("Where the language of a statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." (internal quotation marks and citation omitted)); *State v. Young*, 2004-NMSC-015, ¶ 27, 135 N.M. 458, 90 P.3d 477 (declining "to hobble statutory interpretation with an artificial and unduly narrow construction of the statute" (internal quotation marks and citation omitted)). It would be improper for us to read the Legislature's use of the term "charge" as "conviction" in the absence of ambiguity. *See Peppers*, 1990-NMCA-057, ¶¶ 31-33 (discussing the impact that presumption of innocence has on interpretation of legislative intent: "In trying to discern legislative intent, we should not presume that the [L]egislature set the penalty for failure to appear on the assumption that a person accused of a crime has actually committed the crime."); *see also State v. Hubble*, 2009-NMSC-014, ¶ 10, 146 N.M. 70, 206 P.3d 579 ("[W]hen a statute's language is clear and unambiguous, we will give effect to the language and refrain from further statutory interpretation. We will not read into a statute language which is not there, especially when it makes sense as it is written." (internal quotation marks and citation omitted)).

{12} We also note that the escape from CCP statute serves a different purpose than the habitual offender statute. While the habitual offender statute serves the purpose of deterring criminal conduct "by placing convicted felons on notice that they will be subjected to enhanced sentences for the commission of subsequent offenses[,]" *Haddenham*, 1990-NMCA-048, ¶ 14, the escape from CCP statute "was designed to create incentives for complying with the conditions of restrictive [CCP.]" *Duhon*, 2005-NMCA-120, ¶ 12. In addition, Section 30-22-8.1 can hardly serve the same purpose as the habitual offender statute by giving notice of harsher penalties to convicted felons when it applies to those who may not yet be convicted of a felony. The analysis used in *Keith* and its progeny, in which conflicting statutes with the same purpose are applied with deference to more specific statutes, therefore does not apply here. *See Lacey*, 2002-NMCA-032, ¶ 9.

{13} *Peppers*, in dicta, acknowledged that "if the sentence being enhanced had been imposed for the offense of escape by a convicted felon[,]" the analysis would likely be different. 1990-NMCA-057, ¶ 32 (citing *State v. Cox*, 344 So. 2d 1024 (La. 1977). Because this remark has no bearing on the holding in *Peppers*, it is dicta and is therefore not binding on the application of *Peppers* in this case. *See Ruggles v. Ruggles*, 1993-NMSC-043, ¶ 22 n.8, 116 N.M. 52, 860 P.2d 182 (defining "dictum" as unnecessary to the decision of issues, or a comment concerning a rule of law not necessary to the determination of the case at hand, which therefore lacks the force of an adjudication). Nonetheless, because Defendant cites to *Cox* as support for his position on appeal, we address it briefly.

{14} *Cox* falls somewhere between our reasoning in *Peppers* and the reasoning set forth in *Keith* and its progeny. While the escape statute at issue in *Cox* elevates the degree of offense much like Section 30-22-8.1, it differs from our statute in that it bases the elevated degree of offense not on a prior charge, but on a prior conviction: "The escape statute itself causes an enhancement of penalty by requiring consecutive sentences because of a defendant's previous felony conviction." *Cox*, 344 So. 2d at 1026. By referencing *Cox* in conjunction with the offense of escape by a convicted felon, the *Peppers* court appears to have been alluding to the impact that a prior felony conviction would have on a subsequent escape conviction if a prior *conviction* were an element of the offense. Such a case would be similar to *Haddenham*, where the defendant's status as a felon was impermissibly used both to prove an element of the crime of felon in possession of a firearm and to enhance his sentence under the habitual offender statute. 1990-NMCA-048, ¶ 3. We also note that Section 30-22-8.1 had not been promulgated when *Peppers* was issued, and as such could not have been contemplated by the *Peppers* court's remarks on the legality of a sentence for escape. *See* § 30-22-8.1.

{15} Defendant also urges this Court to apply the rule of lenity, but "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." *State v. Johnson*, 2009-NMSC-049, ¶ 18, 147 N.M. 177, 218 P.3d 863 (emphasis, internal quotation marks, and citation omitted). Because we do not find an insurmountable ambiguity regarding the scope of the statutes in this case, the rule of lenity is inapplicable. *See id.* ("The rule of lenity counsels that criminal statutes should be interpreted in the defendant's favor when insurmountable ambiguity persists regarding the intended scope of a criminal statute." (internal quotation marks and citation omitted)).

{16} Defendant's degree of escape from CCP was based upon the felony possession *charge*, while the enhancement of his felony escape sentence was based upon his three prior felony *convictions*. We conclude that it was permissible for the State to use Defendant's felony possession charge to determine whether to charge Defendant for misdemeanor or felony escape from CCP and to subsequently use Defendant's felony possession conviction to enhance his sentence for escape from CCP.

CONCLUSION

{17} For the foregoing reasons, we affirm the district court's finding that Defendant was a habitual offender and its enhancement of his sentence for felony escape.

{18} IT IS SO ORDERED.

JULIE J. VARGAS, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

STEPHEN G. FRENCH, Judge

Certiorari Denied, December 6, 2018, No. S-1-SC-37366

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-007

No. A-1-CA-36072 (filed October 16, 2018)

DAVID D. GRIEGO,
Worker-Appellant,
v.
JONES LANG LASALLE, and
THE HARTFORD,
Employer/Insurer-Appellee.

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION
Leonard J. Padilla, Workers' Compensation Judge

JUSTIN P. PIZZONIA
ROSE BRYAN
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for Appellant

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ELMORE LAW, LLC
Albuquerque, New Mexico
for Appellee

Opinion

Michael E. Vigil, Judge

{1} David Griego (Worker) appeals from the workers' compensation judge's (WCJ) compensation order denying him workers' compensation for an injury resulting from a trip-and-fall that occurred on the job. Worker argues that the WCJ erred in concluding that his accident did not arise out of and in the course of his employment. *See* NMSA 1978, § 52-1-9 (1973) ("The right to the compensation provided for in [the Workers' Compensation Act (WCA)] . . . shall obtain in all cases where the following conditions occur: . . . at the time of the accident, the employee is performing service arising out of and in the course of his employment and . . . the injury or death is proximately caused by accident arising out of and in the course of his employment[.]"). We reverse.

BACKGROUND

{2} The material facts are not disputed. Worker is employed by a contractor for Intel, Jones Lang LaSalle (Employer), as a maintenance technician. Worker's duties include "fulfilling tenant service requests and performing preventative maintenance and repairs" at the Intel job site. To fulfill these duties, Worker walks long distances in the corridors of the Intel building, which is over a mile long. Maintenance technicians at Intel walk up to twelve miles each day in the facility's corridors and average eight miles of walking per day.

{3} It is Intel's policy for another technician to "spot" the technician performing repairs on a given project for safety reasons due to the dangers of the facility. When spotting another technician, the spotter's job is to observe and call for help if needed.

{4} On July 6, 2015, Worker was working as a spotter for another maintenance technician. In order to get to the location of his job assignment, Worker was required to walk in the Intel corridors. As Worker walked to his job assignment, he tripped over his own foot, causing him to fall. As a result of his fall, Worker sustained a fracture to his humerus.

{5} There was no substance or object on the floor that caused Worker to fall. There was no sudden noise or bright light that startled Worker when he fell. The floor was even; it had no slope or incline. Nor was there evidence that Worker suffers from any neurological or other deficit, preexisting condition, or infirmity that might have contributed to his fall.

{6} Employer's insurer (Insurer) denied Worker's claim for workers' compensation coverage on grounds that Worker's fall was not work-related. Worker filed a complaint with the Workers' Compensation Administration, claiming that he was wrongfully denied workers' compensation. Employer/Insurer responded that Worker "did not suffer an accidental injury arising out of and in the course of his employment, and the accident was not reasonably incident to his employment."

{7} After trial on the merits and submission of proposed findings of facts and conclusions of law by the parties, the WCJ entered an order determining that Worker was not entitled to workers' compensation. The WCJ found and concluded that: "[n]o risk reasonably incident to Worker's employment caused Worker's fall or injury[,]" "[t]he risk experienced by Worker was not increased by the circumstances of Worker's employment[,]" and therefore Worker's accident "did not arise out of Worker's employment with Employer." Worker appeals.

DISCUSSION

I. Standard of Review

{8} The narrow issue presented in this case is whether Worker's trip-and-fall arose out of and in the course of his employment. "Because the material facts in this case are not in dispute, we review de novo" the question of whether Worker's injury arose out of and in the course of his employment. *Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2014-NMCA-019, ¶ 6, 317 P.3d 866; *see Losinski v. Drs. Corcoran, Barkoff & Stagnone, P.A.*, 1981-NMCA-127, ¶ 4, 97 N.M. 79, 636 P.2d 898 ("Where [the] facts are not in dispute, it is a question of law whether an accident arises out of and in the course of employment.").

II. Compensability of Worker's Claim

A. Accidental Injury Arising Out of and in the Course of Employment

{9} In order for an injured worker to receive compensation under the WCA, the worker "must be performing a service arising out of and in the course of his employment at the time of the accident, and the injury must arise out of and in the course of his employment." *Garcia v. Homestake Mining Co.*, 1992-NMCA-018, ¶ 6, 113 N.M. 508, 828 P.2d 420; *see* NMSA 1978, § 52-1-28 (1987). " 'Arising out of' and 'in the course of employment' are two distinct requirements." *Schultz*, 2014-NMCA-019, ¶ 8. "The principles 'arising out of' and 'in the course of his employment[]' . . . must exist simultaneously at the time of the injury in order for compensation to be awarded." *Garcia*, 1992-NMCA-018, ¶ 6.

{10} " '[A]rising out of' . . . relates to the cause of the accident." *Schultz*, 2014-NMCA-019, ¶ 8; *see Velkovitz v. Penasco*

Indep. Sch. Dist., 1981-NMSC-075, ¶ 2, 96 N.M. 577, 633 P.2d 685 ("For an injury to arise out of employment, the injury must have been caused by a risk to which the injured person was subjected in his employment."); *Kloer v. Municipality of Las Vegas*, 1987-NMCA-140, ¶ 3, 106 N.M. 594, 746 P.2d 1126 ("The term 'arising out of' the employment denotes a risk reasonably incident to claimant's work."). Accidents that generally satisfy this requirement "include those occurring during acts the employer has instructed the employee to perform, acts incidental to the worker's assigned duties, or acts that the worker had a common law or statutory duty to perform." *Schultz*, 2014-NMCA-019, ¶ 8.

{11} The "course of employment" requirement, "on the other hand, relates to the time, place, and circumstances under which the accident takes place." *Schultz*, 2014-NMCA-019, ¶ 8 (internal quotation marks and citation omitted). "[A]n injury occurs in the course of employment when it takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is reasonably fulfilling the duties of employment or doing something incidental to it." *Id.* (internal quotation marks and citation omitted). "The term 'while at work' is synonymous with 'in the course of the employment.' " *Thigpen v. Valencia Cty.*, 1976-NMCA-049, ¶ 6, 89 N.M. 299, 551 P.2d 989.

B. Injury Arising Out of Employment

{12} The real dispute in this case concerns whether Worker's injury arose out of his employment. Worker argues, citing *Ensley v. Grace*, 1966-NMSC-181, 76 N.M. 691, 417 P.2d 885, that falling at work is a neutral risk that gives rise to a rebuttable presumption that the worker's injuries are compensable. Worker further argues that because "it is undisputed that [Worker] was performing activities that he was asked to do by his employer" at the time of his fall—"walking through one of [Intel's] corridors to . . . reach a maintenance job within the facility"—his injury arose from his employment.

{13} In *Ensley*, the bodies of the worker and another coemployee were found in the office where the worker was employed as a bookkeeper. 1966-NMSC-181, ¶ 2. The district court found that the coemployee shot and killed the worker, and then took his own life. *Id.* There was no indication why the worker was shot, nor evidence of misconduct or any contact between the worker and the coemployee, except through their connection at work. *Id.* Under these facts, the district court concluded that the death of the worker "did not arise out of her employment, and that evidence was not produced to establish a causal connection between the death and the employment." *Id.* ¶ 3. On appeal, the estate of the worker contended that the district court erred in concluding that the worker's death did not arise out of her employment. *Id.*

{14} Citing *Larson's Workers' Compensation Law*, our Supreme Court recognized that workplace risks fall into three categories: (1) those associated with the employment; (2) those personal to the claimant; and (3) those having no particular employment or personal character, which Larson refers to as "neutral" risks. *Ensley*, 1966-NMSC-181, ¶ 6. Observing Larson's statements that risks such as being assaulted at work for unexplained reasons fall into the category of neutral risks, the Court classified the worker's death as such. *See id.* ¶¶ 6-9. Further, the Court adopted Larson's position that "[w]hen an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death," it would "indulge a presumption or inference that the death arose out of the [worker's] employment." *Id.* ¶ 9 (stating that "[t]he theoretical justification is similar to that for unexplained falls and other neutral harms: The occurrence of the death within the course of employment at least indicates that the employment brought deceased within range of the harm, and the cause of harm, being unknown, is neutral and not personal." (internal quotation marks and citation omitted)) Accordingly, because the cause of the worker's death was unexplained, and in the absence of evidence to rebut the presumption, the Court reversed, determining that the worker's death arose from her employment. *Id.* ¶ 10.

{15} "The commonest example" of a neutral risk for which the cause of the harm is "simply unknown" is the unexplained fall. 1 Lex. K. Larson & Thomas A. Robinson, *Larson's Workers' Compensation Law*, § 7.04[1][a], at 7-25 (June, 2018).

> If an employee falls while walking down the sidewalk or across a level factory floor for no discoverable reason, the injury resembles that from stray bullets and other positional risks in this respect: The particular injury would not have happened if the employee had not been engaged upon an employment errand at the time. In a pure unexplained-fall case, there is no way in which an award can be justified as a matter of causation theory except by a recognition that this but-for reasoning satisfies the "arising" requirement.

Larson, *supra* § 7.04[1][a]. Consistent with this statement, we conclude that the rationale of the *Ensley* Court—that injury or death resulting from the neutral risk of being assaulted at work for unexplained reasons gives rise to a rebuttable presumption that the injury or death arose out of the worker's employment, where the accident occurs within the time and space limits of the worker's employment—extends to cases of unexplained falls. *See Circle K Store No. 1131 v. Industrial Comm'n of Ariz.*, 796 P.2d 893, 898 (Ariz. 1990) (in banc) ("An injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where [claimant] was injured. . . . [C]laimant would not have been at the place of injury *but for* the duties of her employment. [Claimant] was required to throw out the trash from her shift, and was performing this duty on her way home. Consequently . . . her [trip-and-fall] injuries 'arose out of' her employment" (internal quotation marks and citation omitted)); *City of Brighton v. Rodriguez*, 318 P.3d 496, 503-06 (Colo. 2014) (holding that an unexplained fall constitutes a "neutral risk" and satisfies the "arising out of" employment requirement for workers' compensation, if the fall would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position where he or she was injured); *Hodges v. Equity Grp.*, 596 S.E.2d 31, 35 (N.C. Ct. App. 2004) (permitting an inference that the worker's trip-and-fall injury arose from his employment where "the only active force involved was the employee's exertions in the performance of his duties" (internal quotation marks and citation omitted)).

{16} The undisputed facts of this case are that as Worker walked to a maintenance job assignment at Intel, he tripped and fell, which resulted in an injury to his arm. There was no substance or object on the floor that caused Worker to fall. There was no sudden noise or bright light that startled Worker when he fell. The floor was

even; it had no slope or incline. Worker admitted at trial, and camera footage of the accident confirmed, that Worker tripped and fell for no reason other than that "he tripped over his own foot." The WCJ further found that "Worker's accident . . . occurred while Worker was performing his duties as a spotter" and that "[i]n order to get to the location of his job assignment as a spotter, Worker was required to walk in the corridor where he ultimately fell." Under these facts, we conclude that Worker's injury was the result of an unexplained fall, which constitutes a neutral risk under the foregoing authority. These circumstances, therefore, give rise to a rebuttable presumption that Worker's injury arose out of his employment.

{17} In this case, Employer/Insurer has failed to rebut the presumption that Worker's injury arose from his employment. Specifically, the evidence showed that Worker "does not suffer from epilepsy, knee dysfunction or deficit, nor dizzy or fainting spells." No evidence was presented that "Worker suffers from any neurological [deficits] or other deficits which might have caused him to fall." Nor was there evidence that Worker has any "preexisting conditions or infirmities that caused or contributed to his fall."

{18} Accordingly, we determine that Worker's unexplained trip-and-fall injury arose out of his employment. *See Kennels v. Bailey*, 610 S.W.2d 270, 271-72 (Ark. Ct. App. 1981) (awarding workers' compensation to employee of a kennel who fell and was injured while walking to refill a bottle of disinfectant that she was using to clean kennels, on grounds that the injury from her unexplained fall arose out of her employment); *Metro. Sch. Dist. v. Carter*, 803 N.E.2d 695, 698-99 (Ind. Ct. App. 2004) (affirming award of workers' compensation to a school employee who testified that she fell and was injured for no reason other than that she "tripped over her own two feet" while turning to walk out of a classroom, on grounds that the injury from her unexplained fall arose out of her employment (internal quotation marks omitted)); *Worthington v. Samaritan Med. Ctr.*, 2 N.Y.S.3d 290, 291-92 (N.Y. App. Div. 2015) (affirming award of workers' compensation to a nurse who, during her rounds, fell as she was walking down a hallway when her foot became stuck and she fell forward, on grounds that the injury from her unexplained fall arose out of her employment); *Hubble v. State Accident Ins. Fund Corp.*, 641 P.2d 593, 593-94 (Or. Ct. App. 1982) (awarding workers' compensation to a construction inspector who, while walking down a straight corridor to get to a work assignment at the University of Oregon, fell when his knee simply "buckled" while taking a step, on grounds that his injury from his unexplained fall arose out of his employment).

{19} In so concluding, we reject Employer/Insurer's reliance upon *Luvaul v. A. Ray Barker Motor Co.*, 1963-NMSC-152, 72 N.M. 447, 384 P.2d 885; *Berry v. J.C. Penney Co.*, 1964-NMSC-153, 74 N.M. 484, 394 P.2d 996; and *Griego-Melendez v. Souper Salad, Inc.*, No. A-1-CA-29719, 2010 WL 3969296, mem. op. (N.M. Ct. App. Jan. 25, 2010) (nonprecedential). First, as our Supreme Court observed in *Ensley*, 1966-NMSC-181, ¶ 6, *Berry* and *Luvaul*, present fact patterns in which the workers' injuries were caused by risks that were personal to each of them individually, and therefore were noncompensable. *See Berry*, 1964-NMSC-153, ¶¶ 2, 8-13 (affirming denial of a salesperson's claim for workers' compensation on grounds that her injury did not arise out of her employment, where the evidence supported a finding that the salesperson's back sprain that occurred when she picked up some boxes from a table in the store arose out of a risk personal to her—a congenital curve in her lower spine—and was not increased or aggravated by employment); *Luvaul*, 1963-NMSC-152, ¶¶ 1-2, 14, 16, 22-25 (affirming denial of an automobile mechanic's workers' compensation claim on grounds that his fall and resulting injury after becoming dizzy while on the job did not arise out of his employment where the evidence showed that the injury arose from risks personal to him—he had suffered from dizzy spells and fainting feelings for years, as well as had a history of acute brain syndrome possibly due to secondary intoxication). Additionally, because we are not bound by *Griego-Melendez*, a nonprecedential memorandum opinion of this Court, and because the appeal was decided under the same 'personal risk' analysis applied in *Luvaul*, which we concluded above is inapplicable to this neutral risk case, we decline to follow the case here. *Griego-Melendez*, No. A-1-CA-29719, mem. op. at **1-4.

C. Injured in the Course of Employment

{20} The parties do not dispute, and we agree, that Worker fell and was injured in the course of his employment. Worker's duties as a maintenance technician include "fulfilling tenant service requests and performing preventative maintenance and repairs" at various locations at Intel. On the day he was injured, Worker was working as a spotter for another maintenance technician at Intel. To get to the location of his job assignment as a spotter, Worker was required to walk the Intel corridors. As Worker walked to his job assignment, he tripped over his own foot, causing him to fall and be injured. These facts demonstrate that Worker's fall and injury occurred while he was at work—during the period of his employment, at a place where Worker may reasonably be, and while he was reasonably fulfilling the duties of his employment. *See Schultz*, 2014-NMCA-019, ¶ 8.

CONCLUSION

{21} The compensation order of the WCJ is reversed. We remand the case to the Workers' Compensation Administration for further proceedings in accordance with this opinion.

{22} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
DANIEL J. GALLEGOS, Judge

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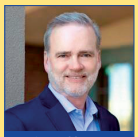
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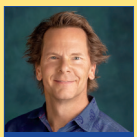
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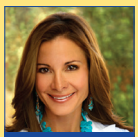
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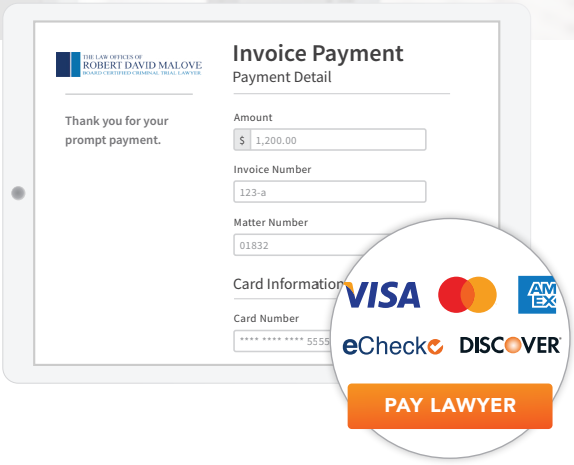

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