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Bar Bulletin

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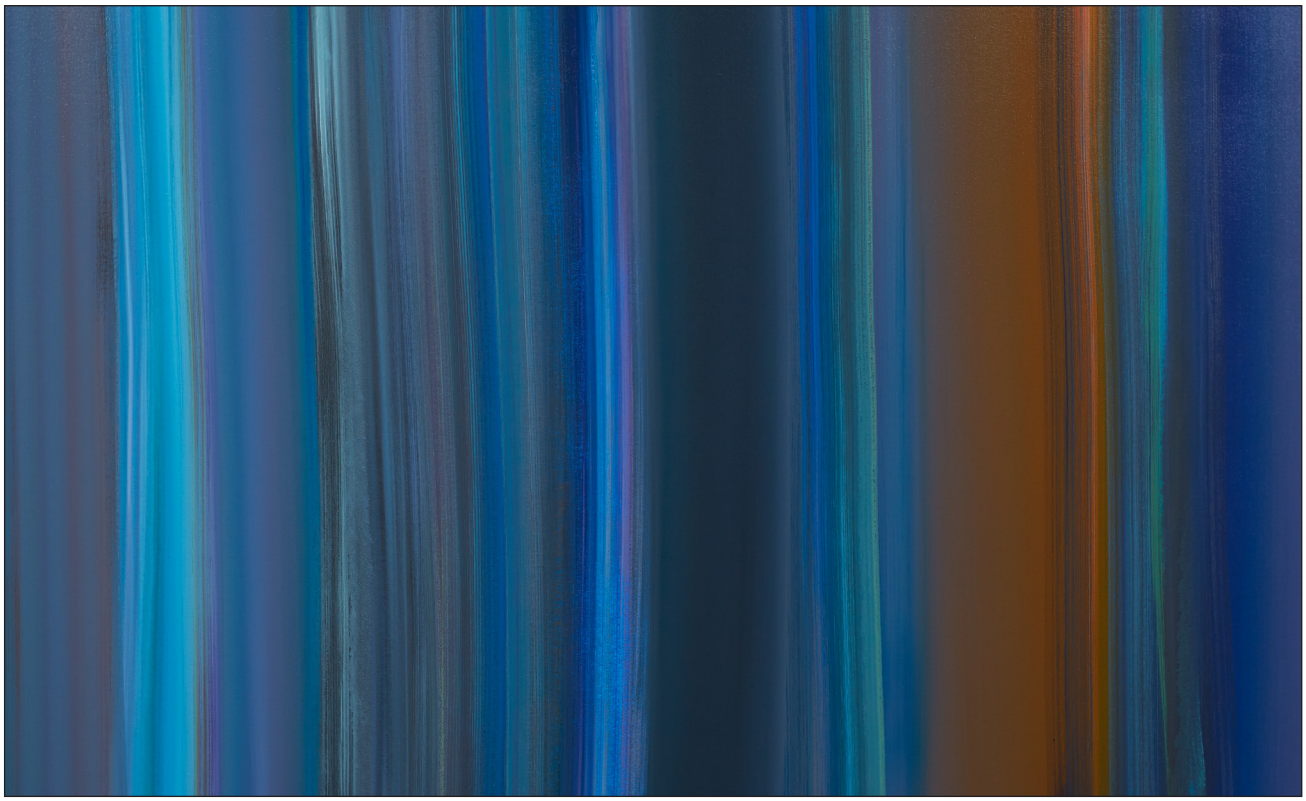

Benelovent Sunrise 8, by Willy Bo Richardson (see page 3)

www.willyborichardson.com

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Congratulations, Tomas

Tomas J. Garcia

Tomas Garcia, an associate with Modrall Sperling, is a recipient of the American Bar Association's On the Rise – Top 40 Young Lawyers Award. The award recognizes ABA members nationwide who exhibit achievement, innovation, vision, leadership, and legal and community service.

He recently helped establish a charter elementary school in Albuquerque's South Valley. Having grown up in the area himself, Tomas felt passionate about the need to expand the educational options for its youngest students and instill a goal of a college degree at the earliest levels. Tomas is a shining example, as he is a graduate of Yale University, Harvard University, and Georgetown University Law Center.

In addition to his community service, Tomas maintains an active and diverse litigation practice, with expertise in healthcare/senior care facilities and products liability.

Tomas was named "Young Lawyer of the Year" by New Mexico Defense Lawyers Association in 2015, is ranked by *Southwest Super Lawyers®*, and has an AV® peer-review rating from Martindale-Hubbell.

Congratulations, Tomas, on another well-deserved accolade. You are an outstanding lawyer and servant to the public.

STATE BAR of NEW MEXICO

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Meetings

August

9
Prosecutors Section Board
Noon, State Bar Center

13
Appellate Practice Section Board
Noon, teleconference

13
Bankruptcy Law Section Board
Noon, U.S. Bankruptcy Court, Albuquerque

14
Children's Law Section Board
Noon, Children's Court, Albuquerque

14
Tax Section Board
11 a.m., teleconference

15
Public Law Section Board
Noon, Legislative Finance Committee, Santa Fe

16
Family Law Section Board
9 a.m., teleconference

23
Immigration Law Section Board
Noon, teleconference

27
Intellectual Property Law Section Board
Noon, JAlbright Law LLC

Workshops and Legal Clinics

August

7
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6000

7
Legal Workshop for Seniors
Ena Mitchell Senior Center, Lordsburg, 10-11:15 a.m., presentation; 11:30 a.m.-1 p.m., POA/AHCD Workshop, 800-876-6657

9
Free Legal Clinic
10 a.m.-1 p.m., Bernalillo County Metropolitan Court, Albuquerque

28
Consumer Debt/Bankruptcy Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6000

September

4
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6000

25
Consumer Debt/Bankruptcy Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6000

About Cover Image and Artist: Willy Bo Richardson received an MFA from Pratt Institute in 2000. He teaches painting at SFUAD and exhibits nationally. In 2011 his work was included in "70 Years of Abstract Painting" at Jason McCoy Gallery in New York, which assembled works by a selection of modern and contemporary painters, including Josef Albers, Hans Hofmann and Jackson Pollock. In 2012 he exhibited a body of watercolors at Phillips auction house in New York. His work and vision was featured on the PBS weekly arts series ¡COLORES!. He is represented by Richard Levy Gallery in Albuquerque and Turner Carroll Gallery in Santa Fe. www.willyborichardson.com

Notices

Court News

New Mexico Supreme Court
New Mexico Commission on Access to Justice

Commission Meeting

The next meeting of the Commission is noon-4 p.m., Aug. 16, at the State Bar of New Mexico. Commission goals include expanding resources for civil legal assistance to New Mexicans living in poverty, increasing public awareness, and encouraging and supporting pro bono work by attorneys. Interested parties from the private bar and the public are welcome to attend. More information about the Commission is available at www.accesstojustice.nmcourts.gov

Rule-Making Activity

To view recent Supreme Court rulemaking activity, visit the Court's website at https://supremecourt.nmcourts.gov/. To view all New Mexico Rules Annotated, visit New Mexico OneSource at https://nmonesource.com/nmos/en/nav.do

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources, including Westlaw, LexisNexis and HeinOnline. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building Hours: Monday-Friday 8 a.m.-5 p.m. Reference and Circulation Hours: Monday-Friday 8 a.m.-4:45 p.m. For more information, call 505-827-4850, email libref@nmcourts.gov or visit https://lawlibrary.nmcourts.gov.

Professionalism Tip

With respect to my clients:

In appropriate cases, I will counsel my client regarding options for mediation, arbitration and other alternative methods of resolving disputes.

Administrative Office of the Courts

Notice of Online Dispute Resolution

The New Mexico Judiciary implemented online dispute resolution in debt and money due cases in early June in district and magistrate courts in the Sixth and Ninth judicial districts. The pilot program will expand to the Second Judicial District Court and the Bernalillo County Metropolitan Court later in June. The free service allows the parties to negotiate online to quickly resolve debt and money due cases without appearing in court. If a resolution is reached, the ODR system will prepare a stipulated settlement agreement and electronically file it in court. The plaintiff's attorney or a self-represented plaintiff will receive an email notification to begin ODR after the defendant files an answer to the complaint. Once the plaintiff makes an offer for possibly settling the dispute, an email goes to the defendant with an opportunity to respond. During the first two weeks of negotiations, the parties can request the help of a trained online mediator. If no agreement is reached after 30 days, the case will move forward in court. ODR notices will be emailed to the parties from no-reply@newmexicocourtsdmd.modria.com. The parties should check their inbox, spam and junk mailboxes to ensure they receive the ODR notices.

Second Judicial District Court

Destruction of Exhibits:

Pursuant to 1.21.2.617 FRRDS (Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy exhibits filed with the Court, the Domestic (DM/DV) for the years of 1984 to 2008 including Criminal single case(s) CR-1983-36306, CR-1986-41147, CR-1991-02346, CR-1994-00531, CR-1994-00553, CR-2000-04292, CR-2001-01101, but not limited to cases which have been consolidated. Cases on appeal are excluded. Parties are advised that exhibits may be retrieved beginning through Oct. 2. Should you have cases with exhibits, please verify exhibit information with the Special Services Division, at 841-6717, from 8 a.m 4 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel for the plaintiff(s) or plaintiffs themselves and defendant's exhibits will be released to counsel of record for defendants(s) or defendants themselves by Order of the Court. All exhibits will be released IN THEIR ENTIRETY. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Thirteenth Judicial District Court

Investiture Ceremony for Judge Amanda Sanchez Villalobos

The judges and employees of the Thirteenth Judicial District Court cordially invite members of the State Bar to attend the investiture ceremony of Hon. Amanda Sanchez Villalobos at 3 p.m., Aug. 15, Cibola County District Courthouse, Courtroom Two, 700 E. Roosevelt Ave, Suite 60, Grants. A reception will follow. Judges who would like to participate in the ceremony should bring their robes and report to Courtroom Two by 2:45 p.m.

Bernalillo County Metropolitan Court

Volunteers are Neded for Legal Clinics

The Legal Services and Programs Committee of the State Bar and the Bernalillo County Metropolitan Court hold a free legal clinic the second Friday of every month from 10 a.m. until 1 p.m. Attorneys answer legal questions and provide free consultations at the Bernalillo County Metropolitan Court, 9th Floor, 401 Lomas Blvd NW, in the following areas of law: landlord/tenant, consumer rights, emndployee wage disputes, debts/bankruptcy, trial discovery preparation. Clients will be seen on a first come, first served basis and attendance is limited to the first 25 persons.

U.S. District Court for the District of New Mexico

Investiture of U.S. Magistrate Judge John F. Robbenhaar

The Honorable John F. Robbenhaar will be sworn in as U.S. Magistrate Judge for the U.S. District Court for the District of New Mexico at 4 p.m. on Aug. 16, in the Rio Grande Courtroom, third floor, of the Pete V. Domenici U.S. Courthouse, 333 Lomas Boulevard N.W. A reception hosted by the Federal Bench and Bar of the U.S. District Court for the District of New Mexico, will follow from 6-9 p.m. at the Albuquerque Country Club, 601 Laguna Boulevard SW. All members of the bench and bar are cordially invited to attend; however, reservations are requested. R.S.V.P., if attending, to Cynthia Gonzales at 505-348-2001, or by email to usdcevents@nmd.uscourts.gov.

U.S. Magistrate Judge Vacancy

The President of the U.S. has nominated current U.S. Magistrate Judge Kevin R. Sweazea to fill a vacancy on the U.S. District Court in Las Cruces. Upon the anticipated confirmation of Judge Sweazea's nomination to be a district judge, the District of New Mexico will have a full-time magistrate judge vacancy in Las Cruces. In order to begin the process of filling the anticipated magistrate judge vacancy, the U.S. District Court for the District of New Mexico announces this notice of availability for a full-time U.S. Magistrate Judge for the District of New Mexico at Las Cruces, New Mexico. This authorization is contingent upon the appointment of incumbent U.S. Magistrate Judge Kevin Sweazea as a District Judge for the District of New Mexico and is contingent upon approval to fill this anticipated magistrate judge vacancy by the Judicial Conference of the U.S. The current annual salary for this position is $194,028. The term of office is eight years. The U.S. Magistrate Judge Application form and the full public notice with application instructions are available from the Court's website at www.nmd.uscourts.gov/employment or by calling 575-528-1439. Applications must be submitted no later than Aug. 9.

State Bar News

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- Aug. 12, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- Aug. 19, 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#.
- Sep. 2, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (the Group meets the first Monday of the month.)

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

Employee Assistance Program: Managing Stress Tool for Members

The Solutions Group, the State Bar's free Employee Assistance Program, announces a new platform for managing stress. My Stress Tools is an online suite of stress management and resilience-building resources which includes: training videos, relaxation music, meditation, stress tests, a journaling feature and much more. My Stress Tools helps you understand the root causes of your stress and gives you the help you need to dramatically reduce your stress and build your resilience. Your Employee Assistance Program is available to help you, 24/7. Call at 866-254-3555.

Prosecutors Section

Annual Prosecutor Section Awards

The State Bar Prosecutors Section is seeking nominations for a rookie prosecutor of the year from each of the following jurisdiction groupings: 1) Third and Sixth; 2) Seventh and Thirteenth; 3) Eleventh and Fourth; 4) First and Eighth; 5) Second and Attorney General; 6) Tenth and Fifth; 7) Twelfth and Ninth. For the purposes of these awards, the prosecutor must have been practicing law for less than three years and exhibit the following criteria: impact of the prosecution on the community; coordination with law enforcement, including training, in the prosecution of the case(s); best litigated case(s) (refers to the quality of the presentation); new approach or legal theory used in the prosecution; case management (refers to process used to manage a large quantity of cases); or any other exhibition of excellence in that category of cases. In addition, the Prosecutors Section will recognize the 2019 Prosecutor of the Year. For this award, we are accepting nominations from the entire state of New Mexico. Nominations should be for individuals with over three years of experience as a prosecutor and should exhibit the same criteria listed above. Send a letter with the name and contact information of the nominee, the case category and the reasons why you believe the individual should receive the award to: Devin Chapman at devin.chapman@state.nm.us. Nominations may be made by anyone and additional letters of support are welcome. The deadline for nominations is Aug. 30. The awards will be presented at the AODA Fall Conference.

Featured Member Benefit

Fastcase
Smarter legal research.

Fastcase is a free member service that includes cases, statutes, regulations, court rules and constitutions. This service is available through www.nmbar.org. Fastcase also offers free live training webinars. Visit www.fastcase.com/webinars to view current offerings. Reference attorneys will provide assistance from 8 a.m. to 8 p.m. ET, Monday–Friday. Customer service can be reached at 866-773-2782 or support@fastcase.com. For more information, contact Christopher Lopez, clopez@nmbar.org or 505-797-6018.

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

UNM School of Law

Spanish for Lawyers I

The UNM School of Law presents "Spanish for Lawyers I" (20.0 G CLE credits) this fall. This course will teach the basic legal terminology that is used in our judicial system in a variety of practice settings, including criminal law, domestic

relations, and minor civil disputes. Practical aspects of language usage will be emphasized, and active participation is required. Lawyers must be conversant in Spanish, as the course is taught entirely in Spanish. All students will be tested prior to the start of class. Classes will be 4:30-6:30 p.m. on Thursdays, from Aug. 22–Nov. 21. To register or for more information, visit http://lawschool.unm.edu/spanishforlawyers/.

Law Library Hours Summer 2019

Through Aug. 18

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	Closed.

Reference

Monday–Friday	9 a.m.–6 p.m.

Closures

Other Bars

Colorado Bar Association

11th Annual Rocky Mountain Regional Elder Law Retreat

The Colorado Bar Association, Elder Law Section of the CBA and the Colorado Chapter of National Academy of Elder Law Attorneys present the 11th Annual Rocky Mountain Regional Elder Law Retreat (13.0 G) from Aug. 22–24 in at the Vail Marriott Resort in Vail, Colo. Visit https://cle.cobar.org/ to register.

National Conference of Bar Examiners

Nationwide Practice Analysis Survey by the Testing Task Force

Attorneys across the country have the opportunity to participate in the NCBE Testing Task Force 2019 practice analysis survey, which will gather current data on theknowledge, skills, abilities, other characteristics and technology newly licensed lawyers use to accomplish the job tasks they perform. This survey is part of the Task Force's three-year study to consider the content, format, timing and delivery methods for the bar exam to ensure it keeps pace with a changing legal profession. The results of the practice analysis, which will be published at the beginning of next year, will be used by NCBE to develop the next generation of the bar exam and will benefit the profession as a whole. To participate in the survey on behalf of New Mexico and learn more about the study, visit https://www.testingtaskforce.org/2019PAsurvey.

New Mexico Black Lawyers Association

Annual Poolside Brunch

The New Mexico Black Lawyers Association invites members of the legal community to attend its annual poolside brunch on from 11 a.m.-2 p.m., on Aug. 17, at 1605 Los Alamos Ave. SW, Albuquerque, NM 87104. Join us for food, drinks and fun! Tickets are only $35 and can be purchased on our New Mexico Black Lawyers Association Facebook page or by emailing us at nmblacklawyers@gmail.com. Each brunch ticket comes with an entry into our raffle for $500. There will only be 100 tickets sold, so get yours today. We are also accepting sponsorships for this event. If you are interested in sponsoring, please email us at nmblacklawyers@gmail.com.

New Mexico Criminal Defense Lawyers Association

Alternatives to Trial: Getting Good Results for Your Client Through the Plea Negotiation Process and Pretrial Litigation

The New Mexico Criminal Defense Lawyers Association presents "Alternatives to Trial: Getting Good Results for Your Client Through the Plea Negotiation Process and Pretrial Litigation" (6.5 G) on Aug. 23 in Las Cruces. What can you do from the very beginnings of a case to prevent it from going to trial? Come learn from the experts all their best tools for plea negotiations, obtaining hard-to-get witnesses, wearing down the prosecution, staying ahead of bias, litigating search warrants, and more. This CLE will feature two breakout sessions to give you a chance to practice these skills so you feel confident in your grasp of the material. PLUS, join us for a special lunch discussion on how to prepare your client and yourself for the mental battles that lie ahead in trial. Members and their friends and family are invited to join us after the CLE for our annual membership party! Visit www.nmcdla.org to register today.

How to Bring Systemic Change Through Large Scale Verdicts in Civil Rights Cases

The New Mexico Criminal Defense Lawyers Association presents "How to Bring Systemic Change Through Large Scale Verdicts in Civil Rights Cases" (6.0 G) on Aug. 9 in Albuquerque. Criminal defense lawyers: Learn how to get immediate care for your client, regardless of whether a civil suit comes of it. Civil rights plaintiff's attorneys: Learn how to triage, select and shift your thinking on damages so they help beyond one client. Presenters include Shannon Kennedy and Matt Coyte civil attorneys who've won multi-million dollar verdicts in prison, jail, sexual assault and police excess force cases. Sponsored by the New Mexico Criminal Defense Lawyers Association and open to civil rights plaintiffs' attorneys. Visit www.nmcdla.org to register today to attend in person or via webcast.

New Mexico Defense Lawyers Association

Insurance Bad Faith Seminar

Join the New Mexico Defense Lawyers Association for "Insurance Bad Faith Seminar" on Aug. 23. This full-day seminar will cover the latest trends and developments in bad faith litigation including post-litigation continuing bad faith, defense within limits (burning limits policies), bad faith from the policyholder's perspective, responding to time-limited policy limit demands, and effective trial strategies for defending insurers. This program is designed to benefit practitioners who represent insurers in bad faith litigation as well as insurance claims professionals, in-house counsel, and outside defense counsel who defend policyholders. A solid understanding of extra-contractual liability is essential for all who work in the insurance defense arena.

Other News

New Mexico Society of CPAs

Women's Leadership Summit

The New Mexico Society of CPAs presents a Women's Leadership Summit on Aug. 16 at Sandia Resort & Casino in Albuquerque. The event is approved for 7.0 CPE credits and 0.8 CLE credits. The summit will provide women at all stages in their careers the opportunity to network, learn and enhance their leadership skills. For more information and to register, visit www.nmscpa.org/cpe/catalog.

Legal Education

August

9 **How to Bring Systemic Change Through Large Scale Verdicts in Civil Rights Cases**
6.0 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

14 **Lawyer Ethics in Employment Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **2019's Best Law Office Technology, Software and Tools—Improve Client Service, Increase Speed and Lower Your Costs**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **2018 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Children's Code: Delinquency Rules, Procedures and the Child's Rights (2019)**
1.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Women's Leadership Summit**
0.8 G
Live Seminar
New Mexico Society of CPAs
505-246-1699

21 **IT Sourcing Agreements: Reviewing and Drafting Cloud Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Spanish for Lawyers I**
20.0 G
Live Seminar, Albuquerque
UNM School of Law
lawschool.unm.edu/spanishforlawyers/

22-24 **11th Annual Rocky Mountain Regional Elder Law Retreat**
12.0 G
Live Seminar, Vail, C.O.
Colorado Bar Association
https://cle.cobar.org/Seminars/EventInfo/sessionaltcd/EL082219L

22-23 **12th Annual Legal Service Providers Conference: Legal Service Providers in Action**
10.0 G, 2.0 EP
Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Alternatives to Trial: Getting Good Results for Your Client Through the Plea Negotiation Process and Pretrial Litigation**
6.5 G
Live Seminar, Las Cruces
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

27 **Trust and Estate Planning for Cabins, Boats and Other Family Recreational Assets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Easements in Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Making your Case with a Better Memory (2019)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Advanced Mediation Skills Workshop (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Health Law Legislative Update (2019)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

September

6 **How to Practice Series: Parentage and Issues in Domestic Violence**
5.5 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Ethics, Disqualification and Sanctions in Litigation**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Your Title Tool Kit**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

September

9 **The Link Between Animal Abuse and Human Violence**
11.2 G
Live Seminar
Positive Links
505-410-3884

13 **30th Annual Appellate Practice Institute**
6.7 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **Trust and Estate Planning for Collectibles, Art and Other Unusual Assets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

19 **Pretrial Practice in Federal Court (2018)**
2.5 G, 0.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **What Drug Dealers and Celebrities Teach Lawyers About Professional Responsibility (2018)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Retail Leases: Restructurings, Subleases and Insolvency**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **The Ethics of Representing Two Parties in a Transaction**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Civil Trial—Everything You Need to Know**
11.0 G
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com

26 **Volunteer Attorney Program Orientation**
2.0 EP
Live Seminar, Albuquerque
Volunteer Attorney Program
www.lawaccess.org

26 **Orientation and Ethics of Pro Bono**
2.0 EP
Live Seminar
Volunteer Attorney Program
505-814-5033

October

4 **Complex, White Collar and Federal Death Penalty Cases**
6.0 G
Live Seminar
New Mexico Criminal Defense Lawyers
www.nmcdla.org

8 **Founding Documents: Drafting Articles of Incorporation & Bylaws, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Founding Documents: Drafting Articles of Incorporation & Bylaws, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Primers, Updates, and Practical Advice in the Current Health Law Environment**
5.5 G, 1.5 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **Ethics in Discovery Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Basic Practical Regulatory Training for the Electric Industry**
28.5 G
Live Seminar, Albuquerque
Center for Public Utilities NMSU
business.nmsu.edu

16 **Auto Injuries Advanced Plaintiff Strategies**
5.0 G, 1.0 EP
Live Seminar, Santa Fe
NBI, Inc.
www.nbi-sems.com

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

Supreme Court of New Mexico

P.O. BOX 848
SANTA FE, NEW MEXICO
87504-0848

CHIEF CLERK
JOEY D. MOYA, ESQ.
(505) 827-4860 FAX (505) 827-4837

July 1, 2019

Dear Member of the New Mexico State Bar:

On behalf of the Supreme Court, I am writing to request your participation in an important and confidential State Bar survey. Please refer to your email for a message from the State Bar of New Mexico with your unique survey link.

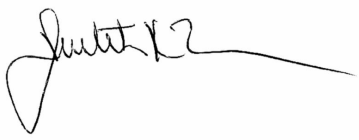
Your participation in this survey is very important to our efforts to support diversity across the State Bar here in New Mexico. Despite an increased emphasis on diversity and inclusion within the legal profession, the legal sector remains one of the least diverse when compared to other professional sectors.[1] The full and equal participation of attorneys of color, women, and other diverse attorneys in the Bar, is critical to the vitality and strength of New Mexico's legal profession and the clients weserve.

The Committee on Women in the Legal Profession in partnership with the Committee on Diversity in the Legal Profession, with the support of the New Mexico Supreme Court and the State Bar of New Mexico, have worked diligently to create this survey. Both Committees are deeply committed to eliminating barriers to success and enhancing the diversity of our Bar at every level. As such, this survey seeks to understand your experience as a member of the New Mexico State Bar.

Your participation in this survey is the first step in identifying and eliminating the barriers to success in the New Mexico legal profession. The aggregate information from this study will be analyzed closely to help us ensure the equal success of all our members and will be published so that you can review the aggregate data upon completion.

Should you have any questions about the survey please contact Richard Spinello at the New Mexico State Bar. Thank you for your time and attention in completing this survey.

Sincerely,



Judith K. Nakamura

[1] (See, Diversity and Inclusion in the Law: Challenges and Initiatives, May 2018, https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law_challenges-and-initiativesQ.

Legal Specialization in New Mexico

On Nov. 1, 2018, the New Mexico Supreme Court issued Order No. 18-8300-018 which withdrew the Rules of Legal Specialization as of Dec. 31, 2018 and transferred oversight of attorneys who held a certification through the New Mexico Supreme Court Board of Legal Specialization to the State Bar of New Mexico. The State Bar of New Mexico is pleased to have arranged a wind-down period for this program with the Court, which allows current specialists to keep their Board Certification until the certification expires by their own terms.

The Board of Bar Commissioners is considering the future of legal specialization in New Mexico.
For more information, contact Richard Spinello at rspinello@nmbar.org.

Below is a list of attorneys that currently hold a legal specialization certification.

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A-1-CA-36069	State v. L Martinez	Reverse/Remand	07/25/2019

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From the New Mexico Supreme Court

Opinion Number: 2019-NMSC-011
No: S-1-SC-36060 (filed May 23, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JASON COMITZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Cristina Jaramillo, District Judge

Bennett J. Baur,
Chief Public Defender
Mary Barket, Assistant Appellate Defender
Santa Fe, NM
for Appellant

Hector H. Balderas,
Attorney General
M. Victoria Wilson,
Assistant Attorney General
Santa Fe, NM
for Appellee

Opinion

Michael E. Vigil, Justice

{1} Defendant Jason Comitz appeals from his convictions of first-degree felony murder (by shooting at a dwelling) and second-degree murder for the death of the same person, four counts of aggravated battery of two other victims, two counts of aggravated assault of the same two victims, two counts of conspiracy to commit aggravated battery of the same two victims, and one count each of conspiracy to commit aggravated assault, shooting at a dwelling, conspiracy to shoot at the same dwelling, and child abuse. We discuss (1) whether the State's evidence was sufficient to prove the crime of shooting at a dwelling and conspiracy to shoot at a dwelling, (2) whether multiple convictions violate Defendant's right under the United States Constitution to be free from double jeopardy, and (3) whether the district court erred in failing to declare a mistrial on grounds that the State allegedly elicited bad-act evidence in violation of its pretrial ruling. We affirm in part and reverse in part.

I. BACKGROUND

{2} On January 28, 2015, Defendant went to the home of his friend Paul Randy Rael (Randy) to pick up $30 that Randy owed him for drugs. When Defendant arrived at the Raels' home, he came into contact with Randy's stepson, Manuel Ramirez (Manuel)—who was just getting home—in front of the house. They argued about the $30 Defendant claimed Randy owed him, which escalated into a fist fight after Manuel saw Defendant reaching for what looked to him like a gun. Manuel punched Defendant multiple times and knocked him to the ground. Randy, his wife Sita Rael (Sita), and their sons Paul Rael Junior (Paul) and Andrew Rael intervened and stopped the fight. Defendant collected the belongings that he had dropped during the fight and left. As Defendant drove off, he held his fingers like a gun and made a shooting gesture at the family.

{3} Four days later, on February 1, 2015, Defendant and two companions, each armed with a hand gun, returned to the Raels' home. Defendant parked his truck across the street from the house, and the three men jumped out of Defendant's truck and started toward the Raels' home. Randy, Sita, Manuel, Paul, and Paul's ten-year-old daughter were at the house.

{4} Paul saw that Defendant and his companions were walking toward the front door, that Defendant had an angry look on his face, and that Defendant was "fidgeting" with something that appeared to be metal. Paul alerted Manuel that Defendant was outside. Paul and Manuel also alerted Sita that Defendant was outside and told Paul's daughter to go into Sita's bedroom.

{5} From the sidewalk in front of the Raels' home, Defendant began calling for Manuel to come outside. Paul and Manuel came out and stood in the doorway on the porch steps in front of the house, with Randy standing next to Paul and Manuel.

{6} While in their respective positions, the two groups argued and exchanged insults. During the argument, Manuel called Defendant a "bitch" for showing up with two men to try to hurt his family. Defendant and his companions responded by drawing their pistols and pointing them at the Raels. One of Defendant's companions moved forward onto the Raels' porch and hit Paul on the head with the handle of his pistol, causing the gun to fire and shoot Paul. This prompted Manuel to reach for his shotgun, which was located inside the front door of the house, whereupon Defendant and his companions started shooting at the Raels. Manuel fired a single shotgun round at Defendant and his companions.

{7} After Manuel fired the shotgun, Defendant and his companions stopped shooting and "disappeared." Manuel testified that he fired the shotgun at Defendant and his companions after they started firing at him and his family. Defendant testified in his own defense and acknowledged that he and his companions shot at the Raels but insisted that it was only after Manuel shot at them first.

{8} As a result of the gunfight, Randy was shot in the neck and died from his injuries. Paul was shot in the head and lived. Manuel was shot in the leg and lived. Sita and Paul's daughter were unharmed. The ballistic evidence presented at trial indicated that the bullet that killed Randy was not fired from Defendant's gun.

{9} The State charged Defendant with committing twenty offenses, together with enhancements, in an eleven-count indictment as follows:

- Count 1, first-degree murder (willful and deliberate) of Randy or the lesser included offenses of second-degree murder (firearm enhancement) or voluntary manslaughter (firearm enhancement), or alternatively, felony murder,
- Count 2, conspiracy to commit first-degree murder, or alternatively, to commit felony murder,
- Count 3, attempt to commit first-degree murder of Paul (willful and deliberate) (firearm enhancement), or alternatively,

either aggravated battery (great bodily harm) (firearm enhancement) or aggravated battery (deadly weapon) (firearm enhancement),

- Count 4, attempt to commit first-degree murder of Manuel (willful and deliberate) (firearm enhancement), or alternatively, either aggravated battery (great bodily harm) (firearm enhancement) or aggravated battery (deadly weapon) (firearm enhancement),
- Count 5, conspiracy to commit aggravated battery (great bodily harm), or alternatively, conspiracy to commit aggravated battery (deadly weapon),
- Count 6, aggravated assault (deadly weapon) (firearm enhancement) of Paul,
- Count 7, aggravated assault (deadly weapon) (firearm enhancement) of Manuel,
- Count 8, conspiracy to commit aggravated assault (deadly weapon),
- Count 9, child abuse (no death or great bodily harm) (firearm enhancement),
- Count 10, shooting at a dwelling or occupied building resulting in injury, and
- Count 11, conspiracy to commit shooting at a dwelling or occupied building.

{10} Defendant claimed self-defense. The jury rejected the claim and returned guilty verdicts for first-degree felony murder and second-degree murder of Randy, four counts of aggravated battery of Paul and Manuel, two counts of aggravated assault of Paul and Manuel, one count of conspiracy to commit aggravated assault, two counts of conspiracy to commit aggravated battery, one count of child abuse, one count of conspiracy to shoot at a dwelling or occupied building, and one count of shooting at a dwelling or occupied building. The district court sentenced Defendant to a term of life imprisonment for the felony-murder conviction and additional terms of incarceration for the remaining convictions and associated firearm enhancements.

{11} Defendant appeals directly to this Court. N.M. Const. art VI, § 2 ("Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court."); Rule 12-102(A)(1) NMRA.

II. DISCUSSION

A. Defendant's Felony-Murder Conviction

{12} First-degree murder in New Mexico includes murder committed "in the commission of or attempt to commit any felony[.]" NMSA 1978, § 30-2-1(A)(2) (1994). This is commonly referred to as felony murder. *State v. Frazier*, 2007-NMSC-032, ¶ 22, 142 N.M. 120, 164 P.3d 1. Notwithstanding the broad statutory language, we have repeatedly stated that, owing to legislative intent, there are many limitations to this crime. *See State v. Marquez*, 2016-NMSC-025, ¶ 14, 376 P.3d 815 (listing cases that have limited the scope of the felony-murder rule). One such limitation is "the collateral-felony rule." *Id.* Under the collateral-felony rule, the predicate felony must "be independent of or collateral to the homicide." *Id.* (internal quotation marks and citation omitted).

{13} Challenging his felony-murder conviction, Defendant argues that shooting at a dwelling or occupied building, as defined in NMSA 1978, Section 30-3-8(A) (1993), cannot serve as a predicate felony for felony murder. Defendant relies on this Court's rationale in *Marquez*, 2016-NMSC-025, ¶¶ 23-25, in which we held that the offense of shooting at or from a motor vehicle as defined in Section 30-3-8(B) cannot serve as the predicate felony for a felony-murder conviction because "shooting at or from a motor vehicle is an elevated form of aggravated battery" and does not have a felonious purpose independent from the purpose of injuring the victim. *Marquez*, 2016-NMSC-025, ¶ 23 (internal quotation marks and citation omitted). Defendant asserts that, likewise, the crime of shooting at a dwelling does not have a felonious purpose independent from the purpose of injuring another. He argues that, under the collateral-felony limitation, shooting at a dwelling cannot serve as a predicate felony for felony murder. *See State v. O'Kelly*, 2004-NMCA-013, ¶ 24, 135 N.M. 40, 84 P.3d 88 ("[T]he 'collateral-felony' limitation dictates that the predicate felony may not be a lesser included offense of second degree murder." (citation omitted)). In light of *Marquez*, Defendant also contends that this Court should overrule *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280. In *Varela* we held that shooting at a dwelling is not a lesser included offense of second-degree murder under a strict elements test and therefore that the collateral-felony limitation does not preclude shooting at a dwelling as a predicate felony to felony murder. *See id.* ¶¶ 18, 20-21.

{14} The State responds that shooting at a dwelling is a proper predicate for Defendant's felony-murder conviction. Specifically, the State argues that a determination that shooting at a dwelling or occupied building may serve as the predicate felony for felony murder is consistent with the *Marquez* "felonious purpose" analysis under the collateral felony doctrine and does not require overruling *Varela*.

{15} However, a felony-murder conviction rests upon proof beyond a reasonable doubt that the predicate felony was committed. *See* UJI 14-202 NMRA. A failure of proof is fundamental error. *See State v. Vance*, 2009-NMCA-024, ¶ 6, 145 N.M. 706, 204 P.3d 31 ("'If the evidence is insufficient to legally sustain one of the elements of a crime, the error is fundamental.'" (alteration omitted) (citation omitted)). We may review an issue of the sufficiency of the evidence on appeal even if the issue is not argued by the parties. *See State v. Doe*, 1978-NMSC-072, ¶ 4, 92 N.M. 100, 583 P.2d 464. Based on our review of the facts of this case, we conclude that a significant issue exists as to whether the State proved the essential elements of the predicate felony used to obtain Defendant's felony-murder conviction—shooting at a dwelling. Therefore, on our own motion, we consider whether sufficient evidence supports Defendant's conviction for shooting at a dwelling. We also consider whether the evidence supports Defendant's conviction for conspiring to commit shooting at a dwelling.

{16} "In reviewing the sufficiency of the evidence, 'the reviewing court views the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.'" *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (alterations omitted) (citation omitted). "'The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.'" *Id.* (citation omitted). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* ¶ 53 (alteration omitted) (citation omitted). "We do 'not evaluate the evidence to determine whether some hypothesis could be designed

which is consistent with a finding of innocence,' and we do 'not weigh the evidence or substitute our judgment for that of the fact finder so long as there is sufficient evidence to support the verdict.'" *Id.* ¶ 52 (alterations omitted) (citation omitted); *see also State v. Torrez*, 2013-NMSC-034, ¶ 40, 305 P.3d 944 (discussing the standard of review for sufficiency of the evidence).

{17} The jury was instructed that in order to find Defendant guilty of felony murder, the State was required to prove beyond a reasonable doubt, in pertinent part, that "[D]efendant committed the crime of Shooting at a Dwelling resulting in great bodily harm under circumstances or in a manner dangerous to human life" and "caused the death of [Randy] during the commission of Shooting at a Dwelling resulting in great bodily harm." The crime of shooting at a dwelling or occupied building is substantively defined as "willfully discharging a firearm at a dwelling or occupied building." Section 30-3-8(A). Consistent with Section 30-3-8(A), the elements instruction given to the jury required the State to prove beyond a reasonable doubt that "[D]efendant willfully shot a firearm at a dwelling."

{18} Viewing the evidence in the light most favorable to the guilty verdict and indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict, we conclude that the State failed to prove that Defendant committed the felony of shooting at a dwelling. No evidence supports a finding that when Defendant fired his pistol he willfully shot *at* the Raels' home as required both by Section 30-3-8(A) and by the elements instruction to the jury for shooting at a dwelling. *See Webster's Third New International Dictionary* 136 (3d ed. 1993) (defining "at" as "a function word to indicate that which is the goal of an action or that toward which an action or motion is directed"); *see also Fleming v. Commonwealth*, 412 S.E.2d 180, 183-84 (Va. Ct. App. 1991) (stating that the word "at," for purposes of a statute prohibiting discharge of a firearm at an occupied dwelling, is defined as "a function word used to indicate that toward which an action is directed" (alterations omitted) (internal quotation marks and citation omitted)). Instead, the only reasonable inference from the evidence is that Defendant and his companions specifically and primarily targeted the Raels themselves in the course of a gunfight that took place in front of the dwelling. In other words, the evidence was that the goal of Defendant and his companions was to shoot *at* the Raels, not *at* the house. The fact that the Raels were standing in front of the house during the gunfight did not shift Defendant's target from the Raels to the house.

{19} The facts of this case stand in stark contrast to other cases in which we have upheld convictions, based on challenges to the sufficiency of the evidence, for shooting at a dwelling or occupied building in violation of Section 30-3-8(A). In those cases, the facts clearly support a finding that the target of the defendants' gunfire was the dwelling or occupied building itself. In *Torrez*, following an altercation at a party, the defendant left the house, armed himself, and then returned to the house. *See* 2013-NMSC-034, ¶¶ 2-4. From the street, the defendant took out his firearm and fired at the house. *See id.* ¶¶ 3-4. There was no evidence presented that the defendant was aiming at any particular individual during his assault. *See id.* ¶¶ 2-4, 42-43 ("[S]everal witnesses . . . testified that when [the d]efendant returned to the house where the party was taking place, he opened fire on the house without anyone else firing back at him." *Id.* ¶ 42.). As a result of the defendant's indiscriminate gunfire, one partygoer was injured and another was killed. *See id.* ¶ 4. Under these facts, we concluded that there was sufficient evidence to support the defendant's conviction of felony murder based on the predicate felony of shooting at a dwelling. *See id.* ¶¶ 41-42.

{20} Similarly, in *State v. Arrendondo*, we affirmed the defendant's conviction of shooting at a dwelling, noting three pieces of evidence upon which the jury could have relied to reasonably infer that the defendant intentionally shot into the house. *See* 2012-NMSC-013, ¶¶ 36-37, 278 P.3d 517. First, there was evidence that the defendant "was expressing hostility towards" an occupant of the house who was not the ultimate and intended murder victim. *Id.* ¶ 37. Second, there was "evidence that at least two bullets entered the house." *Id.* Finally, there was "evidence that the trajectory of the bullets that entered the house was different from the trajectory of the bullets that entered [the victim's] body." *Id.* In reference to the trajectories, there was testimony that "the trajectory of the bullets that landed in the house indicate[d] that the shooter was aiming directly at the house." *Id.* ¶¶ 12, 36.

{21} Finally, in *Varela*, we concluded that the facts supported a conviction of accessory to felony murder by shooting at a dwelling when, just before midnight, one of the defendant's companions fired several shots into a dark mobile home before speeding away. *See* 1999-NMSC-045, ¶¶ 1-2, 7, 9, 21. The companion who admitted to firing the gun testified that the motive behind the attack was to "get even" with a rival gang member whose father owned the mobile home. *See id.* ¶¶ 2, 4, 7. The rival gang member's father was killed when he was struck by one of the fired rounds while asleep in the mobile home. *Id.* ¶¶ 2, 4. We held that this evidence was sufficient to support a conviction of felony murder predicated on shooting at a dwelling. *Id.* ¶¶ 1, 21.

{22} By contrast, the evidence in the instant case is not sufficient to support a conviction of felony murder predicated on the felony of shooting at a dwelling. Unlike the defendants in *Torrez*, *Arrendondo*, and *Varela*, Defendant and his companions did not target the house in their attack. They did not fire indiscriminately at the house from the street like the defendants in *Torrez* and *Varela*. The objects of Defendant's assault were individual Raels. This is supported by the facts that Defendant's group specifically urged Manuel to come outside the house and that Paul was targeted at close range when one of Defendant's companions moved onto the porch before striking him and shooting him in the head. In contrast to the evidence in *Arrendondo*, there was no bullet trajectory evidence presented at Defendant's trial to show that Defendant's group directly aimed at the house. Absent sufficient evidence that the dwelling was the principal target of Defendant's gunfire, we will not permit Defendant's conviction of second-degree murder to be elevated to a conviction of felony murder simply because the second-degree murder occurred in front of a dwelling.

{23} Because the State failed to prove the felony used as the predicate for Defendant's felony-murder conviction, it follows that Defendant's conviction of felony murder (Count 1 alternative) as well as Defendant's conviction of shooting at a dwelling (Count 10) must be vacated for a failure of proof. Therefore we do not need to address Defendant's argument that his felony-murder conviction must be vacated on grounds that a flaw in the felony-murder jury instruction constituted fundamental error.

{24} In addition, and for largely the same reasons, the State failed to present sufficient evidence that Defendant conspired to shoot at a dwelling or occupied building. The jury was instructed in pertinent part that in order for it to find Defendant guilty of conspiracy to commit shooting at a dwelling or occupied building, the State was required to prove beyond a reasonable doubt that Defendant "and another person by words or acts agreed together to commit Shooting at a Dwelling" and that Defendant "and the other person intended to commit Shooting at a Dwelling." The evidence presented by the State and the inferences from that evidence fail to prove that Defendant and his companions at any time formed an agreement to shoot *at* the Raels' home or that they intended to shoot *at* the Raels' home. The fact that there was a gunfight in which Defendant and his companions were shooting *at* the Raels does not equate, by itself, to an agreement to shoot *at* the Raels' home. Defendant's conviction of conspiracy to commit shooting at a dwelling or occupied building (Count 11) must also be set aside for a failure of proof.

B. Defendant's Double Jeopardy Claims

{25} Defendant argues that several of his convictions violate his right to be free from double jeopardy and must be vacated. The State agrees with Defendant that some convictions violate double jeopardy and must be vacated. However, we are not bound by the State's concession, and we independently assess Defendant's claims. *See State v. Martinez*, 1999-NMSC-018, ¶ 26, 127 N.M. 207, 979 P.2d 718 (stating that the appellate courts are not bound by the State's concession of an issue in a criminal appeal).

{26} "This Court reviews claims involving alleged violations of a defendant's right to be free from double jeopardy de novo." *State v. Loza*, 2018-NMSC-034, ¶ 4, 426 P.3d 34. The Fifth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits double jeopardy and "functions in part to protect a criminal defendant against multiple punishments for the same offense." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747 (internal quotation marks and citation omitted). There are two classes of double jeopardy multiple-punishment cases: (1) the "double-description case, where the same conduct results in multiple convictions under different statutes," and (2) the "unit-of-prosecution case, where a defendant challenges multiple convictions under the same statute." *Id.* Defendant's arguments raise both double-description and unit-of-prosecution claims, and we proceed to analyze each double jeopardy argument.

1. Defendant's felony-murder and second-degree-murder convictions

{27} Defendant argues that double jeopardy was violated because his felony-murder and second-degree-murder convictions both result from Randy's killing. Because we have concluded that Defendant's felony-murder conviction must be vacated for a failure of proof, Defendant's argument is moot, and Defendant's second-degree-murder conviction stands.

2. Defendant's conviction for shooting at a dwelling

{28} Defendant argues that his conviction for shooting at a dwelling must be vacated on double jeopardy grounds. Again, Defendant's double jeopardy argument is moot because we vacate Defendant's conviction for shooting at a dwelling on the basis of insufficient evidence.

3. Defendant's convictions for the aggravated batteries of Paul and Manuel

{29} Defendant argues that his two convictions for the aggravated battery of Manuel (Count 4) and two convictions for the aggravated battery of Paul (Count 3), where each count was charged in the alternative as aggravated battery with a deadly weapon and aggravated battery resulting in great bodily harm, both result in multiple punishments in violation of his double jeopardy rights. The State concedes that one aggravated battery conviction per victim must be vacated.

{30} In *State v. Cooper*, this Court reviewed whether multiple convictions for a single count of aggravated battery charged under multiple theories of the crime violated double jeopardy. *See* 1997-NMSC-058, ¶ 53, 124 N.M. 277, 949 P.2d 660. We held that the defendant's two convictions for one count of aggravated battery charged under two theories—"battery with a deadly weapon and battery in a manner that could cause great bodily harm"—constituted a violation of double jeopardy. *Id.* Therefore, the Court vacated one of the defendant's aggravated battery convictions. *Id.* ¶¶ 53, 63.

{31} Under the circumstances of this case, *Cooper* is on point. Defendant was charged with two counts of attempt to commit deliberate first-degree murder, relating to the shooting of Manuel and Paul, respectively. Each attempted murder count included as alternatives two aggravated battery charges brought under theories of use of a deadly weapon and resulting in great bodily injury. The jury was further instructed that it could find Defendant guilty of the attempted murder of Manuel and of Paul, or alternatively of the aggravated battery of each. The jury received separate instructions for aggravated battery as to each victim, Manuel and Paul, under both theories: battery with a deadly weapon and battery resulting in great bodily harm. The jury returned four aggravated battery convictions against Defendant—two for the shooting of Manuel under each of the two charged theories and two for the shooting of Paul under each of the two charged theories. Because the indictment and jury instructions reflect that Defendant was charged in Counts 3 and 4 with only one act of battering each of the two victims—Manuel and Paul—under two theories of the crime, we conclude following *Cooper* that one aggravated battery conviction per count must be vacated. *See also State v. Garcia*, 2009-NMCA-107, ¶¶ 9, 16-17, 147 N.M. 150, 217 P.3d 1048 (determining that the defendant's aggravated-battery and simple-battery convictions arising from the same conduct violated his double jeopardy rights).

4. Defendant's conspiracy convictions

{32} Defendant argues that the State failed to establish the existence of distinct conspiracies at trial, and as a result, three of his four conspiracy convictions must be vacated. The State agrees.

{33} In *State v. Gallegos*, we concluded that based on "the text, history, and purpose of our conspiracy statute . . . the Legislature established . . . a rebuttable presumption that multiple crimes are the object of only one, overarching, conspiratorial agreement subject to one, severe punishment set at the highest crime conspired to be committed." 2011-NMSC-027, ¶ 55, 149 N.M. 704, 254 P.3d 655. "At trial, the state has an opportunity to overcome the Legislature's presumption of singularity, but doing so requires the state to carry a heavy burden." *Id.*

{34} In determining whether the State has overcome the Legislature's presumption of singularity and demonstrated the existence of more than one conspiracy, this Court has adopted a multifactor totality of circumstances test used by federal courts. *Id.* ¶¶ 42, 56. The factors used to determine the number of agreements where more than one conspiracy is alleged include whether the alleged conspiracies (1) have the same location, (2) overlap significantly

in time, (3) involve the same or overlapping personnel, (4) involve similar overt acts charged against the defendant, and (5) involve the defendant performing a similar role. *Id.* ¶ 42. "While New Mexico law does not require the existence of an overt act, our courts may still rely on this factor to help determine whether a defendant entered into one or more conspiratorial agreements." *Id.* ¶ 56 n.3.

{35} The jury returned four conspiracy convictions against Defendant arising from the shooting: (1) conspiracy to commit aggravated battery (great bodily harm), as charged in Count 5, (2) conspiracy to commit aggravated battery (deadly weapon), charged as an alternate in Count 5, (3) conspiracy to commit aggravated assault (deadly weapon), as charged in Count 8, and (4) conspiracy to commit shooting at a dwelling (great bodily harm), as charged in Count 11. However, because we have already concluded that the evidence fails to prove a conspiracy to shoot at a dwelling, we limit our discussion to the remaining three conspiracy convictions. Applying the totality of circumstances test, we conclude that the evidence at trial established the existence of only one conspiracy. First, the location and time of the alleged conspiracies were the same, and they overlapped temporally. The direct and circumstantial evidence showed that the agreement to shoot at the Rael family was formed between Defendant and his companions while they were on the way to the Raels' home or during the verbal exchange that preceded the exchange of gunfire. *See State v. Trujillo*, 2002-NMSC-005, ¶ 62, 131 N.M. 709, 42 P.3d 814 ("The agreement [necessary to establish conspiracy] may be established by circumstantial evidence."). Second, the personnel involved in the several charged conspiracies, Defendant and his two companions, were the same. Finally, the overt acts and Defendant's role in the several charged conspiracies were the same. Specifically, Defendant's role in the charged conspiracies was to call the Raels outside and shoot at them.

{36} Because Defendant's actions were all part of one, overarching conspiratorial agreement, Defendant's multiple conspiracy convictions violate double jeopardy. Because the highest crime conspired to be committed was aggravated battery, this conspiracy conviction is affirmed. *Compare* NMSA 1978, § 30-3-5(C) (1969) ("Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon . . . is guilty of a third degree felony.") *with* NMSA 1978, § 30-3-2 (1963) ("Whoever commits aggravated assault is guilty of a fourth degree felony.").

5. Defendant's aggravated-battery and aggravated-assault convictions

{37} Defendant argues that his aggravated-assault convictions (Counts 6 and 7) must be vacated on double jeopardy grounds because they are subsumed in his aggravated-battery convictions (Counts 3 and 4). The State responds that "[b]ecause Defendant's aggravated-assault convictions and aggravated-battery convictions are not based on unitary conduct, they do not result in a double jeopardy violation." We agree with the State.

{38} The double jeopardy analysis for double-description cases applies to this argument because Defendant's aggravated-assault and aggravated-battery convictions arise under different statutes. "In reviewing a double-description double jeopardy challenge, . . . we must first determine whether the defendant's conduct was unitary, requiring an analysis of whether or not a defendant's acts are separated by sufficient 'indicia of distinctness.'" *State v. Torres*, 2018-NMSC-013, ¶ 18, 413 P.3d 467 (citation omitted). "If the conduct is not unitary, then there is no double jeopardy violation." *Id.* "If the conduct is unitary, we must determine whether the Legislature intended multiple punishments for the unitary action." *Id.*

{39} "Conduct is unitary when not sufficiently separated by time or place, and the object and result or quality and nature of the acts cannot be distinguished." *State v. Silvas*, 2015-NMSC-006, ¶ 10, 343 P.3d 616. In considering whether conduct is unitary, the courts "have looked for an identifiable point at which one of the charged crimes had been completed and the other not yet committed." *State v. DeGraff*, 2006-NMSC-011, ¶ 27, 139 N.M. 211, 131 P.3d 61. The courts have also "looked for an event that intervened between" the crimes at issue, distinguishing the crimes from one another. *Id.*

{40} The evidence at trial was that Defendant and his companions drew and pointed their guns at the Raels after the argument involving Defendant, his two companions, and the Raels began. The men argued and yelled at one another, and Defendant and his companions continued to point their guns at the Raels until they heard the sound of a siren. At that point, Defendant and his companions lowered their guns to their sides, and everyone stopped arguing. After the passing of the vehicle with the siren, which turned out to be an ambulance and not a police car, one of Defendant's companions moved onto the Raels' porch, and the violence between the two groups ensued, culminating in the injuries to Paul and Manuel.

{41} Defendant argues that the conduct underlying his aggravated-assault and aggravated-battery convictions was unitary. He contends that "the pointing of the firearms occurred in the same place as the firing of them and occurred within a matter of seconds or, at most, minutes. Moreover, the nature and quality of the alleged acts demonstrate that they are necessarily related: pointing guns at the targets was an essential antecedent to firing them at the targets."

{42} The State responds, and we agree, that "[a]fter lowering their guns at the sound of a siren, Defendant and his companions had an opportunity to walk away, having made their threats without harming anyone. But they chose, instead, to do more." The passing siren and subsequent brief moment of repose stand as identifiable points marking the completion of the assaults (the initial pointing of guns) and the forthcoming batteries. Once the ambulance passed, Defendant and his companions again raised their guns in a second, distinct act of aggression before firing at Paul and Manuel. Under these circumstances, the conduct underlying Defendant's aggravated-assault convictions and the conduct underlying his aggravated-battery convictions were separated by sufficient indicia of distinctness. Because Defendant's conduct was not unitary, there is no double jeopardy violation in Defendant's aggravated-battery and aggravated-assault convictions. *See Torres*, 2018-NMSC-013, ¶ 18 ("If the conduct is not unitary, then there is no double jeopardy violation.").

6. Defendant's sentence enhancements for using a firearm in committing aggravated battery and aggravated assault

{43} Defendant argues that "aggravation" of the sentences for his assault and battery "charges based upon the presence of a firearm" results in double jeopardy, "requiring that the firearm enhancements be vacated." The State responds that this Court recently rejected this argument in *State v. Baroz*, 2017-NMSC-030, 404 P.3d 769. We agree. In *Baroz*, the Court held,

> The legislative policy behind the firearm sentence enhancement[, NMSA 1978, § 31-18-16(A) (1993),] is that a noncapital

> felony, committed with a firearm, should be subject to greater punishment than a noncapital felony committed without a firearm because it is more reprehensible. The very nature of a firearm enhancement is to require the sentencing judge to increase or enhance the basic sentence that applies to the crime. By enacting the enhancement, the Legislature intended to authorize greater punishment for noncapital felonies committed with a firearm. We conclude the Legislature intended to authorize an enhanced punishment when a firearm is used in the commission of aggravated assault. The sentence enhancement does not run afoul of double jeopardy[.]

Id. ¶ 27 (footnote omitted). Similarly, following *Baroz* in *State v. Branch*, the Court of Appeals concluded that the sentences for the defendant's aggravated-assault and aggravated-battery convictions, which were each increased by the firearm enhancement, did not violate double jeopardy. *See* 2018-NMCA-031, ¶¶ 32-34, 417 P.3d 1141.

{44} *Baroz* and *Branch* are directly applicable here. The basic sentences of three years for Defendant's third-degree aggravated-battery conviction and eighteen months for his fourth-degree aggravated-assault conviction, *see* NMSA 1978, § 31-18-15(A)(9)-(10) (2007), were each increased by one year, to four years and to thirty months respectively, consistent with the firearm enhancement statute, § 31-18-16(A). Because the Legislature intended to authorize an enhanced punishment when a firearm is used in the commission of aggravated assault and aggravated battery, the firearm enhancement of the sentences for these convictions did not violate double jeopardy.

C. The district court ruling when the State elicited testimony about Defendant's affiliation with the Black Berets Motorcycle Club

{45} Finally, Defendant argues that the district court erred in failing to declare a mistrial when the State elicited testimony regarding the motorcycle club with which Defendant and his companions were affiliated, in violation of the district court's pretrial ruling. The State responds that "[t]he prosecutor's questions were permissible under the doctrine of curative admissibility and, therefore, did not amount to prosecutorial misconduct." Further, the State asserts that the district court's "curative instruction was sufficient to prevent prejudice from the prosecutor's questioning." We agree with the State.

{46} We review the district court's evidentiary rulings for an abuse of discretion. *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829. Further, the appellate courts "review the denial of [a d] efendant's motion for mistrial based on prosecutorial misconduct for an abuse of discretion." *State v. Sena*, 2018-NMCA-037, ¶ 7, 419 P.3d 1240. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *Rojo*, 1999-NMSC-001, ¶ 41 (internal quotation marks and citation omitted).

{47} If the district court determines that a prosecutor's comment or questioning of a witness "is substantially likely to cause a miscarriage of justice, the judge should grant a defendant's motion for a mistrial." *See State v. Reynolds*, 1990-NMCA-122, ¶ 12, 111 N.M. 263, 804 P.2d 1082. However, when a defendant gives testimony "that 'opens the door' to inadmissible evidence, the doctrine of curative admissibility in some circumstances may permit the State to rebut that claim with otherwise inadmissible evidence." *State v. Tollardo*, 2012-NMSC-008, ¶ 22, 275 P.3d 110.

{48} For example, in *State v. Andrade*, where the defendant physically attacked the victim while committing aggravated burglary, the district court granted the defendant's motion to exclude evidence of his prior arrests for battery and shoplifting pursuant to Rule 11-404 NMRA (1993). *See* 1998-NMCA-031, ¶¶ 2, 12-14, 124 N.M. 690, 954 P.2d 755. In her cross-examination by the defense, the victim testified about the defendant's prior arrests for battery and shoplifting. *Id.* ¶ 14. When the defendant subsequently took the stand on his own behalf, he testified that during his relationship with the victim, she often beat him and forced him to shoplift for her. *Id.* ¶ 17. On cross-examination of the defendant, the prosecutor asked the defendant about his history of shoplifting and prior arrests for battery. *Id.* ¶ 21. The Court of Appeals determined that no prosecutorial misconduct occurred as a result of the prosecutor's cross-examination of the defendant because the defendant's testimony opened the door to the prosecutor's questioning. *Id.* ¶ 21. The Court reasoned that "[g]iven that [the d]efendant opened the door regarding prior violent episodes between [the d]efendant and [the v]ictim, he cannot complain that the State questioned him regarding who really beat whom. Such responsive evidence is admissible under the doctrine of curative admissibility[.]" *Id.* Therefore, the Court concluded, although the evidence concerning the defendant's prior arrests for shoplifting and battery had initially been excluded, when the defendant "contended on direct examination that he was shoplifting to satisfy [the v]ictim's demands, the State could properly pursue cross-examination" to rebut the defendant's statements. *Id.*

{49} Prior to trial in this case, the State filed notice of intent to introduce other acts evidence under Rule 11-404(B). In pertinent part, the State sought to introduce evidence that Defendant was affiliated with the Black Berets Motorcycle Gang. The State asserted that

> Defendant has affiliations with the Black Beret's Motorcycle Gang. He was allegedly stripped of his membership for trafficking narcotics. Simultaneously, a group of "rogue" Black Beret members had become increasingly violent and had originated by an agreement that each of these members in this "rogue" crew were willing to commit murder for the club. Two of these "rogue" members are co-Defendants Ricardo Romero, and David Ulibarri. . . . This information is relevant to show that the Defendant knew his co-defendant's would resort to deadly violence on Defendant's behalf, and that they acted in concert on February 1, 201[5] when they came to the Rael house to shoot the victims.

The district court addressed the admissibility of this evidence on the first day of trial. The State argued concerning the proffered evidence as follows: "I think it's important to the conspiracy charge that Mr. Comitz knows if he brings these two guys, they're, you know, they're brothers. That means something, that they would fight on behalf of Mr. Comitz. And I think that's pertinent to the conspiracy charges in this case." Defense counsel objected to the State being able to reference the group with which Defendant and his companions were affiliated as a "motorcycle club." The district court ruled that the State could

reference the affiliation as with a "club" but not a "motorcycle club," which would tend to reinforce the inference the State sought to elicit—that Defendant and his companions "have this brotherhood going on."

{50} At trial, when defense counsel asked Defendant whether he was "a member of any clubs or groups[,]" Defendant answered that he was a member of the "Black B[e]rets Motorcycle Club." Defendant proceeded to describe the club as a support club for POW/MIA veterans that raises money for "toys and stuff" for veterans' families. Defendant also testified that the two men who accompanied him to the Raels' home on the day of the shooting were also part of that club.

{51} The prosecutor asked on cross-examination whether the Black Berets are a motorcycle gang, to which Defendant responded, "No." The prosecutor proceeded by saying, "You're telling me that the Black B[e]rets are not affiliated with the Banditos organized motorcycle gang?" Again, Defendant answered, "No." Defendant further testified that he was still a member of the Black Berets, and in response the prosecutor asked, "It's not true that you were kicked out of that club for selling methamphetamine?" Defense counsel objected and requested a mistrial based on the district court's pretrial ruling, which the district court denied. However, in response to the objection, the district court instructed the jury that "[t]he last question asked by the State and the answer given by the witness will be stricken. I ask you to disregard it and do not consider it in your deliberations[.]"

{52} Under the circumstances, we conclude that the district court did not abuse its discretion in denying Defendant's motion for a mistrial based on the prosecutor's cross-examination of Defendant. Similar to *Andrade*, when Defendant testified on direct examination that he was part of the Black Berets Motorcycle Club and that it was a charitable club, he opened the door to cross-examination on these issues under the doctrine of curative admissibility. Assuming the prosecutor's specific question to Defendant about whether he was kicked out of the Black Berets for selling methamphetamine was improper, the district court effectively addressed the potential of prejudice to Defendant by instructing the jury to disregard the question and Defendant's answer. *See State v. Smith*, 2016-NMSC-007, ¶ 46, 367 P.3d 420 ("An error committed by admitting inadmissible evidence is generally cured by a ruling of the court striking the evidence and admonishing the jury to disregard such evidence."). Accordingly, we conclude that the district court did not abuse its discretion in denying Defendant's motion for a mistrial.

III. CONCLUSION

{53} We affirm Defendant's convictions of second-degree murder under Count 1, one count of aggravated battery under Count 3 (Paul), one count of aggravated battery under Count 4 (Manuel), one count of conspiracy to commit aggravated battery under Count 5, one count of aggravated assault under Count 6 (Paul), one count of aggravated assault under Count 7 (Manuel), and one count of child abuse under Count 9, together with the associated firearm enhancements as decided by the jury. We vacate Defendant's other convictions. We remand this case to the district court for further proceedings in accordance with this opinion.

{54} IT IS SO ORDERED.

MICHAEL E. VIGIL, Justice

WE CONCUR:

JUDITH K. NAKAMURA, Chief Justice

BARBARA J. VIGIL, Justice

PETRA JIMENEZ MAES, Justice, Retired
Sitting by designation

CHARLES W. DANIELS, Justice, Retired
Sitting by designation

Certiorari Denied, January 15, 2019, No. S-1-SC-37369.
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From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-019

No. A-1-CA-35602 (filed October 11, 2018)

STATE OF NEW MEXICO
Plaintiff-Appellee,,
v.
ROMAN F. MONTANO, SR.,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Benjamin Chavez, District Judge

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for Appellee

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for Appellant

Opinion

Jennifer L. Attrep, Judge

{1} Pursuant to a plea agreement, Defendant Roman F. Montano, Sr. pleaded guilty to first degree criminal sexual penetration, in violation of NMSA 1978, Section 30-9-11(D)(1) (2009), as well as criminal sexual contact of a minor in the second and third degrees, in violation of NMSA 1978, Section 30-9-13(B)(1), (C)(1) (2003). Defendant then moved to withdraw his guilty plea, arguing that his attorney had been ineffective on a number of grounds. At the evidentiary hearing on his motion, Defendant's paramount claim was that counsel provided ineffective assistance by erroneously informing him that his DNA was found on the couch where the incident occurred, when in fact there was no such DNA evidence. It also became clear at the hearing that Defendant had been advised by counsel that he could plead guilty and later attempt to withdraw his plea through another attorney. Although Defendant acted on this advice, he did not claim this advice was ineffective below nor does he make such a claim on appeal. The district court denied Defendant's motion to withdraw his plea, and Defendant appealed. Although the advice regarding the DNA was deficient, we determine that Defendant has failed to establish there is a reasonable probability he would have gone to trial instead of pleading guilty had counsel not acted unreasonably. We therefore affirm.

BACKGROUND

{2} The charges in this case arose from an incident between Defendant and his then twelve-year-old female cousin G.H. in August 2009. At the time of the incident, G.H. had spent the weekend at Defendant's residence for a family celebration. Other family members were present during the weekend. After G.H. left Defendant's residence, she reported to law enforcement that Defendant had fondled her breast and vagina and had penetrated her vagina briefly. G.H. then underwent a sexual abuse examination during which samples were collected for DNA testing. Law enforcement arrived at Defendant's residence later that evening to execute a search warrant. Defendant waived his *Miranda* rights and spoke with a law enforcement officer regarding the incident. Defendant stated that the incident occurred on a couch in his residence. Defendant claimed that G.H. initiated sexual contact with him. During the interview, Defendant eventually admitted to touching G.H.'s breast, rubbing his penis against G.H.'s vagina, and briefly penetrating G.H.'s vagina. Law enforcement collected samples from the couch, Defendant, and Defendant's clothing for DNA testing. Defendant was charged with criminal sexual penetration in the first degree (child under 13), two counts of criminal sexual contact of a minor in the second degree, and kidnapping.

DISCUSSION

{3} This case languished for nearly five years in district court prior to Defendant's guilty plea. Defendant was represented by a public defender until approximately June 2012 when contract public defender Jonathan Miller entered his appearance. Mr. Miller represented Defendant until he pleaded guilty in June 2014 at docket call. Trial was to begin the day of docket call or the next day. The State tendered a plea offer the morning of docket call. At docket call, Mr. Miller moved for a continuance on the ground that he wanted to explore a potential conflict between the investigating agent at New Mexico State Police (NMSP) and G.H.'s mother, who was an employee of NMSP at the time of the incident. Mr. Miller represented to the court that he was otherwise ready for trial. Defendant personally spoke out in support of the motion to continue, asking for additional time to look into the case with Mr. Miller and defense investigator, William David Meek. The court denied the request for a continuance, citing the age of the case. Mr. Miller then reiterated that he was ready to go to trial.

{4} The court recessed for Mr. Miller to speak with Defendant about the pending plea offer. After the almost one-hour break, Defendant moved to discharge Mr. Miller as his attorney. As grounds, Mr. Miller stated that Defendant was displeased because counsel had not previously stressed how damning Defendant's confession was to the case. Mr. Miller again reiterated he was ready to go to trial. In support of his motion, Defendant stated that "there's just been a lot of things that haven't been done properly, and . . . I need to seek different counsel[.]" The district court denied the motion to discharge counsel. At that point, the court took another one-hour recess. After the

recess, Mr. Miller informed the court that there likely was a plea, at which point the court recessed for another two hours. Upon court resuming, Defendant pleaded guilty pursuant to a plea agreement to first degree criminal sexual penetration and criminal sexual contact of a minor in the second and third degrees. Sentencing was postponed for three months upon the request of the defense to present mitigation evidence.

{5} After pleading guilty, Defendant retained private counsel who filed a motion to withdraw the plea, asserting that Defendant's plea was not knowing and voluntary due to Mr. Miller's ineffective assistance. In the motion, Defendant argued that the public defender contract system was constitutionally deficient, essentially guaranteeing ineffective assistance in this case, and that counsel was deficient by, inter alia, failing to investigate defense witnesses and file a witness list. Five months after filing the motion, Defendant filed a supplement to the motion, asserting that Defendant had been erroneously informed that there was DNA evidence against him and claiming "the [DNA] result was a central factor in the plea discussions[.]" Sentencing was postponed until resolution of the motion.

{6} At the evidentiary hearing on Defendant's motion to withdraw the plea, Mr. Miller, defense investigator Mr. Meek, Defendant's fiancée Erminia Marie Velarde, Defendant, Maurice Moya (expert on investigating crimes against children), and Lelia Hood (director of the contract public defender system) all testified. Relevant testimony is briefly summarized here; additional detail is discussed as needed in our analysis.

{7} At the evidentiary hearing, Mr. Miller readily admitted to erroneously advising Defendant that his semen and DNA were found on the couch. The State's laboratory report in fact did not show a positive test result for semen or male DNA on the couch. Counsel's mistaken belief likely came from a police report in which a preliminary test showed a presumptive presence of semen. Mr. Miller first informed Defendant of this purported DNA evidence at a meeting several days before docket call and advised Defendant that the DNA evidence could be damaging at trial. Prior to this, Defendant had been told by his previous attorney that there was no DNA evidence against him. Defendant understood that the DNA evidence the State allegedly had was on his couch, not on G.H., and that there were plausible alternative explanations for his DNA being on the couch.[1]

{8} At the pre-docket call meeting, Defendant, Ms. Velarde, Mr. Miller, and Mr. Meek met to discuss the case. This was the first time Defendant had met Mr. Meek. Mr. Miller testified that he went over the evidence with Defendant, including Defendant's confession, G.H.'s credibility, and the fact that Mr. Meek had interviewed all the State's witnesses. At the meeting, Mr. Miller told Defendant that he would have a choice at docket call—plead guilty or go to trial—and Defendant wanted to proceed to trial notwithstanding the purported DNA evidence. Mr. Miller testified that he prepared for trial over the weekend and was ready for trial the day of docket call.

{9} At docket call on June 30, 2014, Mr. Miller informed Defendant that trial would begin the next day. Defendant testified that he was caught off guard and was in shock that trial was starting so soon.[2] Mr. Miller told Defendant he was ready to go to trial but explained that he requested a continuance due to Defendant's agitation and nervousness. Defendant testified that he did not believe Mr. Miller was prepared to go to trial because he had not interviewed witnesses identified by Defendant and had not moved to suppress Defendant's confession. During the multiple recesses at docket call, Defendant considered whether to plead guilty or go to trial. Defendant spoke throughout the day with Ms. Velarde, Mr. Miller, and Mr. Meek. Defendant testified that, even though Mr. Miller emphasized the strength of the State's case (including the non-existent DNA), "I honestly was going to go to trial and lose so I could appeal it. That's what I was going to do." But Defendant also testified that he took the plea because of the DNA evidence and because Mr. Miller emphasized the DNA evidence was harmful. Mr. Miller testified that, in his view, the DNA was not so damning, it was Defendant's confession and G.H.'s testimony that concerned him. Mr. Miller advised Defendant to take the plea.

{10} At some point, Defendant asked Mr. Miller if there was any other option. Counsel advised Defendant that he could plead guilty and then attempt to withdraw his guilty plea with another attorney. Mr. Miller made no guarantees about whether this tactic would work, but Defendant thought "it [was] worth a shot." Defendant then entered into the plea agreement with the intention of later attempting to withdraw his guilty plea.

{11} The district court denied Defendant's motion to withdraw his plea. The court concluded that the only basis for deficient performance was the erroneous advice regarding the non-existent DNA. The district court, nonetheless, concluded that Defendant had not demonstrated the prejudice necessary to establish a claim of ineffective assistance of counsel because there was no reasonable probability that Defendant would have gone to trial if properly advised about the DNA evidence. The district court further concluded that "the evidence . . . demonstrate[s] a strategic decision [by Defendant] to enter into the plea in order to delay the trial and to hire a new attorney." This appeal followed after entry of judgment and sentence.

DISCUSSION

I. Standard of Review

{12} "A motion to withdraw a guilty plea is addressed to the sound discretion of the [district] court, and we review the [district] court's denial of such a motion only for abuse of discretion." *State v. Favela*, 2015-NMSC-005, ¶ 9, 343 P.3d 178 (internal quotation marks and citation omitted). "A [district] court abuses its discretion when it denies a motion to withdraw a plea that was not knowing or voluntary." *State v. Hunter*, 2006-NMSC-043, ¶ 12, 140 N.M. 406, 143 P.3d 168. "Where, as here, a defendant is represented by an attorney during the plea process and enters a plea upon the advice of that attorney, the voluntariness and intelligence of the defendant's plea generally depends on whether the attorney rendered ineffective assistance in counseling the plea." *Favela*, 2015-NMSC-005, ¶ 9 (internal quotation

[1]In his brief in chief, Defendant asserts that "Mr. Miller told [Defendant] that they had his DNA, which he thought meant that the claim of penetration which the alleged victim had made could be proven through the use of DNA evidence." There is no record citation for this assertion and, as far as we can tell, there simply is no support in the record for this assertion. To the contrary, Defendant clearly testified that he understood the DNA "was on my couch where the alleged incident occurred."

[2]It should be noted that Defendant received a copy of the notice of docket call, which provided that trial was to begin on July 1, 2014.

marks and citation omitted). "We review claims of ineffective assistance under a mixed standard of review, viewing the factual record in the light most favorable to the court's ruling but deciding de novo whether counsel was ineffective as a matter of law." *State v. Gutierrez*, 2016-NMCA-077, ¶ 33, 380 P.3d 872; *see id.* ("defer[ring] to the district court's findings of fact when they are supported by the record").

{13} "The two-part standard delineated in *Strickland v. Washington*, 466 U.S. 668 . . . (1984), applies to ineffective-assistance claims arising out of a plea agreement." *State v. Paredez*, 2004-NMSC-036, ¶ 13, 136 N.M. 533, 101 P.3d 799. "To establish ineffective assistance of counsel, a defendant must show: (1) 'counsel's performance was deficient,' and (2) 'the deficient performance prejudiced the defense.'" *Id.* (quoting *Strickland*, 466 U.S. at 687).

II. Deficient Performance

{14} "Counsel's performance is deficient if it 'fell below an objective standard of reasonableness.'" *Hunter*, 2006-NMSC-043, ¶ 13 (quoting *Strickland*, 466 U.S. at 688). "We indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation marks and citations omitted).

{15} Defendant argues that his counsel's performance fell below an objective standard of reasonableness in three broad respects: (1) counsel failed to file a motion to suppress Defendant's confession, (2) counsel undertook inadequate pretrial investigation and preparation, and (3) counsel erroneously advised Defendant of the existence of DNA evidence when there was none. On their face, Defendant's allegations of his counsel's deficiencies give us pause; however, a review of the entire record reveals that Defendant's claim of ineffective assistance does not withstand scrutiny. *See State v. Martinez*, 2007-NMCA-160, ¶¶ 20-28, 143 N.M. 96, 173 P.3d 18 (holding that myriad claims of ineffective assistance in child sex crime case were without merit upon a review of the entire record).

{16} Defendant first argues that counsel was ineffective in failing to move to suppress his confession to law enforcement as involuntary. "Where, as here, the ineffective assistance of counsel claim is premised on counsel's failure to move to suppress evidence, [the d]efendant 'must establish that the facts support the motion to suppress and that a reasonably competent attorney could not have decided that such a motion was unwarranted.'" *State v. Mosley*, 2014-NMCA-094, ¶ 20, 335 P.3d 244 (quoting *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 19, 130 N.M. 179, 21 P.3d 1032). Whether a confession is involuntary depends on whether "official coercion" has occurred. *State v. Evans*, 2009-NMSC-027, ¶ 33, 146 N.M. 319, 210 P.3d 216. "Official coercion occurs when a defendant's will has been overborne and his capacity for self-determination has been critically impaired." *Id.* (alterations, internal quotation marks, and citations omitted). In determining the voluntariness of a defendant's confession, courts look at the totality of the circumstances. *State v. Fekete*, 1995-NMSC-049, ¶ 34, 120 N.M. 290, 901 P.2d 708. "[U]nder the totality of circumstances test, a confession is not involuntary solely because of a defendant's mental state. Instead, the totality of circumstances test includes an element of police overreaching." *Id.* ¶ 35.

{17} Defendant's argument that counsel should have filed a motion to suppress his confession is premised on his alleged intoxication. During the interview, Defendant stated that he had been drinking and that he was "a little buzzed," but he was thinking clearly. Defendant asserts that had defense witnesses been interviewed, they would have supported his contention that he was intoxicated at the time of his confession.[3] Defendant, however, does not argue that law enforcement was engaged in improper coercion when interviewing him. Defendant further concedes that a motion to suppress his confession may have been denied on this basis. As previously stated, Defendant's intoxication, or state of mind, alone is insufficient to render a confession involuntary without accompanying police misconduct or overreaching. *See Fekete*, 1995-NMSC-049, ¶¶ 35, 38; *see also State v. Cooper*, 1997-NMSC-058, ¶ 47, 124 N.M. 277, 949 P.2d 660 (holding that the defendant's confession was voluntary because although the defendant was "most likely in a weakened mental state," officers did not exploit the defendant's mental state to obtain the confession). As such, Defendant has not established a factual basis to support the filing of a motion to suppress his confession. And "trial counsel is not incompetent for failing to make a motion when the record does not support the motion." *State v. Stenz*, 1990-NMCA-005, ¶ 7, 109 N.M. 536, 787 P.2d 455.

{18} Second, Defendant argues that counsel failed to undertake an adequate pretrial investigation and to prepare for trial. In support of this, Defendant refers generally to counsel's failure to investigate witnesses identified by Defendant, failure to file a defense witness list, and failure to pursue pretrial motions.[4] "'[C]ounsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary.'" *Lytle v. Jordan*, 2001-NMSC-016, ¶ 40, 130 N.M. 198, 22 P.3d 666 (alteration and emphasis in original) (quoting *Strickland*, 466 U.S. at 691); *see also State v. Barnett*, 1998-NMCA-105, ¶ 30, 125 N.M. 739, 965 P.2d 323 ("Failure to make adequate pretrial investigation and preparation may . . . be grounds for finding ineffective assistance of counsel." (internal quotation marks and citation omitted)). "'In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *Lytle*, 2001-NMSC-016, ¶ 40 (quoting *Strickland*, 466 U.S. at 691).

{19} In his briefing, Defendant does not identify the witnesses he requested be interviewed or what specific testimony these witnesses would have offered.[5]

[3]In his reply brief, Defendant claims that witnesses said he had a lot to drink prior to his confession. There is no record citation for this assertion, we have found none, and we accordingly need not consider it. *See In re Aaron L.*, 2000-NMCA-024, ¶ 27, 128 N.M. 641, 996 P.2d 431 ("This Court will not consider and counsel should not refer to matters not of record in their briefs.")

[4]Other than the motion to suppress his confession, Defendant does not identify any other specific pretrial motion he contends should have been filed. We, accordingly, need not address this issue further. *See Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 ("This Court has no duty to review an argument that is not adequately developed.").

[5]Although not identified in Defendant's briefing, it appears that the potential witnesses were Defendant's family members who were present during the relevant weekend.

Instead, Defendant generally argues that, had counsel interviewed defense witnesses, this "would have enabled him to effectively challenge the alleged confession and defend the charges against him." Defendant does not elaborate on this bald claim. Instead, Defendant simply asserts that Mr. Moya (expert on investigating crimes against children) "learned key information [that] would have been important to the defense in the case[,]" citing, without discussion, four pages of Mr. Moya's testimony. In the cited transcript, Mr. Moya testified that there were witnesses who knew how much alcohol was served over the weekend in question, but Mr. Moya provided no specifics regarding how much alcohol Defendant consumed. Mr. Moya further testified that a witness knew that both Defendant and G.H. had been up late the night of the incident and that G.H. may have been menstruating. Defendant never explains how this information would have enabled him to better defend against the charges, and it is not apparent from the record before us. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("We will not review unclear arguments, or guess at what a party's arguments might be." (alteration, internal quotation marks, and citation omitted)).

{20} Further, Mr. Miller explained that the potential defense witnesses did not have knowledge about the incident. Instead, Mr. Miller understood that their knowledge was limited to Defendant's level of intoxication, which already has been addressed, and their assessment of G.H.'s and Defendant's credibility and character. Counsel believed such testimony would be more prejudicial than probative given that it may have opened the door to Defendant's prior felony convictions. Particularly in light of the fact that there is no developed record about what these witnesses would have testified to, we cannot assume their testimony would have been helpful, and we will not second guess counsel's tactical determination that the testimony would have proven more harmful than helpful. *See State v. Nguyen*, 2008-NMCA-073, ¶ 30, 144 N.M. 197, 185 P.3d 368 (citing *Lytle*, 2001-NMSC-016, ¶ 43 (stating that on appeal, we will not second guess the trial strategy and tactics of the defense counsel)); *see also State v. Orosco*, 1991-NMCA-084, ¶ 36, 113 N.M. 789, 833 P.2d 1155 ("Without more facts indicating that trial counsel's actions were truly an error and not a strategy, we cannot say there was ineffective assistance of counsel on this basis."), *aff'd*, 1992-NMSC-006, ¶ 32, 113 N.M. 780, 833 P.2d 1146. In short, Defendant's general assertions of inadequate pretrial investigation and preparation are insufficient to establish a claim of ineffective assistance. *See State v. Cordova*, 2014-NMCA-081, ¶ 10, 331 P.3d 980 ("A general claim of failure to investigate is not sufficient to establish a prima facie case if there is no evidence in the record indicating what information would have been discovered.").

{21} Finally, it is undisputed that counsel misinformed Defendant that his DNA was found on the couch where the incident occurred, when in fact there was no such DNA evidence.[6] The State does not contest that this advice was deficient, and, as such, we assume that counsel's advice regarding the existence of DNA was deficient. Thus, the question then becomes whether this deficient performance prejudiced Defendant. *See Paredez*, 2004-NMSC-036, ¶ 13.

III. Prejudice

{22} Under *Strickland*'s second prong, in order to establish prejudice, "[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. In the plea context, "a defendant must establish that **. . . but for counsel's errors, he would not have pleaded guilty and instead gone to trial."** *Patterson*, 2001-NMSC-013, ¶ 18 (internal quotation marks and citation omitted).

A. We Will Not Presume Prejudice in This Case

{23} Before examining whether Defendant has met his burden to show he suffered prejudice as a result of counsel's error, we address the threshold argument advanced by Defendant. Defendant argues that—given the circumstances of this case, in particular the alleged systemic problems with the contract public defender system—Defendant is relieved of showing prejudice. In support of this argument, Defendant relies on the testimony of Ms. Hood regarding the public defender contract system and on *State v. Schoonmaker*, 2008-NMSC-010, 143 N.M. 373, 176 P.3d 1105, *overruled on other grounds by State v. Consaul*, 2014-NMSC-030, ¶ 38, 332 P.3d 850. We take these in turn.

{24} Ms. Hood testified at length regarding her general observations about the contract public defender system and the negative incentives that result from this system. Ms. Hood dubbed the contract public defender system the "hamster wheel of injustice," in which counsel are forced to take on more and more cases to stay in business (given the low flat fees) and, consequently, are unable to expend the necessary time and resources on each case. The value of this testimony is drawn into question in light of our Supreme Court's decision in *Kerr v. Parsons*, 2016-NMSC-028, 378 P.3d 1. In *Kerr*, the Supreme Court held that deficient performance would not be presumed from the flat-fee public defender contract system. *See id.* ¶ **25 ("find**[ing] no basis to presume that any indigent defendant currently represented by contract counsel necessarily receives constitutionally deficient assistance"). Given *Kerr*, Ms. Hood's general observations about the deficiencies with the contract public defender system do not provide a basis for presuming prejudice in this case.

{25} Ms. Hood further opined—without undertaking a review of Mr. Miller's testimony, his file, or the witness interviews conducted by the defense—that the negative effects of the contract public defender system were at play in this case,

[6]Defendant argues in passing that the State's laboratory report could have been used as exculpatory evidence that there was no penetration. Defendant's implicit claim here is that one would expect to find semen or male DNA on G.H. But under the particular facts of this case—where both G.H. and Defendant stated that the penetration lasted only ten to fifteen seconds and the sexual assault examination occurred hours after the assault—Defendant's assertion about the exculpatory nature of the State's laboratory report is drawn into doubt. Without expert testimony to support Defendant's claim regarding the exculpatory nature of the report, we decline to entertain this undeveloped argument. *See State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining that appellate courts are under no obligation to review unclear or undeveloped arguments); *Chan v. Montoya*, 2011-NMCA-072, ¶ 9, 150 N.M. 44, 256 P.3d 987 ("It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence." (internal quotation marks and citation omitted)).

impacted counsel's performance, and removed Defendant's choice to plea or go to trial. Defendant argues that Ms. Hood's opinions "should have been accepted and applied by the trial judge[.]" This argument is directly contrary to our Supreme Court's decision in *Lytle*. In *Lytle*, defense offered expert attorney testimony on the issue of whether defense counsel was ineffective. 2001-NMSC-016, ¶¶ 48-49. Our Supreme Court stated that "it is superfluous for expert witnesses to advise a court, whether it is the district court or an appellate court, about the proper application of existing law to the established historical facts and about the ultimate issue of trial counsel's effectiveness." *Id.* ¶ 49. The Court accordingly rejected the expert's testimony concerning defense counsel's performance. *Id.* Likewise, here, the district court was free to disregard Ms. Hood's opinion regarding counsel's ineffectiveness.

{26} Defendant additionally cites to *Schoonmaker* in support of his argument that he need not show prejudice in this case. In *Schoonmaker*, the defendant was represented by private counsel but could not afford to pay for expert witnesses that were essential to his defense. 2008-NMSC-010, ¶ 1. Counsel advised the district court of this situation and requested necessary funding or, in the alternative, leave to withdraw in favor of the public defender so that experts could be hired using public funding. *Id.* ¶ 17. The district court refused these requests and the defendant was forced to go to trial without essential expert witnesses. *Id.* ¶¶ **19-20. The** *Schoonmaker* Court held that a presumption of prejudice applied in that case because "the district court essentially put [the d]efendant in the position of receiving ineffective assistance of counsel." *Id.* ¶¶ **1, 36.** This case is distinguishable from *Schoonmaker*. In this case, counsel repeatedly represented to the district court at the docket call that he was prepared to go to trial notwithstanding his client's displeasure. This is not the case where counsel alerted the district court of the need for tools essential for trial without which ineffective assistance was guaranteed. We accordingly conclude that *Schoonmaker* does not control here, and we will not presume prejudice in this case.

B. Defendant Has Not Established That He Was Prejudiced by Counsel's Unreasonable Advice

{27} We now examine whether Defendant has met his burden in establishing prejudice. "The question is whether there is a reasonable probability that the defendant would have gone to trial instead of pleading guilty . . . **had counsel not acted unreasonably."** *Patterson*, 2001-NMSC-013, ¶ 18 (internal quotation marks and citation omitted). In this case, "Defendant must show he would not have entered into the plea agreement if he had been given constitutionally adequate advice about [the DNA evidence in his case]." *Hunter*, 2006-NMSC-043, ¶ 26. "[I]n assessing whether a defendant has been prejudiced by an attorney's deficient performance, 'courts are reluctant to rely solely on the self-serving statements of defendants.'" *Favela*, 2015-NMSC-005, ¶ 19 (quoting *Patterson*, 2001-NMSC-013, ¶ 29). "Thus, a defendant will often need to provide additional, objective evidence of prejudice." *Id.* In this context, our courts have considered the defendant's pre-conviction statements and actions as well as the strength of the state's evidence to adduce whether the defendant was disposed to plead or go to trial. *Patterson*, 2001-NMSC-013, ¶¶ 30-31.

{28} We first consider the testimony presented at the evidentiary hearing. Defendant points to his and Ms. Velarde's testimony about the importance of the DNA evidence to Defendant's decision to plead guilty. Mr. Miller and Mr. Meek, however, provided contrary testimony, stating that other aspects of the State's case were emphasized in the plea discussions with Defendant. The district court chose not to credit Defendant and Ms. Velarde's testimony regarding the importance of the non-existent DNA evidence in Defendant's plea decision process. We defer to the district court's resolution of conflicting evidence. *See Gutierrez*, 2016-NMCA-077, ¶ 33 ("defer[ring] to the district court's findings of fact when they are supported by the record"); *see also Evans*, 2009-NMSC-027, ¶ 37 ("If faced with conflicting evidence, [appellate courts] defer to the district court's factual findings, so long as those findings are supported by evidence in the record.").

{29} Moreover, the first time Defendant mentioned the importance of the DNA evidence was in his supplement to the motion to withdraw his plea, which came almost six months after the motion was filed and almost nine months after Defendant pleaded guilty. The district court found that Defendant's belated assertion of the importance of the DNA evidence undermined his testimony at the evidentiary hearing. Defendant claims the district court should not have held the delay in raising the DNA issue against him because successor counsel only discovered Mr. Miller's error after the motion to withdraw the plea was filed. Defendant misses the mark. The fact that the advice regarding the DNA evidence turned out to be wrong does not change whether the non-existent DNA truly impacted the plea process. Had the DNA evidence been as important to Defendant's decision to plead guilty as he later claimed, why wasn't the issue mentioned at docket call or in the motion to withdraw the plea along with the myriad other claims of ineffective assistance? Defendant's belated assertion about the importance the DNA played on his plea decision weighs against him and supports the district court's rejection of Defendant's testimony at the evidentiary hearing. *See State v. Trammell*, 2016-NMSC-030, ¶ 26, 387 P.3d 220 (holding that the defendant's delay in asserting ground to withdraw plea "bolster[ed the Court's] conclusion that [the defendant's] claim that he would not have accepted his plea is self-serving").

{30} Second, we consider Defendant's pre-conviction statements and actions. Prior to his guilty plea, Defendant asserted his desire to go to trial. For example, Defendant rejected a more favorable plea offer in favor of interviewing G.H. But of particular significance to this case is the fact that, even *after* his attorney mistakenly advised him, several days before docket call, that DNA evidence existed, Defendant still wanted to go to trial. And on the day of docket call, Defendant still was planning to go to trial until the option of withdrawing his plea with new counsel was presented. While a defendant's pre-conviction statements supporting a willingness to go to trial generally may weigh in favor of finding prejudice, in this instance it does not. The district court did not err in finding that Defendant's "testimony regarding the weight that the DNA played in his decision to plea is contradicted and outweighed by his clear willingness to proceed to trial with the DNA evidence."

{31} Third, we consider the strength of the State's evidence against Defendant. We do this "because the evidence against a defendant informs his or her decision about whether to challenge the charges at trial. . . . As the strength of the evidence increases, so does the likelihood that a defendant will accept a plea offer instead of going to trial." *Patterson*, 2001-NMSC-013, ¶ 31. The evidence against Defendant was significant. G.H. was described by counsel and the defense investigator as

sympathetic, believable, consistent in her statements over a period of years, and difficult to impeach. Indeed, Mr. Miller thought Defendant could be convicted on G.H.'s testimony alone. Additionally, Defendant's confession plainly was damaging—Defendant admitted to law enforcement that he touched G.H.'s breast, rubbed his penis outside G.H.'s vagina, and penetrated G.H. for a brief period. Against this backdrop, Defendant received a benefit from the plea—if convicted at trial, he faced a term of imprisonment of fifty-one to sixty-six years, but if he pleaded guilty, his exposure was reduced to fourteen to thirty years.

{32} Finally, ample evidence supports the district court's determination that Defendant made a strategic decision to plead guilty, not because of the non-existent DNA evidence, but based on the advice of counsel to plead guilty and later attempt to withdraw his plea with new counsel. Although it is undisputed that Mr. Miller made no guarantees about whether this unorthodox approach would succeed, the reasonableness of counsel's advice to plead guilty with the intention of later withdrawing the plea based on claims of ineffective assistance appears questionable to us. We, however, do not pass on whether this advice amounted to ineffective assistance of counsel as this issue is not before us today.

{33} In light of the facts of this case, Defendant has failed to show that there is a reasonable probability that but for counsel's error regarding the non-existent DNA evidence he would not have pleaded guilty and, instead, would have insisted on going to trial.

CONCLUSION

{34} Because we hold that Defendant has failed to establish that he was prejudiced by counsel's deficient performance, Defendant's claim of ineffective assistance fails. As such, the district court did not abuse its discretion in denying Defendant's motion to withdraw his plea. The district court's order denying Defendant's motion is affirmed.

{35} IT IS SO ORDERED.

JENNIFER L. ATTREP, Judge

WE CONCUR:

HENRY M. BOHNHOFF, Judge

EMIL J. KIEHNE, Judge

Certiorari Denied, February 18, 2019, No. S-1-SC-37431.
Released for Publication July 2, 2019

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-020

No. A-1-CA-35785 (filed November 19, 2018)

DEBRA GALLEGOS,
Plaintiff-Appellant,
v.
NEW MEXICO STATE POLICE
OFFICER CHARLES J. VERNIER,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF COLFAX COUNTY
Emilio J. Chavez, District Judge

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Opinion

J. Miles Hanisee, Judge

{1} Plaintiff Debra Gallegos brought civil rights claims against Defendant State Police Officer Charles Vernier for violations of her right under the United States Constitution to be free from unreasonable seizure and unlawful arrest. The district court granted Defendant's motion for summary judgment after concluding that Defendant "should be entitled to qualified immunity because [D]efendant reasonably believed that he had probable cause to arrest [P]laintiff at the time of the arrest[,]" and dismissed Plaintiff's case with prejudice. Concluding that the district court erred in dismissing all of Plaintiff's claims, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

{2} On May 4, 2013, at approximately two o'clock in the afternoon, Plaintiff was stopped at a DWI checkpoint while traveling on Interstate 25 in Northern New Mexico. Upon making contact with Plaintiff, Defendant "observed that Plaintiff was emitting a 'strong odor of alcoholic beverage' and had 'bloodshot[,] watery eyes.' " Plaintiff denied drinking that day but acknowledged that she had been drinking the previous night. She informed Defendant that she "had bad allergies" and "had been diagnosed with dry eyes by [her] doctor[,]" a condition for which she used eye drops. She agreed to submit to standardized field sobriety tests (SFSTs), on which Defendant contended Plaintiff "performed . . . poorly." Specifically, Defendant described Plaintiff as being "unable to remain in the starting position and ha[ving] to move her foot and raise her arms for balance" during the walk-and-turn test, failing to have "smooth pursuit in both eyes" during the horizontal gaze nystagmus test, and putting her foot down during the one-leg-stand test. Defendant arrested Plaintiff for a first-offense DWI, a misdemeanor, and transported her to the local detention center, where Plaintiff agreed to submit to a breathalyzer test.

{3} Approximately thirty minutes after the initial stop, Plaintiff completed a first breathalyzer test, which recorded a result of .000 breath alcohol content (BrAC). Plaintiff submitted to a second breathalyzer test, which also recorded a result of .000 BrAC. Defendant then transported Plaintiff to a nearby medical center where Defendant ordered hospital medical personnel to draw Plaintiff's blood to test it for drugs. According to Defendant, he did so "[b]ased on Plaintiff's poor performance on the [SFSTs]." When the blood test results were not immediately available, Defendant transported Plaintiff back to the detention center, where she was booked for DWI. The blood test later came back negative for both alcohol and drugs, and the DWI charge was later dismissed for failure to prosecute.

Procedural History

{4} Plaintiff filed a complaint under 42 U.S.C. §§ 1983 and 1988 (2012) to recover damages for alleged deprivations of her civil rights resulting from Defendant's actions on May 4, 2013. Plaintiff brought two claims in her action. The first was for "unreasonable seizure" based on Defendant's (1) "seizing her for the crime of DWI and transporting her to a hospital after she blew a .000 [on] two breath tests[,]" (2) "causing her blood to be taken from her person without probable cause to believe that she was under the influence of drugs and without a judicially sanctioned warrant to search[,]" and (3) "transporting her back to the jail and booking her on the crime of DWI without probable cause to believe that Plaintiff was under the influence of liquor or alcohol and without a judicially sanctioned warrant." Plaintiff's second claim was for "unlawful arrest" based on Defendant "arresting her for DWI after she blew a .000 on a breath test" because "Defendant did not have probable cause to believe that she had been driving while under the influence of alcohol or drugs."

{5} Defendant moved for summary judgment, arguing that he is entitled to qualified immunity. Characterizing Plaintiff's case as "an arrest case," Defendant contended that "the proper constitutional provision to analyze Plaintiff's claim is the Fourth Amendment and its probable cause standard." Defendant argued that "[t]he existence of probable cause or arguable probable cause is . . . a complete defense to a claim for unreasonable seizure and unlawful arrest brought pursuant to 42 []U.S.C. [§] 1983." Defendant thus concluded that "there was no violation of the Fourth Amendment because there was probable cause or arguable probable cause for Plaintiff's arrest" based on "Plaintiff's poor performance of the SFTSs and [Defendant's] observation[s]." Defendant's motion for summary judgment did not address that

aspect of Plaintiff's claim alleging unreasonable seizure based on the warrantless blood draw that Defendant ordered.

{6} In her response, Plaintiff argued that the facts, taken in the light most favorable to her, established that Defendant had violated her clearly established Fourth Amendment rights in three ways. Plaintiff first argued that Defendant violated her rights "by arresting her and detaining her after two breath alcohol tests showed that [Plaintiff] was not under the influence of alcohol[.]" Plaintiff next argued that Defendant violated her rights by "failing to release her after two breath alcohol tests showed that [Plaintiff] was not under the influence of alcohol[.]" Plaintiff lastly argued that Defendant violated her rights by "subjecting her to a warrantless blood test unsupported by exigent circumstances[.]" Other than disputing that "there was an odor of alcohol emanating from her vehicle[,]" Plaintiff did not dispute Defendant's statements of undisputed facts, including Defendant's characterization of her performance on the SFSTs. She did, however, offer certain clarifications and explanations, such as that "the wind was blowing strongly along the highway, which caused her skirt to lift up during the tests" and resulted in her being "distracted and embarrassed" during the SFSTs.

{7} In response to Plaintiff's argument regarding the warrantless blood draw, Defendant argued for the first time in his reply that Plaintiff "consented to the blood draw[,]" thereby rendering the blood draw constitutional. According to Defendant, Plaintiff "did not and could not contest this fact" and "it is undisputed that [Plaintiff] consented."

{8} The district court granted Defendant's motion for summary judgment. In its order, the district court stated, "The determinative issue is whether Defendant Vernier had probable cause to arrest [P]laintiff for driving while under the influence." The district court concluded that "[u]nder the facts presented to the [c]ourt[,] Defendant Vernier should be entitled to qualified immunity because [he] reasonably believed that he had probable cause to arrest [P]laintiff at the time of the arrest." The district court's order contained no findings or conclusions related to Plaintiff's unreasonable seizure claim based on the warrantless blood draw and whether Plaintiff consented to the blood draw. From the district court's subsequent order dismissing Plaintiff's case with prejudice, Plaintiff appealed.

DISCUSSION

Standard of Review

{9} We review de novo a district court's grant of summary judgment. *Benavidez v. Shutiva*, 2015-NMCA-065, ¶ 8, 350 P.3d 1234. Likewise, we review de novo the applicability of qualified immunity, which is a question of law. *Starko, Inc. v. Gallegos*, 2006-NMCA-085, ¶ 11, 140 N.M. 136, 140 P.3d 1085. Ordinarily, summary judgment may only be granted in New Mexico when, viewing the evidence in the light most favorable to the nonmoving part, "there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and citation omitted). However, courts "review summary judgment decisions involving a qualified immunity defense somewhat differently than other summary judgment rulings." *Nelson v. McMullen*, 207 F.3d 1202, 1205-06 (10th Cir. 2000) (internal quotation marks and citation omitted). Because of "the unique nature of qualified immunity, . . . [w]hen a defendant raises the qualified immunity defense on summary judgment, the burden shifts to the plaintiff to meet a strict two-part test." *Nelson*, 207 F.3d at 1206; *cf. Romero*, 2010-NMSC-035, ¶ 10 (explaining in the context of a motion for summary judgment not based on qualified immunity that "[i]n New Mexico, summary judgment may be proper when the moving party has met its initial burden of establishing a prima facie case for summary judgment"). "First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right. Second, the plaintiff must show that the constitutional or statutory rights the defendant allegedly violated were clearly established at the time of the conduct at issue." *Nelson*, 207 F.3d at 1206 (internal quotation marks and citation omitted). A plaintiff's failure to meet either of these burdens entitles the defendant to qualified immunity and a grant of summary judgment. *See Benavidez*, 2015-NMCA-065, ¶¶ 11-14 (affirming the district court's dismissal of the plaintiff's "unreasonable seizure" claim where the facts established that the defendant officer had probable cause to arrest the plaintiff, meaning there was no violation of the plaintiff's constitutional rights); *Cockrell v. Bd. of Regents of N.M. State Univ.*, 1999-NMCA-073, ¶ 8, 127 N.M. 478, 983 P.2d 427 ("The immunity obtains unless it can be shown as a matter of clearly established law that an objectively reasonable official would have known that rights were being violated.").

{10} Thus, a court reviewing a grant of summary judgment based on qualified immunity must consider whether the undisputed facts viewed in the light most favorable to the nonmovant, coupled with those facts adduced by the plaintiff, provide "any evidentiary support for finding a possible violation of law." *Benavidez*, 2015-NMCA-065, ¶ 8 (internal quotation marks and citation omitted). If not, summary judgment for the defendant is proper. *See Starko, Inc.*, 2006-NMCA-085, ¶¶ 21, 30 (expressing "doubt that [the p]laintiffs have even alleged a 'deprivation' " and, therefore, reversing the district court's denial of qualified immunity and remanding for entry to summary judgment in favor of the defendants). If, on the other hand, the plaintiff has proven a violation of a constitutionally protected right, we next ask "whether the right in question was 'clearly established' at the time of the violation." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam). If it was, then granting summary judgment based on qualified immunity is improper. *Cf. Chavez v. Bd. of Cty. Comm'rs of Curry Cty.*, 2001-NMCA-065, ¶ 30, 130 N.M. 753, 31 P.3d 1027 (concluding that the defendant officers were "not entitled to qualified immunity" where "the relevant law was clearly established"). Alternatively, "if it is clear that the relevant legal issue was not clearly established at the time, we [need] not reach the first issue" of whether a violation occurred at all. *Benavidez*, 2015-NMCA-065, ¶ 8.

I. Defendant Is Entitled to Qualified Immunity on (1) Plaintiff's "Unlawful Arrest" Claim, and (2) Plaintiff's " Unreasonable Seizure" Claim to the Extent It Is Based On Defendant's Failure to Release Her Following the Breath Tests

{11} In opposing Defendant's motion for summary judgment, Plaintiff first attempted to prove a violation of law based on what she described as Defendant "arresting her and detaining her *after* two breath alcohol tests showed that [she] was not under the influence of alcohol[.]" (Emphasis added.) As an initial matter, we clarify this ambiguous, somewhat misleading allegation by noting that it was undisputed that Defendant placed Plaintiff under arrest *prior* to the breathalyzer tests. To the extent Plaintiff attempts to characterize the facts as suggesting otherwise—

i.e., that Plaintiff was not placed under arrest until after the breathalyzer tests—the record provides no support for such an interpretation. Indeed, at the hearing on Defendant's motion, the district court expressly sought clarification regarding when Defendant placed Plaintiff under arrest and was told that, per Defendant's affidavit, Plaintiff was placed under arrest "following the failed sobriety tests[,]" i.e., prior to the breathalyzer tests. Plaintiff did not challenge that representation. This clarification is important because the question of whether Defendant violated Plaintiff's Fourth Amendment right to be free from "unlawful arrest"—Plaintiff's second claim, which is grounded in her contention that "Defendant did not have probable cause to believe that she had been driving while under the influence of alcohol or drugs"—hinges on whether Defendant had probable cause to arrest Plaintiff at the time he arrested her. *See State v. Ochoa*, 2004-NMSC-023, ¶ 9, 135 N.M. 781, 93 P.3d 1286 ("Probable cause exists when the facts and circumstances warrant a belief that the accused had committed an offense, or is committing an offense. More specifically, probable cause must be evaluated in relation to the circumstances as they would have appeared to a prudent, cautious and trained police officer." (internal quotation marks and citation omitted)).

A. Defendant Had Probable Cause to Arrest Plaintiff

{12} Here, the district court concluded that Defendant had probable cause to arrest Plaintiff and transport her to the detention center for breath testing based on (1) Defendant's "interaction" with Plaintiff, (2) Plaintiff's poor performance on the SFSTs, (3) the odor of alcohol on Plaintiff, and (4) Plaintiff's admission to having drunk six beers the night before. The record also supplies the additional undisputed fact that Plaintiff had "bloodshot[,] watery eyes" when Defendant first came into contact with her. The district court's conclusion that probable cause existed to arrest Plaintiff following the SFSTs is supported by New Mexico law. *See State v. Granillo-Macias*, 2008-NMCA-021, ¶ 12, 143 N.M. 455, 176 P.3d 1187 (holding that an odor of alcohol emanating from the defendant, his lack of balance at the vehicle, and his failure to satisfactorily perform field sobriety tests supported an objectively reasonable belief that the defendant had been driving while intoxicated, and thus constituted probable cause to arrest); *State v. Jones*, 1998-NMCA-076, ¶ 10, 125 N.M. 556, 964 P.2d 117 (concluding that the officer had probable cause to arrest for DWI when the officer noticed bloodshot, watery eyes, slurred speech, and a strong odor of alcohol, when the defendant admitted to having drunk two beers, swayed when he was talking to the officer, and failed the field sobriety tests); *see also State v. Sanchez*, 2001-NMCA-109, ¶ 12, 131 N.M. 355, 36 P.3d 446 (explaining that "[e]ach case stands on its own facts; there is no one set of circumstances required for probable cause").

{13} However, that determination alone—while important—is not, as the district court erroneously believed it to be, dispositive of all of Plaintiff's claims. While probable cause may have supported Defendant's initial decision to place Plaintiff under arrest, it does not necessarily or automatically render constitutional any and all actions by Defendant, nor does it supply a basis to immunize Defendant for separately alleged, later-occurring constitutional violations. Plaintiff's first claim—that she was unreasonably seized by Defendant over an extended period of time and at certain points at which Plaintiff contends her ongoing seizure became constitutionally unreasonable—is not necessarily foreclosed by the district court's determination that no violation occurred upon Plaintiff's initial arrest. We next consider that aspect of Plaintiff's "unreasonable seizure" claim based on Defendant's continued detention of her following her separate breath tests that yielded .000 BrAC results.

B. Defendant's Failure to Release Plaintiff Following the Two Breath Tests Did Not Violate Clearly Established Law

{14} Plaintiff argued to the district court that probable cause to arrest her for DWI "dissipated when breath testing showed conclusively that Plaintiff had no breath alcohol." She thus argued that Defendant "had a duty to release" her following the breathalyzer tests and that his failure to do so violated a clearly established Fourth Amendment right. Plaintiff's argument fails for two reasons.

{15} First, Plaintiff's argument ignores that "dissipation" as to probable cause to suspect Plaintiff of driving under the influence of "intoxicating liquor" neither automatically nor necessarily dispelled probable cause to suspect that Plaintiff was driving under the influence of drugs. In New Mexico, it is a crime for a person to drive a vehicle while under the influence of *either* "intoxicating liquor" *or* "any drug to a degree that renders the person incapable of safely driving a vehicle." NMSA 1978, § 66-8-102(A), (B) (2016). The undisputed facts in the record establish that Defendant "placed Plaintiff under arrest for Driving under the Influence of an Intoxicating Liquor *or Drugs*." (Emphasis added.) Importantly, Plaintiff has not challenged whether Defendant had probable cause or arguable probable cause to initially arrest Plaintiff for driving while under the influence of drugs, specifically. Instead, she argues that in order for Defendant to continue to detain her for and ultimately charge her with driving while under the influence following her breath tests, Defendant "had a duty to conduct [a drug recognition evaluation] to re-establish probable cause of intoxication." Because Plaintiff cites no authority to support this contention, we assume none exists. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority."). Critically, because it is Plaintiff's burden to show that the clearly established law would have put Defendant on notice that his failure to "re-establish probable cause of intoxication" following Plaintiff's negative breath tests violated Plaintiff's rights, her failure to cite a single on-point case compels the conclusion that she has failed to meet her burden.

{16} Second and similarly, Plaintiff fails to establish that Defendant's failure to immediately release Plaintiff following her breathalyzer tests violated a clearly established right protected under the Fourth Amendment. While it is generally recognized that "[a] person may not be arrested, or must be released from arrest, if previously established probable cause has dissipated[,]" *United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005), such a rule does not compel the conclusion that Defendant's failure to release Plaintiff under the facts of this case violated a right "that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (per curiam) (internal quotation marks and citation omitted). The lone case Plaintiff perfunctorily cites, *McConney v. City of Houston*, 863 F.2d 1180 (5th Cir. 1989), to support the general proposition that officers have an ongoing duty to assess their initial probable cause

determination does not suggest, let alone clearly establish, that an officer faced with the same facts as Defendant would be violating an arrestee's constitutional rights by not immediately releasing the arrestee following breath tests of .000 BrAC.

{17} *McConney* involved a § 1983 claim by a plaintiff who was arrested for public intoxication and detained for four hours in accordance with a city regulation despite the fact that the booking officer "knew [the plaintiff] was sober[.]" *McConney*, 863 F.2d at 1182-83. Aside from being distinguishable on the facts, *McConney* involved a discrete legal question, different than that presented here: whether the City of Houston's "four hour detention policy" deprived McConney of his constitutional rights. *Id.* at 1184. The court concluded as a general matter that "a person may constitutionally be detained for at least four or five hours following a lawful warrantless arrest for public intoxication without the responsible officers having any affirmative duty during that time to inquire further as to whether the person is intoxicated[.]" *Id.* at 1185. The court, however, limited its holding, explaining that "once a responsible officer actually does ascertain beyond reasonable doubt that one who has been so arrested is in fact not intoxicated, the arrestee should be released." *Id.* The court ultimately declined to reverse judgment against the city, which was premised on a jury's determination that McConney had been "detained even after the appropriate officials had determined that he clearly was no longer intoxicated." *Id.* at 1185, 1188. *McConney* is thus distinguishable.

{18} Plaintiff has failed to demonstrate that existing precedent placed the constitutional question of an officer's affirmative duty to release an arrestee—arrested on suspicion of driving while under the influence of intoxicating liquor *or* drugs—following negative breath tests beyond debate. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (explaining that to conclude that a right is "clearly established" does not "require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate"); *Panagoulakos v. Yazzie*, 741 F.3d 1126, 1129-31 (10th Cir. 2013) (rejecting a post-arrest "duty to release" argument where the court concluded that "the clearly established weight of authority from other courts" had not "imposed a duty to release under [the] circumstances [presented]" (internal quotation marks and citation omitted)). We, therefore, conclude that Plaintiff has not met her burden to overcome Defendant's qualified immunity claim because she has not shown that the right arguably violated was clearly established.

II. Whether Defendant Is Entitled to Qualified Immunity on Plaintiff's "Unreasonable Seizure" Claim Based on the Warrantless Blood Draw

{19} Plaintiff next argues that Defendant violated her right to be free from unreasonable seizure "by subjecting her to a warrantless blood test unsupported by exigent circumstances[,]" a right she contends was clearly established as of May 4, 2013. Defendant contends that Plaintiff consented to the blood draw, thereby rendering it constitutional despite the absence of a warrant. Because it is potentially dispositive and informs later portions of our analysis, we first address Defendant's contention that Plaintiff consented to the blood draw. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."); *Amundsen v. Jones*, 533 F.3d 1192, 1194, 1201 (10th Cir. 2008) (explaining that "a blood test conducted pursuant to valid consent does not violate the Fourth Amendment[,]" and reversing the district court's denial of summary judgment on qualified immunity in a § 1983 case where the record established that the plaintiff voluntarily consented to a blood test).

A. Defendant Failed to Establish That Plaintiff Consented to the Blood Draw

{20} "Whether a search is consensual is a question of fact to be determined by the totality of the circumstances." *Marshall v. Columbia Lea Reg'l Hosp.* (*Marshall I*), 345 F.3d 1157, 1177 (10th Cir. 2003). To be valid, consent to search must be given freely and voluntarily. *See State v. Anderson*, 1988-NMCA-033, ¶ 7, 107 N.M. 165, 754 P.2d 542. "The determination of voluntariness involves a three-tiered analysis: (1) there must be clear and positive testimony that the consent was specific and unequivocal; (2) the consent must be given without duress or coercion; and (3) the first two factors are to be viewed in light of the presumption that disfavors the waiver of constitutional rights." *Id.* The party claiming that consent to search was given must establish by clear and convincing evidence that the consent was given voluntarily. *Cf. State v. Villanueva*, 1990-NMCA-051, ¶ 22, 110 N.M. 359, 796 P.2d 252 ("The state bears the burden of proof to establish that a consent to search was given voluntarily by clear and convincing evidence.").

{21} As the party moving for summary judgment on Plaintiff's complaint, Defendant bore the burden of showing that he was entitled to judgment as a matter of law on each of her claims.[1] *See* Rule 1-056(C) NMRA. Thus, to defeat Plaintiff's claim of a constitutional violation related to the warrantless blood draw on the theory of consent, Defendant bore the burden of showing that there was no genuine issue as to any material fact regarding a valid consent to search. The record exposes that Defendant failed to meet his burden.

{22} In his motion for summary judgment, the only statement of undisputed fact regarding consent to testing that Defendant set forth was that after placing Plaintiff under arrest, he "read [Plaintiff] New Mexico's Implied Consent Law, and she agreed to be tested." Defendant set forth no other facts on which the district court could find that there was "clear and positive testimony" that Plaintiff specifically and unequivocally consented to a blood draw. *Anderson*, 1988-NMCA-033, ¶ 7. Defendant contends that by failing to dispute the fact that she "agreed to be tested[,]" Plaintiff failed "to establish a genuine issue of material fact per Rule 1-056," meaning that Plaintiff "conceded the consent issue." Plaintiff argues the issue of consent "was never litigated." We agree with Plaintiff.

{23} The fact that Defendant's motion for summary judgment contains neither specific facts pertaining to whether Plaintiff consented to the blood test nor any argument whatsoever regarding Plaintiff's warrantless

[1]We analyze Defendant's argument based on Plaintiff's alleged consent to the blood draw under standard summary judgment rules because a defense based on consent is analytically distinct from a qualified-immunity-based defense. *See Marshall I*, 345 F.3d at 1176-77, n.12 (explaining that in that case, the defendants had not "raised or briefed qualified immunity" on appeal because they had prevailed in the district court on the "alternative ground" of consent-to-search, and analyzing the question of consent under the traditional summary judgment standard).

blood draw claim evinces that Defendant either failed to appreciate the need or chose not to address the warrantless blood draw claim, generally, and the question of consent, specifically. Moreover, whether Plaintiff consented to the blood draw is a question of fact that must be determined by the district court in the first instance. *See State v. Davis*, 2013-NMSC-028, ¶ 10, 304 P.3d 10 ("The voluntariness of consent is a factual question in which the trial court must weigh the evidence and decide if it is sufficient to clearly and convincingly establish that the consent was voluntary." (internal quotation marks and citation omitted)). Here, the district court entered no findings regarding whether Plaintiff consented to the blood draw because—following the flawed approach advanced by Defendant in his motion—it mistakenly believed that its finding regarding probable cause to arrest was "determinative" of all of Plaintiff's claims.

{24} Based on the foregoing, we agree with Plaintiff that Defendant failed to establish that Plaintiff unequivocally and specifically consented to the blood test and that the issue of consent remains in dispute. Because Defendant cannot rely, at this juncture, on a defense that the blood draw was consensual, we next consider whether Defendant violated a clearly established right when he ordered hospital staff to seize Plaintiff's blood without a warrant.

B. Defendant's Warrantless Blood Draw of Plaintiff Following Her Arrest for Misdemeanor DWI Violated a Clearly Established Right That Existed at the Time

1. Defendant Violated Plaintiff's Fourth Amendment Right When He Ordered Her Blood to Be Drawn Without A Warrant and Absent Exigent Circumstances

{25} "[A] warrantless blood test, performed without consent, is presumptively unreasonable unless the state actors involved had probable cause *and* exigent circumstances sufficient to justify it." *Marshall I*, 345 F.3d at 1172 (emphasis added). The reason for this is that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid . . . intrusions [beyond the body's surface] on the mere chance that desired evidence may be obtained." *Schmerber v. California*, 384 U.S. 757, 769-70 (1966). "In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search." *Id.* The "exigent circumstances" exception to the warrant requirement "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Missouri v. McNeely*, 569 U.S. 141, 148-49 (2013) (internal quotation marks and citation omitted). In the context of exigent circumstances that would support a warrantless blood draw in a case involving suspected DWI, there are no categorical rules—such as the dissipation of blood-alcohol evidence—establishing per se exigency. *See id.* at 147, 152. Rather, such cases require a "finely tuned approach" and "demand[] that [the courts] evaluate each case of alleged exigency based on its own facts and circumstances." *Id.* at 150 (internal quotation marks and citation omitted). In the complete absence of exigent circumstances, however, a warrantless blood draw is considered unreasonable and, therefore, unconstitutional. *See Schmerber*, 384 U.S. at 770 ("Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.").

{26} Here, Defendant identified no exigent circumstance whatsoever supporting the warrantless blood draw. His motion for summary judgment set forth no facts even tending to suggest that exigent circumstances existed that would justify seizing Plaintiff's blood under the circumstances, and he developed no argument at all regarding Plaintiff's specific allegation of a constitutional violation based on the unreasonable seizure of her blood. Indeed, Defendant singularly argued in his motion for summary judgment that "[t]he existence of probable cause or arguable probable cause is also a complete defense to a claim for unreasonable seizure and unlawful arrest[,]" wholly failing to appreciate that a warrantless blood draw requires both probable cause *and* exigent circumstances. Only after Plaintiff argued in her response to Defendant's motion for summary judgment that a warrantless blood draw requires exigent circumstances to be considered reasonable, did Defendant then contend that Plaintiff consented to the blood draw, thereby rendering the warrantless blood draw constitutional even in the absence of exigent circumstances.

{27} In the absence of Defendant even suggesting the presence of an exigent circumstance that may have justified the warrantless blood draw, we conclude that Plaintiff demonstrated that Defendant violated Plaintiff's constitutional right to be free from unreasonable search and seizure by ordering hospital staff to draw Plaintiff's blood without a warrant. The question, then, is whether that right was clearly established as of May 4, 2013.

2. The Right to Be Free From a Warrantless Blood Draw in the Absence of Exigent Circumstances Was Clearly Established

{28} "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City & Cty. of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). As previously noted, the law, generally, regarding the unconstitutionality of a warrantless blood draw—absent consent or both probable cause and exigent circumstances—in a DWI case had been clearly established under United States Supreme Court law as of at least 1966. *See Schmerber*, 384 U.S. at 770 ("Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned."); *see also Birchfield v. North Dakota*, 136 S.Ct. 2160, 2173 (2016) (explaining that the United States Supreme Court had "previously had occasion to examine whether [the exigent circumstances] exception [to the warrant requirement] applies in drunk-driving investigations" and noting that *Schmerber* "held that drunk driving *may* present" an exigent circumstance rendering constitutional a warrantless blood draw)[2]. It was

[2]To be clear, we recognize that *Birchfield* was decided after the events giving rise to Plaintiff's suit, and we do not rely on it in concluding that the right violated, here, was clearly established as of the time of the warrantless blood draw in this case. Indeed, *Birchfield* involved a different exception to the warrant requirement—the search-incident-to-arrest doctrine—that is not at issue in this case. *See id.* at 2173-74 (discussing *Schmerber* and *McNeely* and noting that those cases involved the exigent-circumstances exception whereas the cases before the *Birchfield* court involved the question of "how the search-incident-to-arrest doctrine applies to breath and blood tests incident to [drunk driving] arrests").

also clear well prior to 2013 that "[s]tate actors administering a blood test without warrant or consent may be subject to suit under § 1983." *Marshall I*, 345 F.3d at 1171. And just prior to the incident giving rise to Plaintiff's claim in this case, the United States Supreme Court, in fact, reiterated that "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *McNeely*, 569 U.S. at 152.[3] More importantly, the law, specifically and under facts similar to those present here, was clearly established as of at least 2003, when *Marshall I*—an on-point Tenth Circuit case—was decided, and certainly no later than 2007, when *Marshall v. Columbia Regional Hospital* (*Marshall II*), 474 F.3d 733 (10th Cir. 2007), was decided and expressly held the specific right here at issue to be clearly established. We explain.

{29} In *Marshall I*, the court reversed the federal district court's grant of summary judgment to police officers against whom the plaintiff had brought various § 1983 claims, including a Fourth Amendment warrantless blood test claim. *Marshall I*, 345 F.3d at 1159. In that case, the plaintiff was stopped in Hobbs, New Mexico for various traffic violations, arrested on suspicion of driving under the influence, and taken to the local jail where he submitted to sobriety tests and two breathalyzer tests. *Id.* at 1161. On the sobriety tests, the plaintiff "had difficulty completing the recitation of the alphabet (the 'ABC test') [,]" and there was "conflicting testimony about whether the horizontal gaze stymosis test was administered, and whether [the plaintiff] passed the finger-number test." *Id.* The plaintiff "passed" both breathalyzer tests. *Id.* An officer then transported the plaintiff to a hospital for blood testing. *Id.* The plaintiff told the nurse who took his blood, "I'm not going to resist, but you don't have my consent oral or written." *Id.* (internal quotation marks omitted). Upon the defendants' motion for summary judgment, the district court "concluded that the warrantless blood test was constitutional under the Supreme Court's ruling in *Schmerber*[.]" *Marshall I*, 345 F.3d at 1164. The district court found that based on the plaintiff's performance on the field sobriety test, "there was probable cause to justify the blood test, since passing the breathalyzer test did not rule out the presence of other drugs in his bloodstream." *Id.* (internal quotation marks and citation omitted). It, thus, rejected the plaintiff's Fourth Amendment claim. *Id.*

{30} The *Marshall I* court addressed whether "administration of a blood test without a warrant was in violation of the Fourth Amendment." *Id.* at 1171. After assuming, based on the district court's ruling, that the plaintiff's "mixed performance on the field sobriety tests provided probable cause for the blood tests[,]" the court turned to the "harder question" of "whether there were exigent circumstances." *Id.* at 1172. The court engaged in a lengthy discussion of the "exigent circumstances" requirement set forth in *Schmerber* vis-à-vis NMSA 1978, Section 66-8-111 (2005), of New Mexico's Implied Consent Act (NMICA), NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2015). *See Marshall I*, 345 F.3d at 1172-74 The court noted that Section 66-8-111 provides that a warrant may only issue to compel chemical testing, including blood testing, in two circumstances: (1) upon probable cause "to believe that the person has driven a motor vehicle while under the influence of alcohol or a controlled substance, thereby causing the death or great bodily injury of another person," or (2) upon probable cause "to believe that the person has committed a felony while under the influence of alcohol or a controlled substance." Section 66-8-111(A); *see Marshall I*, 345 F.3d at 1173-74. Accordingly, the court reasoned, "[w]hen a crime is not important enough to justify a warranted search, it is not important enough to justify an 'exigent circumstances' search." *Marshall I*, 345 F.3d at 1173. The court noted that the record contained no evidence that the plaintiff had either caused death or great bodily injury, or that the blood test would produce material evidence in a felony prosecution because by all accounts, the plaintiff was charged with a first DWI offense, a petty misdemeanor. *Id.* at 1174. Concluding that exigent circumstances did not exist under the facts of that case—meaning the warrantless blood draw was unreasonable in violation of the Fourth Amendment—the court reversed the grant of summary judgment and remanded for further proceedings. *Id.* at 1176, 1181.

{31} It is difficult to imagine a case more instructive than *Marshall I* for purposes of determining whether the law was clearly established as of 2013 that an officer in New Mexico who orders a blood draw in a misdemeanor DWI case in the absence of either a warrant, consent, or both probable cause and exigent circumstances violates a person's Fourth Amendment rights. The similarities—both factual and legal—between the cases abound. First, like in *Marshall I*, Defendant's probable cause determination to support a blood draw consisted of nothing more than Plaintiff's performance on the SFSTs. Second, Plaintiff had already passed two breath tests before being subjected to blood testing. Third, Plaintiff was charged with only a misdemeanor offense, meaning that under the plain language of Section 66-8-111(A), Defendant could not have obtained a warrant to test Plaintiff's blood under any circumstances. But most importantly and dispositive of the legal question here at issue is that like in *Marshall I*, Defendant failed to identify, let alone establish the existence of, any exigent circumstances that would support a warrantless blood draw in a misdemeanor DWI case.

{32} To the extent there remained any question after *Marshall I* regarding the unconstitutionality of a warrantless non-consensual blood draw in New Mexico in cases where the person was arrested

[3]Defendant points out that *McNeely* "was decided seventeen days before Plaintiff approached a DWI checkpoint in Colfax County." To the extent Defendant suggests that the nascent nature of the *McNeely* decision somehow diminishes its value in this analysis, we reject any such contention for two reasons. First, *McNeely* did not establish a new right of which Defendant may not have been aware, thus arguably making it unfair to make him stand suit and potentially hold him liable for a violation thereof. *McNeely* merely held that the exigent circumstance allowed in *Schmerber* to render reasonable a warrantless blood draw in that case could not be relied on as a "per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." McNeely, 569 U.S. at 144. Second, in light of the fact that in this case Plaintiff was arrested at a planned DWI checkpoint, set up by the New Mexico State Police, it is particularly unavailing to suggest that the officers involved may not have been aware of their constitutional obligations in connection with that checkpoint. *Cf. City of Las Cruces v. Betancourt*, 1987-NMCA-039, ¶ 10, 105 N.M. 655, 735 P.2d 1161 (explaining that "the reasonableness of any roadblock will be very closely scrutinized").

for misdemeanor DWI, *Marshall II* unequivocally established that to be the law. In *Marshall II*, the court considered an appeal by the defendant officers in *Marshall I*, who, on remand following *Marshall I*, were found liable by a jury for violating the plaintiff's Fourth Amendment right based on the warrantless blood test. *Marshall II*, 474 F.3d at 735. The officers argued that "the district court erred when it denied their post-judgment motion for judgment as a matter of law based on qualified immunity." *Id.* at 737. Specifically, the officers contended that at the time they ordered the blood draw, "no clearly established law precluded a warrantless nonconsensual blood test." *Id.* The *Marshall II* court flatly rejected that contention. Reiterating and expanding upon *Marshall I*'s analysis of *Schmerber* and the NMICA, the court concluded that (1) "the officers had fair warning of [the] exigent circumstances requirement under federal law[,]" and (2) the NMICA is "uniquely clear" regarding "whether or not a search or seizure conducted in violation of state law would also infringe the Fourth Amendment." *Marshall II*, 474 F.3d at 742, 743. The court—agreeing with the district court's conclusion that "it was objectively unreasonable for [the officers] to think they could lawfully give this blood test in the absence of [the plaintiff's] consent"—stated, "it is difficult to imagine how a competent officer could think it could make sense or be reasonable to violate state law." *Id.* at 746 (internal quotation marks and citation omitted).

{33} Defendant's only attempt to distinguish *Marshall I* rests on his contention that the plaintiff in *Marshall I* expressly refused to consent to the blood test whereas Plaintiff, here, consented to the blood test. He contends that *Schmerber* and *McNeely* also do not apply for the same reason: because those cases involved nonconsensual searches unlike the consensual search he contends occurred here. However, for the reasons already discussed, Defendant's arguments based on a contention that Plaintiff consented to the blood test are unavailing because Defendant has not, in fact, established that Plaintiff consented. In the absence of a factual distinction regarding the issues of consent between this case and those cited, we conclude that the violative nature of Defendant's particular conduct here at issue was clearly established and that he is, therefore, not entitled to qualified immunity on Plaintiff's warrantless blood draw claim.

CONCLUSION

{34} We affirm the district court's grant of summary judgment to Defendant as to Plaintiff's unlawful arrest claim. We reverse the district court's grant of summary judgment to Defendant based on qualified immunity as to Plaintiff's unreasonable seizure claim insofar as it is based on the warrantless blood draw and remand for further proceedings in light of this opinion.

{35} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

JULIE J. VARGAS, Judge

Certiorari Denied January 7, 2019, No. S-1-SC-37406.
Released for Publication July 2, 2019

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-021

No. A-1-CA-35562 (filed November 20, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOHNNY SALAZAR,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Fernando R. Macias, District Judge

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Opinion

Jennifer L. Attrep, Judge

{1} Defendant Johnny Salazar appeals his convictions for aggravated driving while intoxicated (DWI), in violation of NMSA 1978, Section 66-8-102(D)(3) (2016), and resisting, evading, or obstructing an officer, in violation of NMSA 1978, Section 30-22-1(B) (1981). Defendant contends no reasonable suspicion supported his detention and the district court thus erred in denying his motion to suppress. Defendant adds that the district court erred in compelling his counsel to return to the State video evidence the State had initially disclosed, and by failing to permit his counsel to withdraw based on a purported conflict. We affirm Defendant's convictions.

BACKGROUND

{2} In March 2015, a magistrate court jury found Defendant guilty of both aggravated DWI and evading an officer. Defendant appealed his convictions to district court, where he moved to suppress any evidence arising from his detention on the ground that reasonable suspicion was lacking. The district court held a hearing on the motion at which the arresting officer testified. The following recitation of facts is based on the officer's testimony.

{3} On an evening in late April 2014, New Mexico State Police set up a DWI checkpoint on Camino Real Road in Las Cruces, New Mexico. Camino Real Road ran roughly north-south through the checkpoint. Cones and signs indicating the checkpoint's presence and directing drivers to stop were placed both north and south of the checkpoint. Multiple marked police vehicles, including a large state police van displaying the words "state police" in "huge letters" on its sides, were stationed at the checkpoint. At least two of the parked police vehicles were operating their overhead lights continuously. Among the officers on duty was patrolman Oliver Wilson, who was positioned furthest south on Camino Real Road.

{4} Just as the sun was setting, Wilson observed a red or maroon, four-door sedan approach the checkpoint from the south. The car traveled north on Camino Real a short distance past the intersection of Dona Ana School Road, which was visible from the checkpoint. Then, roughly one hundred yards south of where Wilson was stationed, the car pulled completely off the road onto the dirt shoulder "just before the cones" marking the checkpoint. Wilson, with an unobstructed view, noted the car lingered at the side of the road "long enough to be noticeable," before making a U-turn across the double-yellow lines of Camino Real. The car accelerated, turned right on Dona Ana School Road, and drove "rapidly" away from the checkpoint. Wilson's radar, however, was off, and he was unsure whether the car had at any point traveled faster than the posted speed limit or committed any other traffic violation. Even though there were no other vehicles obstructing Wilson's view of the vehicle, he could not make out a license plate or any identifying features of the driver. Wilson could not recall whether the signs announcing the checkpoint would have been viewable from the vehicle at any point. Wilson, however, testified that the stop, pause, U-turn, and departure at a high rate of speed were uncharacteristic of traffic typically approaching the checkpoint—most traffic either turned at the Dona Ana School Road intersection or continued through the checkpoint.

{5} Wilson testified that he "suspected, from [his] experience, that there was someone trying to avoid the checkpoint." Wilson shouted to his fellow officers that he had seen a "turnaround," jumped into his patrol car, activated his emergency lights, and drove off in pursuit. He made the right turn onto Dona Ana School Road and re-established visual contact with the car, which was by then ahead by "quite a distance." The car next turned right on Dona Ana Road. Wilson attempted to close the gap, but he was unsuccessful. As they traveled on Dona Ana Road, Wilson lost sight of the car.

{6} Shortly after losing contact, Wilson came to a four-way stop at the intersection of Dona Ana Road and Thorpe Road. He had not seen the car approach this intersection, and, as a result, he had doubts about where to head next. He made his "best guess" and turned right, heading east along Thorpe Road. After driving in that direction briefly, Wilson noticed in his rearview mirror a maroon car parked in the driveway of a duplex or triplex just east of the Dona Ana-Thorpe intersection. A man stood outside the car. Wilson believed, though he did not know, that this was the "same maroon vehicle" he had been pursuing. Wilson made a U-turn and approached the man standing next to the car. Wilson asked the man

whether he had been trying to evade him, and the man conceded that he had. Wilson investigated further, identified the man as Defendant, and conducted field sobriety tests. Defendant performed poorly on the tests and refused to submit to chemical testing. Wilson later arrested Defendant for aggravated DWI (refusal) and evading an officer.

{7} Defense counsel did not present evidence at the suppression hearing but offered to have the district court view the video from Wilson's dashboard video camera, which the court declined. Defendant argued that Wilson could not have developed reasonable suspicion based on his observation of the U-turn at the checkpoint and that, even if there was reasonable suspicion at the checkpoint, Wilson did not have the requisite particularized suspicion as to Defendant on Thorpe Road because Wilson lost contact in pursuit and guessed about Defendant's direction of travel. In ruling on the motion to suppress, the district court adopted much of Wilson's testimony in its oral findings. Specifically, the court found that Defendant had traveled past the Dona Ana School Road intersection on its approach to the checkpoint. Defendant had then paused on the shoulder, before making the observed U-turn on Camino Real and accelerating away to "create distance" from Wilson. The court added that Wilson had pursued and lost sight of Defendant's vehicle briefly, but Wilson eventually reestablished contact with and detained Defendant as described on Thorpe Road. Based on those findings, the district court concluded that Wilson had reasonable suspicion to believe Defendant was or had been driving while under the influence. That suspicion, the district court concluded, supported Wilson's investigative detention, and thus the court denied Defendant's motion to suppress.

{8} Defendant's case was slated to go to trial the week after the suppression hearing. The day before trial, the State realized it had lost or misplaced its only copy of Wilson's dashcam video. Before the magistrate court jury trial, the State had provided defense counsel a copy of the video. Aware that defense counsel had retained the copy, the State requested that defense counsel return to the State a courtesy copy. Defense counsel declined, and the State moved the district court to compel production. On the morning of the first day of trial, the district court granted the State's motion to compel, ordered defense counsel to produce a copy of the video to the State, and briefly adjourned.

{9} Returning from the recess, defense counsel renewed her objection to production, contending the order to produce might give rise to a conflict as she could no longer give her undivided loyalty to Defendant. The district court concluded production would raise no conflict and again ordered counsel to produce a copy of the video. Defense counsel complied and then moved to withdraw from her representation and for a new trial, maintaining that Defendant was entitled to conflict-free counsel. The court denied the motions. After Defendant was convicted of both aggravated DWI and evading an officer, defense counsel renewed in writing her motion for a new trial based on the order compelling production of the video. The district court denied the motion, concluding that Defendant had established "no substantial injustice" warranting a new trial. This appeal followed.

DISCUSSION

{10} We first hold that reasonable suspicion supported Wilson's detention of Defendant and, thus, the district court did not err in denying Defendant's motion to suppress. Next, we conclude that the district court did not abuse its discretion in ordering Defendant to return a copy of the video that the State had provided to Defendant in discovery and in denying Defendant's related motion for a new trial. Finally, we hold that the district court did not err in denying defense counsel's motion to withdraw because counsel's compliance with the district court's order compelling production of the video did not create an actual conflict of interest.

I. Reasonable Suspicion Supported Defendant's Detention

{11} Defendant maintains the district court erred in concluding Wilson had reasonable suspicion supporting Defendant's detention in the driveway on Thorpe Road. Defendant first contends that the facts known to Wilson when he departed the DWI checkpoint were insufficient to create reasonable suspicion that Defendant was or had been driving while under the influence. Defendant adds that the insufficiency was compounded when Wilson later lost sight of Defendant and guessed as to his route of travel. The parties agree that Wilson's investigation of Defendant constituted a seizure under the Fourth Amendment, which must be supported by reasonable suspicion.[1] *See State v. Contreras*, 2003-NMCA-129, ¶ 5, 134 N.M. 503, 79 P.3d 1111.

{12} A review of a denial of a motion to suppress presents a mixed question of fact and law. *See State v. Lowe*, 2004-NMCA-054, ¶ 8, 135 N.M. 520, 90 P.3d 539. We give deference to the district court's findings of fact, reviewing them for substantial evidence. *Id.* ¶ 9. We recognize fact-finding frequently requires the drawing and selection of specific inferences, and we indulge all reasonable inferences in support of the district court's decision. *See State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856. "Questions of reasonable suspicion are reviewed de novo by looking at the totality of the circumstances to determine whether the detention was justified." *State v. Hubble*, 2009-NMSC-014, ¶ 5, 146 N.M. 70, 206 P.3d 579 (internal quotation marks and citation omitted). We have often explained a police officer may detain an individual in investigating potential criminal activity where the officer has formed a reasonable suspicion the individual "is breaking, or has broken, the law." *Id.* ¶ 8 (internal quotation marks and citation omitted). Reasonable suspicion must arise from "specific articulable facts," along with any "rational inferences that may be drawn from those facts." *Contreras*, 2003-NMCA-129, ¶ 5 (internal quotation marks and citation omitted).

{13} Our Supreme Court has provided specific guidance in evaluating whether reasonable suspicion may arise based on purportedly evasive driving behavior near a DWI checkpoint. *See generally State v. Anaya*, 2009-NMSC-043, ¶¶ 11-18, 147 N.M. 100, 217 P.3d 586. A legal turn in the vicinity of the checkpoint, for example, will not typically give rise to reasonable suspicion. *Id.* ¶ 16. As in all cases, however, an officer need not have observed illegal activity to develop

[1]Whether and at what point Wilson may have seized Defendant in this encounter, given the limited facts before us, is unclear. The parties agreed in contesting Defendant's motion to suppress that Defendant had been seized as a result of a traffic stop, and they contested only the grounds for the stop. The parties likewise have not addressed on appeal whether and when a seizure was made, and we give the questions no further attention. *See, e.g., State v. Garnenez*, 2015-NMCA-022, ¶ 15, 344 P.3d 1054 ("We will not address arguments on appeal that were not raised in the brief in chief and have not been properly developed for review.").

reasonable suspicion. *Id.* ¶ 12. A legal turn observed in combination with other circumstances may well support a reasonable suspicion of criminal activity—particularly where the circumstances suggest the turn is made for the purpose of evading the checkpoint. *Id.* ¶¶ 15-16. *Anaya* explained that various considerations may be relevant in discerning the driver's purpose for engaging in certain observed activity near a checkpoint. Whether the driver is on notice that the checkpoint is looming is clearly relevant in making the determination. *Id.* ¶ 16. Thus, questions such as whether the driver "was in a position to observe police emergency lights" emanating from the checkpoint and whether the driver could have observed signs announcing the checkpoint may aid in evaluating the purpose underlying the driver's behavior. *Id.* ¶ 18. Other considerations, such as the time of day, the location of the activity and its proximity to the checkpoint, the nature of the road, and the typicality of the conduct observed may also inform the evaluation. *Id.* ¶ 17. Evaluation of these and any other relevant circumstances should guide the determination of whether an officer may reasonably believe specific driving behavior constitutes an attempt to evade a checkpoint, which in turn may support a reasonable suspicion the driver is driving while intoxicated. *Id.* ¶ 16.

{14} The district court's findings and associated permissible inferences support a determination of reasonable suspicion here. The district court noted the vehicle had traveled on Camino Real Road past the intersection of Dona Ana School Road in the direction of the checkpoint. Before arriving at the checkpoint, the district court found, the vehicle paused on the shoulder for that period of time notable to Wilson before making its U-turn. Neither of those findings were disputed, and we conclude both were supported by substantial evidence. The district court further found that after making the U-turn, the vehicle accelerated away from the checkpoint and must have maintained "an accelerated speed" as Wilson pursued, so as to maintain its distance ahead. While Defendant questions the basis for this latter finding, the district court was entitled to credit Wilson's observations, and we find no reason to reweigh Wilson's testimony here. *See, e.g.*, *State v. Martinez*, 2018-NMSC-007, ¶ 15, 410 P.3d 186 (deferring to district court's implicit acceptance of testifying officer's perceptions). Were we to end the analysis there, as Defendant appears to do, whether these findings alone—the location of the turn, the pause, the acceleration away from the checkpoint—supported the requisite reasonable suspicion is debatable. *See Anaya*, 2009-NMSC-043 ¶¶ 13, 16 (suggesting legal U-turn made in view of checkpoint may require additional circumstances to support reasonable suspicion).

{15} Yet the vehicle's progress past the Dona Ana School Road intersection and its roadside pause, when viewed in conjunction with the testimony regarding the checkpoint's visibility, the daylight remaining, the absence of any intervening traffic, and the vehicle's distance from the checkpoint, support inferences that the driver was aware of the checkpoint and tried to evade it. *See id.* ¶ 18 ("[The d]efendant was in a position to observe police emergency lights and other lights illuminating the checkpoint."). In addition, Wilson's testimony regarding traffic patterns that evening suggested the U-turn and subsequent turn onto Dona Ana School Road were abnormal. That abnormality likewise supported inferences that the driver was aware of the checkpoint and sought to evade it. *See id.* ("[The d]efendant then proceeded in the opposite direction of travel, which was inconsistent with typical driving patterns given the location of the highway."). Wilson's testimony regarding the difficulty he had in tracking down the vehicle after he left the checkpoint only served to bolster the inference that the driver was engaging in evasive behavior. Under the totality of these circumstances, we conclude that Wilson had reasonable suspicion that the driver of the maroon vehicle was driving while intoxicated. *See id.* ¶ 16.

{16} Despite the support for those inferences, Defendant makes much of the fact that Wilson lost sight of the vehicle and eventually resorted to his best guess as to where to head next when he reached the intersection of Dona Ana Road and Thorpe Road. When Wilson later came across Defendant standing next to a maroon vehicle in the Thorpe Road driveway, Defendant contends, Wilson could not possibly have had the requisite individualized suspicion with respect to Defendant to support a detention. No doubt an "unsupported intuition" regarding an individual falls short of the "particularized suspicion" necessary to subject the individual to an investigative detention. *Jason L.*, 2000-NMSC-018, ¶ 20. Particularized suspicion must be a suspicion based on all the circumstances known to the officer that the "particular individual" detained is breaking or has broken the law, as distinct from a more generalized suspicion untethered to the individual. *See id.* Officers, however, need not limit themselves to their direct observations in developing suspicions, and they need not "exclude all possible innocent explanations of the facts and circumstances" they observe. *State v. Candelaria*, 2011-NMCA-001, ¶ 14, 149 N.M. 125, 245 P.3d 69 (internal quotation marks and citation omitted); *see State v. Alderete*, 2011-NMCA-055, ¶ 15, 149 N.M. 799, 255 P.3d 377. Instead, they may rely on their own experiences and specialized training to draw inferences and make deductions from the totality of information available to them—inferences and deductions that may well elude the untrained observer. *See Alderete*, 2011-NMCA-055, ¶ 15; *State v. Maez*, 2009-NMCA-108, ¶ 23, 147 N.M. 91, 217 P.3d 104.

{17} Various facts and inferences supported Wilson's suspicion regarding Defendant here. Wilson testified about the lack of traffic at the checkpoint. His ability to observe the vehicle and its route of travel at a distance, despite the vehicle's substantial head start and apparently evasive behavior, reinforced the fact that there were few cars on the road to impede his pursuit or view that evening. That suggested the potential universe of suspects was small, as did the short length of the time that Wilson lost contact with the vehicle. *Cf. Commonwealth v. Bostock*, 880 N.E.2d 759, 764 (Mass. 2008) (finding reasonable suspicion existed where the defendant was found in the vicinity of the alleged crimes within minutes of the crimes, the defendant matched the description given by witnesses, and upon canvass of the area no one else matching the description was found); *State v. Lovato*, 1991-NMCA-083, ¶ 11, 112 N.M. 517, 817 P.2d 251 (finding reasonable suspicion where "the incident involving the reported shooting occurred around midnight, the car occupied by defendants met the general description radioed by the police dispatcher, and there was no other vehicular traffic in the area"). And Defendant's maroon vehicle in the driveway, close in time and place to the pursuit here, placed him comfortably within that small population of suspects, strengthening the notion that Wilson's suspicion was sufficiently particularized. *Cf. United States v. Mosley*, 878 F.3d 246, 252 (8th Cir. 2017) (concluding that, given "the close temporal and physical proximity of the [vehicle] to the crime, the totality of the circumstances indicates that reasonable suspicion supported the vehicle

stop and rendered it constitutional" (internal quotation marks and citation omitted)). The district court, thus, was free to credit Wilson's testimony that the maroon vehicle he spotted on Thorpe Road was "the same maroon vehicle" he had pursued from the checkpoint.

{18} Were the brief loss of visual contact by the pursuing officer in this case sufficient to eliminate reasonable suspicion, as Defendant suggests, this might condone a constitutional test not only inconsistent with our prior precedent but also dismissive of the significant risk that fleeing drunk drivers pose to the public. We long have held that "in determining whether the totality of circumstances gave [the officer] a reasonable suspicion to stop [the d]efendant, we must balance the possible threat of drunk driving to the safety of the public with [the d]efendant's right to be free from unreasonable seizure." *Contreras*, 2003-NMCA-129, ¶ 13. We have repeatedly acknowledged the "compelling public interest" in eliminating drunk driving and its deadly consequences. *State v. Simpson*, 2016-NMCA-070, ¶ 24, 388 P.3d 277 (internal quotation marks and citation omitted); *State v. Nance*, 2011-NMCA-048, ¶ 26, 149 N.M. 644, 253 P.3d 934; *Contreras*, 2003-NMCA-129, ¶ 14. Where, as here, a driver appears to be deliberately evading a DWI checkpoint, giving rise to reasonable suspicion of DWI, and the driver then proceeds to speed away from that checkpoint, posing a substantial danger to others, "the exigency of the possible threat to public safety that a drunk driver poses . . . and the minimal intrusion of a brief investigatory stop tip the balance in favor of the stop[,]" notwithstanding that the pursuing officer lost sight of the fleeing vehicle for a brief period. *See Contreras*, 2003-NMCA-129, ¶ 21.

{19} Given the observations Wilson made at the checkpoint and as he pursued the vehicle, as well as the reasonable inferences he drew under the circumstances, we conclude he had developed reasonable suspicion of DWI and evading an officer and those suspicions were sufficiently particularized with respect to Defendant. Defendant's detention was therefore reasonable, and the district court did not err in denying Defendant's motion to suppress.

II. The District Court Did Not Err in Compelling Defendant to Produce the State's Video

{20} Turning to the issue of the return of the State's video, Defendant questions the basis for the district court's order compelling its production and the associated denial of Defendant's motion for a new trial. Neither our Rules of Criminal Procedure nor our Rules of Professional Conduct, Defendant observes, provide clear guidance for dealing with the State's loss of its copy of the video here. Defendant contends that in the absence of clear guidance no legal principle should require a defendant to provide the State with evidence harmful to the defendant's case.

{21} We review discovery rulings for abuse of discretion. *See State v. Ortiz*, 2009-NMCA-092, ¶ 24, 146 N.M. 873, 215 P.3d 811. Abuse of discretion occurs when "the ruling is clearly against the logic and effect of the facts and circumstances of the case." *See State v. Layne*, 2008-NMCA-103, ¶ 6, 144 N.M. 574, 189 P.3d 707 (internal quotation marks and citation omitted). We will determine that an abuse of discretion has occurred only where we can conclude the ruling is "clearly untenable or not justified by reason." *Id.* (internal quotation marks and citation omitted). We apply the same standard of review to the district court's denial of Defendant's motion for new trial. *See State v. Guerra*, 2012-NMSC-027, ¶ 18, 284 P.3d 1076.

{22} The district court determined that while counsel's refusal to produce the video "arguably [was] not violative of the rules of discovery," it "[did] run afoul of the spirit, if not the letter, of Rule 16-304(A) [NMRA] of the Rules of Professional Conduct" and "serve[d] to undermine the truth-finding function of a trial[.]" Rule 16-304(A) directs that a "lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value[.]" The rule tells us nothing more, however, about what might constitute "unlawful" obstruction or concealment, or whether defense counsel's failure to voluntarily return the video here might have come within the prohibition. Evaluation of the scope of counsel's obligation requires, instead, examination of our basic rules governing discovery and procedure. *Cf. In re Estrada*, 2006-NMSC-047, ¶ 32, 140 N.M. 492, 143 P.3d 731 (per curiam) (noting that discovery rules are designed to ensure "disclos[ure] to the fullest practicable extent" and counsel's failure to comply with these rules may rise to the level of violating the Rules of Professional Conduct (internal quotation marks and citation omitted)).

{23} No one disputes that our discovery rules for criminal cases generally require only that a defendant disclose to the State the evidence he "intends to introduce . . . at the trial." Rule 5-502(A)(1) NMRA. Whether a district court may compel disclosure of material not explicitly covered by the rules, however, is a different question, and one the rules illuminate further. Rule 5-502, for example, specifies a variety of material for which discovery is *not* authorized, including reports and documents created by the defense in connection with the case, as well as statements the defendant has made to his agents or attorneys. *See* Rule 5-502(C). Evidence initially produced by the State and unmodified by the defendant is absent from the list, suggesting it is not subject to the same absolute prohibition. Rule 5-101(B) NMRA adds that our criminal procedure rules are to "be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." That basic governing principle suggests a district court retains some flexibility in crafting solutions for situations not expressly contemplated by the rules. *See Piña v. Espinosa*, 2001-NMCA-055, ¶ 28, 130 N.M. 661, 29 P.3d 1062 (providing the same in the context of the Rules of Civil Procedure); *cf. State v. Le Mier*, 2017-NMSC-017, ¶ 18, 394 P.3d 959. ("[T]rial courts shoulder the significant and important responsibility of ensuring the efficient administration of justice in the matters over which they preside[.]").

{24} Defendant makes no reference to these provisions; he instead suggests that a defendant should never be required to turn over "harmful" evidence to the State in the absence of an explicit disclosure requirement. Our Supreme Court, however, has long held that the Rules of Criminal Procedure "provide for reciprocal discovery rights and are intended to provide ample opportunity for investigation of facts." *State v. Stills*, 1998-NMSC-009, ¶ 52, 125 N.M. 66, 957 P.2d 51 (internal quotation marks and citation omitted); *see also United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive."). And while this opportunity for investigation will yield to various privileges and protections, Defendant here has identified no potentially applicable protections whatsoever. *See Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 18, 138 N.M. 398, 120 P.3d 820 (recognizing "'the ancient proposition of law' that 'the public has a right to every man's evidence, except for those persons protected by a

constitutional, common-law, or statutory privilege'" (omission omitted) (quoting *Nixon*, 418 U.S. at 709)).

{25} While we have no obligation to guess at what Defendant's arguments might be, we observe that Defendant's reproduction of the State's video in this case does not appear to implicate Defendant's rights or privileges. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("We will not . . . guess at what a party's arguments might be." (alteration, internal quotation marks, and citation omitted)). Indeed, other jurisdictions facing the same situation have concluded that a defendant is required to return video evidence initially disclosed by the government. *See Commonwealth v. Tahlil*, 94 N.E.3d 840, 842 (Mass. 2018) (holding that the trial court erred in not ordering the defendant to return video originally disclosed by the prosecution); *Adams v. State*, 969 S.W.2d 106, 114 (Tex. Ct. App. 1998) (holding that the district court did not err in compelling the defendant to return videotape of field sobriety test after the state lost original).

{26} These courts have determined that production of such evidence does not implicate a defendant's right to be free from self-incrimination or the attorney-client or work product privileges. *See, e.g.*, *Tahlil*, 94 N.E.3d at 842 ("Providing a copy of the DVD to the [prosecution] . . . would not be an incriminating admission[.] . . . It would merely be the act of the defendant returning to the [prosecution] a copy of something that the [prosecution] provided to him in the first place."); *Adams*, 969 S.W.2d at 114 (rejecting "[t]he notion that information which is tendered as a result of court ordered or statutorily mandated discovery, can be converted into privileged information, though it has not been altered since tendering, enhanced by fruits of an attorney's labor since tendering, or added to with communicative actions after tendering"). Instead, these courts have concluded that the video evidence initially developed and produced by the government was returnable, largely because it was the government's evidence to begin with. *See, e.g.*, *Adams*, 969 S.W.2d at 114 ("The tape is a recording of an event made by the [s]tate and disclosed to the defense as part of statutory pretrial discovery."); *see also Tahlil*, 94 N.E.3d at 842 n.3 ("[I]t is exactly this point—that the evidence was once in the [prosecutor's] possession, and that the [prosecutor] gave it to the defendant—that *is* relevant and dispositive."); *accord United States v. Province*, 45 M.J. 359, 363 (C.A.A.F. 1996) ("[H]ad the [g]overnment asked the defense for a copy of th[e] document, alleging that their copy had been lost or destroyed, then defense counsel would have been obligated to turn [it] over[.]").

{27} We find these cases persuasive, and they guide our analysis here. The video at issue was the State's evidence, produced in compliance with its discovery obligations. Because the video originated with the State and remained unaltered by the defense, it appears no constitutional, statutory, or common law prohibition on disclosure applied. In the absence of an identified prohibition or protection, the district court was entitled to resolve the dispute with an eye toward promoting "fairness in administration and the elimination of unjustifiable . . . delay" as contemplated by the rules. *See* Rule 5-101(B). In short, fairness, expediency, and the absence of an identified prohibition or protection all counseled in favor of production here, regardless whether Rule 16-304(A) required it. *Cf. State v. Wasson*, 1998-NMCA-087, ¶ 16, 125 N.M. 656, 964 P.2d 820 ("[W]e may affirm the district court's order on grounds not relied upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below."). We thus cannot say that the district court erred in compelling Defendant to return to the State a copy of the video the State had initially provided, and as a result, we affirm the district court's denial of Defendant's motion for a new trial. *See, e.g.*, *State v. Stephens*, 1982-NMSC-128, ¶ 15, 99 N.M. 32, 653 P.2d 863 (concluding new trial was unwarranted where no error was identified).

III. No Conflict Arose as a Result of the District Court's Order Compelling Production

{28} Defendant argues that his compelled production of the video created a conflict on the ground that defense counsel's duty as an officer of the court had, at that point, triumphed over her duty as an advocate for Defendant. Defendant maintains that he was entitled to counsel having undivided loyalty and, thus, the district court's failure to allow counsel to withdraw was error.

{29} Claims of conflict of interest and the related question of whether a defendant is entitled to any presumption of prejudice as a result of a conflict are reviewed de novo. *See State v. Vincent*, 2005-NMCA-064, ¶ 4, 137 N.M. 462, 112 P.3d 1119. A presumption is applicable only where the record reveals "an actual, active conflict that adversely affects counsel's trial performance[.]" *Id.* We have long recognized the Sixth Amendment guarantees a defendant the right to counsel of undivided loyalty, free from conflicts of interest. *See State v. Santillanes*, 1990-NMCA-035, ¶ 1, 109 N.M. 781, 790 P.2d 1062. While the typical conflict arises in cases involving multiple representation, a conflict may also arise in any case where "the interests of the client and the attorney diverge." *See State v. Martinez*, 2001-NMCA-059, ¶ 25, 130 N.M. 744, 31 P.3d 1018. That proposition is restated slightly in our Rules of Professional Conduct, which direct that "a lawyer shall not represent a client if the representation [of that client may be] . . . materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer." Rule 16-107(A)(2) NMRA.

{30} We have previously found various considerations to be relevant to our determination of whether a defendant can establish the requisite divergence of interest or material limitation in his counsel's representation. Where a lawyer is implicated in the same criminal enterprise as the defendant, for example, we have noted a conflict will arise because the "lawyer's need for self-preservation will trump the duties of representation owed to the client." *Martinez*, 2001-NMCA-059, ¶ 25. We also have concluded representation may be impermissibly limited and a conflict may arise where counsel would have pursued "some plausible defense" strategy but avoided it because it would have been "damaging to another's interest." *Santillanes*, 1990-NMCA-035, ¶ 7; *see also State v. Sosa*, 1997-NMSC-032, ¶ 22, 123 N.M. 564, 943 P.2d 1017 ("[The defendant's] fail[ure] to prove that [counsel] . . . was forced to abandon the defenses of diminished capacity or duress in order to protect [another] . . . [was] not sufficient to establish an actual conflict of interest.").

{31} Defendant here does not rely on these principles. He instead suggests the district court's order compelling production of the video—and the ensuing possibility of contempt for failure to comply—impermissibly limited his counsel's loyalty, as his counsel was faced with the unpalatable choice between contempt and weakening her client's case. New Mexico courts, however, as well as courts elsewhere, have recognized the lawyer's duties to the client are often, and properly,

circumscribed by the lawyer's duties to the court and the administration of justice. *See, e.g.*, *In re Howes*, 1997-NMSC-024, ¶ 20, 123 N.M. 311, 940 P.2d 159 ("[In] the end, each member of the bar is an officer of the court. His or her first duty is not to the client or the senior partner, but to the administration of justice." (internal quotation marks and citation omitted)); *see also State v. Kruchten*, 417 P.2d 510, 515 (Ariz. 1966) ("The duty of an attorney to a client, whether in a private or criminal proceeding, is subordinate to his responsibility for the due and proper administration of justice."); *Commonwealth v. Holliday*, 882 N.E.2d 309, 320-21 (Mass. 2008) ("[A] lawyer's duty to advance the interests of his client are properly limited by his duty to comply with court rules."). Put another way, failure to comply with obligations to the court constitutes not the "zealous advocacy" our adversarial system requires, but violates "professional obligations to the system of justice itself." *Estrada*, 2006-NMSC-047, ¶ 32. Compliance with these obligations, particularly in the absence of error by the court, generally gives rise to no conflict. *See, e.g.*, *Holliday*, 882 N.E.2d at 320-21; *cf. Nix v. Whiteside*, 475 U.S. 157, 176 (1986) (highlighting the "problems" and "volumes of litigation" that might be "spawned" by any rule recognizing a conflict between duty of loyalty to the client and ethical obligations to the court).

{32} We already have concluded here that the district court did not abuse its discretion when it ordered Defendant to return the video provided by the State. Counsel's duty to comply with that order thus presented no conflict, and Defendant has not established any "actual, active conflict," impairing his counsel's performance at trial. *See Martinez*, 2001-NMCA-059, ¶ 24. As a result, we cannot conclude the district court erred in denying defense counsel's motion to withdraw.

CONCLUSION

{33} We affirm the district court's denials of Defendant's motion to suppress, Defendant's motion for a new trial, and defense counsel's motion to withdraw.

{34} IT IS SO ORDERED.

JENNIFER L. ATTREP, Judge

WE CONCUR:

JULIE J. VARGAS, Judge

HENRY M. BOHNHOFF, Judge

Classified

Positions

Associate Attorney

Tucker, Yoder, Hatfield, Eley & Associates, the largest firm in San Juan County, practicing in New Mexico and Colorado, has an immediate associate opening in its Farmington office for civil, domestic relations and criminal practice. Ideal candidates will be team players, ready to assist clients in a variety of cases. New Mexico and Colorado bar admission a plus. Salary depending on experience. Please send cover letter and resume to jennifer@tbylaw.com

Bilingual Associate Attorney (Uptown Albuquerque)

Rebecca Kitson Law is adding a full time, bilingual associate attorney position. Candidate must have passion and commitment to advocate for immigrants in all areas of relief. We are an inclusive, supportive office culture that welcomes all to apply. Must be fluent in Spanish. Must be willing to travel for Hearings and Interviews, as needed. Law License from any state accepted but New Mexico preferred. Preference will be given to those with 1-2 years of law-related experience. Salary DOE, full benefits and fun perks offered. Please send letter of interest, resume, and writing sample to rk@rkitsonlaw.com. You will only be contacted if you are being considered for the position. Please note that incomplete applications will not be considered.

Trial Attorney

Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney's Office, which includes Curry and Roosevelt counties. Employment will be based in either Curry County (Clovis) or Roosevelt County (Portales). Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Email resume, cover letter, and references to: Steve North, snorth@da.state.nm.us.

Proofreader/Legal Assistant

The New Mexico Public Education Department (NMPED) is seeking a person to fill a position within its Office of General Counsel. The working title for this position will be Proofreader and Legal Assistant. The person in the position must be well-organized, detail-oriented and thorough, able to work independently, be excellent at accuracy and follow through, and have a team-oriented mindset. The preferred experience and education sought is one (1) year of work experience writing, preparing, and filing correspondence, pleadings, and other legal documents; proofreading legal documents; and/or maintaining a case management/tracking system. The preferred candidate will have experience in a position that requires direct contact with the public or with customers. An Associate's degree or more advanced degree is required, and two writing samples are required when submitting an application. The position will have an annual salary range of $29,347/yr. to $51,056/yr. Applications for this position must be submitted online to the State Person¬nel Office at http://www.spo.state.nm.us. The posting will be used to conduct ongoing recruitment and will remain open until the position has been filled. Further information and application requirements are online at www.spo.state.nm.us, position (PED #10103590).

Associate Attorney

Hatcher Law Group, P.A. seeks an associate attorney with two-plus years of legal experience for our downtown Santa Fe office. We are looking for an individual motivated to excel at the practice of law in a litigation-focused practice. Hatcher Law Group defends individuals, state and local governments and institutional clients in the areas of insurance defense, coverage, workers compensation, employment and civil rights. We offer a great work environment, competitive salary and opportunities for future growth. Send your cover letter, resume and a writing sample via email to juliez@hatcherlawgroupnm.com.

Commercial Liability Defense, Coverage Litigation Attorney P/T maybe F/T

Our well-established, regional, law practice seeks a contract or possibly full time attorney with considerable litigation experience, including familiarity with details of pleading, motion practice, and of course legal research and writing. We work in the are of insurance law, defense of tort claims, regulatory matters, and business and corporate support. A successful candidate will have excellent academics and five or more years of experience in these or highly similar areas of practice. Intimate familiarity with state and federal rule of civil procedure. Admission to the NM bar a must; admission to CO, UT, WY a plus. Apply with a resume, salary history, and five-page legal writing sample. Work may be part time 20+ hours per week moving to full time with firm benefits as case load develops. We are open to "of counsel" relationships with independent solo practitioners. We are open to attorneys working from our offices in Durango, CO, or in ABQ or SAF or nearby. Compensation for billable hours at hourly rate to be agreed, generally in the range of $45 - $65 per hour. Attorneys with significant seniority and experience may earn more. F/T accrues benefits. Apply with resume, 5-10p legal writing example to revans@evanslawfirm.com with "NM Attorney applicant" in the subject line.

Public Education Department – Attorney Positions

The Public Education Department (PED) is seeking attorneys for its Office of General Counsel. In addition to practicing education law, attorneys may be relied on for advice on matters relating to contracts, procurement, employment, public records, federal and state government funding, and/or other governmental agency matters. Strong writing and interpersonal skills are essential. More details about positions and how to apply are provided on the State Personnel Office website at http://www.spo.state.nm.us/. Please check the website periodically for updates to the list of available positions.

Senior Trial Attorney
Eleventh Judicial District
Attorney's Office, Div II

The McKinley County District Attorney's Office, Gallup, New Mexico is seeking resumes to fill current vacancies. The DUI Task Force is seeking a Senior Trial Attorney position. This position must be New Mexico and Navajo Nation Licensed. The DUI Task Force is a multi-agency taskforce established to prosecute DUI cases in courts of the State of New Mexico and on the Navajo Nation. The District Attorney is also seeking resumes for an Assistant Trial Attorney and Senior Trial Attorney. Former position is ideal for persons who recently took the NM bar exam. Senior Trial Attorney position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence. Admission to the New Mexico State Bar preferred, but will consider applicants who are eligible to be admitted by reciprocity. The McKinley County District Attorney's Office provides regular courtroom practice and a supportive and collegial work environment. Enjoy the spectacular outdoors in the adventure capital of New Mexico. Salaries are negotiable based on experience. Submit letter of interest, resume and references to Paula Pakkala, District Attorney, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter and resume to PPakkala@da.state.nm.us by 5:00 p.m. August 30, 2019.

Attorney Wanted

Park & Associates, LLC is seeking a full time or part time attorney, with 2 to 5 years of litigation experience. Excellent research and writing skills required. Experience in medical malpractice preferred. Duties include legal analysis and advice, preparing legal pleadings and documents, performing legal research, preparing for and conducting pretrial discovery, preparing for and conducting administrative and judicial hearings, civil jury trials and post-trial activities. Excellent benefits and competitive salary. Please submit resume, writing sample and salary requirements to: jertsgaard@parklawnm.com

Entry Level Attorney

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Custodian of Public Records

The University of New Mexico seeks a motivated, detail-oriented person to coordinate and facilitate UNM's compliance with the New Mexico Inspection of Public Records Act (IPRA). The Custodian serves as the primary contact regarding requests to inspect public records, and oversees and coordinates UNM's response to such requests in a timely manner. The Custodian is responsible for managing UNM's online public records portal, communicating with public requesters and UNM personnel, reviewing records to determine whether they are responsive to a particular request, drafting response letters, and working closely with University Counsel when issuing final response letters. The Custodian is responsible for requests involving public records maintained by the Main Campus, the branch campuses, the UNM Health Sciences Center (including the UNM hospitals) and the Office of Medical Investigator. Applicants should be familiar with adhering to statutory deadlines and be able to work in a fast-paced environment. The Custodian operates under the direction of UNM's Chief Legal Counsel and supervises a staff of 1-2 paralegals. Minimum qualifications: Bachelor's degree and at least five years of experience directly related to the duties and responsibilities specified; skilled in interpreting, applying and explaining laws, rules and regulations; ability to use independent judgment and manage confidential information; strong interpersonal and communication skills; and the ability to work effectively with a wide range of constituencies. Preferred qualifications: Juris doctorate and at least three years of experience in evaluating and responding to requests for public records; supervisory experience; and experience working with an electronic records management system. To apply please visit our website at http://unmjobs.unm.edu, Req. #9760. Open until filled. UNM is an equal opportunity employer. EEO/AA/Minorities/Females/Vets/Disabled/and other protected classes.

Assistant City Attorney
Property and Finance Division

The City of Albuquerque Legal Department is hiring an Assistant City Attorney for the Property and Finance Division. The work includes, but is not limited to: contract drafting, analysis, and negotiations; drafting ordinances; regulatory law; Inspection of Public Records Act; procurement; general commercial transaction issues; intergovernmental agreements; dispute resolution; and civil litigation. Attention to detail and strong writing skills are essential. Three (3)+ years' experience is preferred and must be an active member of the State Bar of New Mexico, in good standing. Please submit resume and writing sample to attention of "Legal Department Property Finance Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or amaragon@cabq.gov.

New Mexico — Ethics Commission
Executive Director

The New Mexico Ethics Commission seeks a licensed attorney to serve as Executive Director. Responsibilities will include hiring and managing Ethics Commission staff, including a General Counsel, to fulfill the powers and duties provided by the State Ethics Commission Act, Laws 2019, Ch. 86, §§ 1-16. The Executive Director will oversee the receipt of complaints alleging violations of statutes under the Commission's jurisdiction and, if appropriate, the referral of such complaints to other state agencies. The Executive Director will, in some circumstances, report to the Commission on the status of investigations and assist the Commission in compelling testimony or production of evidence. The Executive Director will also assist the Commission in both the initiation of complaints and the promulgation of regulations, including rules of procedure, forms of complaints and other filings, rules for the qualifications of hearing commissioners, and rules for the issuance of advisory opinions. Further, the Executive Director will prepare and submit the Commission's annual budget; make recommendations for changes to statutes and rules that would facilitate administration of the State Ethics Commission Act; enter into contracts on behalf of the Commission; and maintain public access to the Commission's opinions and reports through a website. The Executive Director will assist the Commission in providing for ethics guides and ethics trainings for public officials, public employees, government contractors, lobbyists, and other interested persons. Additionally, the Executive Director will assist the Commission in drafting advisory opinions, proposed codes of ethics for state agencies, and annual reports of the Commission's activities to the Legislature and the Governor. A successful applicant will have experience in litigation, management and budgeting, and drafting adjudicatory opinions, contracts, and reports. The Executive Director must reapply for the position after six years of service and may serve for no more than twelve years. The position will have an annual salary range of $125,000.00 to $146,150.58. Please send applications by September 1, 2019 to: Ethics.Commission@state.nm.us or, by postal mail, to Karen Armijo, Department of Finance and Administration, Bataan Memorial Building, Room 180, 407 Galisteo St., Santa Fe, NM 87501. The position will remain open until filled.

Associate Attorney

Scott & Kienzle, P.A. is hiring an Associate Attorney (0 to 10 years experience). Practice areas include insurance defense, subrogation, collections, creditor bankruptcy, and Indian law. Associate Attorney needed to undertake significant responsibility: opening a file, pretrial, trial, and appeal. Lateral hires welcome. Please email a letter of interest, salary range, and résumé to paul@kienzlelaw.com.

Sandia National Laboratories - General Law Counsel Albuquerque, NM

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Associate Attorney

Holt Mynatt Martínez, P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking associate attorneys with 1-5 years of experience to join our team. Duties would include providing legal analysis and advice, preparing court pleadings and filings, performing legal research, conducting pretrial discovery, preparing for and attending administrative and judicial hearings, civil jury trials and appeals. The firm's practice areas include insurance defense, civil rights defense, commercial litigation, real property, contracts, and governmental law. Successful candidates will have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. Prefer attorney licensed in New Mexico and Texas but will consider applicants only licensed in Texas. Salary commensurate with experience, and benefits. Please send your cover letter, resume, law school transcript, writing sample, and references to rd@hmm-law.com.

Assistant General Counsel - Attorney III (NMDOT – Position #18541)

The New Mexico Department of Transportation is recruiting to fill an Attorney III position. The position provides representation of the Department in construction claims and litigation in state and federal court, in construction and procurement-related administrative hearings, and in other practice areas as assigned by the General Counsel. Experience in construction litigation, governmental entity defense litigation or representation in complex civil litigation matters is highly desirable. Experience in environmental law, public works procurement or financing or transportation planning would be useful. The requirements for the position are a Juris Doctor Law degree from an accredited law school, a current license as a New Mexico attorney in good standing and a minimum of four (4) years of experience practicing law. The position is a Pay Band LH, annual salary range from $63,851 to $101,996 depending on qualifications and experience. All state benefits will apply. Overnight travel throughout the state, good standing with the New Mexico State Bar and a valid New Mexico driver's license are required. We offer the selected applicant a pleasant environment, supportive colleagues and dedicated support staff. Working conditions: Primarily in an office or courtroom setting with occasional high pressure situations. Interested persons must submit an on-line application through the State Personnel Office website at http://www.spo.state.nm.us/, no later than the applicable closing date posted by State Personnel. Additionally, please submit a copy of your resume, transcripts and bar card to Darlene Madrid, Human Resources Division, New Mexico Department of Transportation, located at 1120 Cerrillos Road, Room 135, P.O. Box 1149, Santa Fe, New Mexico 87504. The New Mexico Department of Transportation is an equal opportunity employer.

Employment Opprotunities

The Pueblo of Laguna is seeking applicants for the position of: ASSOCIATE PROSECUTOR and COURT PROSECUTOR: Will present/file criminal complaints and prosecutes individuals accused of violating criminal laws or Pueblo laws, codes, and/or ordinances. Assist law enforcement on warrants, subpoenas and charging decisions. Work with service providers to recommend sentences, referrals and other related services. COURT ADMINISTRATOR: Plans, organizes, and supervises functions required to operate, maintain, and provide comprehensive Pueblo Court services. ASSOCIATE JUDGE: Adjudicates cases, prepares decisions, and carries out other functions of the judicial processes. For more information, contact the Pueblo of Laguna Human Resources Office at (505) 552-6654 or visit our website www.lagunapueblo-nsn.gov

Full-Time Staff Attorney and Bilingual Staff Attorney

Pegasus Legal Services for Children is a nonprofit organization dedicated to advancing the rights of New Mexico's children. We are hiring for the following positions: We are seeking a full-time staff attorney to join our Education Team. The focus of our education work is to keep children in high quality schools and out of the criminal justice system. We accomplish this through multiple strategies including direct representation, impact litigation, outreach and training, and policy advocacy. Must be licensed in New Mexico or eligible for a limited practice license. Must also have a demonstrated interest in working on behalf of children and youth, excellent interpersonal skills, writing skills, attention to detail, and the ability to work as part of a team. Knowledge of education and disability rights laws preferred. We are seeking a full-time, bilingual, staff attorney to join our Kinship Guardianship team. We represent kin relations seeking guardianship for the children in their care. Must be licensed in New Mexico or eligible for a limited practice license. Must have demonstrated interested in working on behalf of children and youth, excellent interpersonal skills, writing skills, attention to details, and the ability to work as part of a team. To apply, submit resume and cover letter to info@pegasuslaw.org. No phone calls please. Pegasus is an Equal Opportunity Employer (EOE) and values diversity. Applicants are considered for employment without regard to age, race, color, religion, sex, national origin, sexual orientation, gender identity and gender expression, disability, veteran status, or any other category protected under the law.

Solo/Small Firm

Are you an established solo or small firm that would like the benefit of being part of an AV-rated, small firm that concentrates in civil litigation, especially insurance defense? We seek one or more such attorneys with same or compatible practices. Contact Nathan H. Mann by email at nmann@gcmlegal.com

Attorney Position

DeNiro Law, LLC is seeking a full-time Attorney to join our team who is motivated to excel at the practice of law in a litigation-focused firm. Our practice areas include foreclosure defense, real estate, consumer protection, and probate law. Candidates must be organized, professional, responsible, and thorough. Strengths including legal research, drafting, and client relations. Entry-level applicants welcome. Compensation will be based on experience. Please send a letter of interest, resume, and names of three references to thawk@denirolaw.com.

Assistant Trial Attorney/Deputy District Attorney

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

Lawyer Position

Hennighausen & Olsen, L.L.P., seeks an attorney to practice in the following areas: civil, contract, water law, natural resources, and property. If interested, please send resume and recent writing sample to: Managing Partner, Hennighausen & Olsen, L.L.P., P.O. Box 1415, Roswell, NM 88202-1415. All replies are kept confidential. No telephone calls please.

Attorney

The Carrillo Law Firm, P.C., located in Las Cruces, NM, is seeking an Attorney to join our firm. We handle complex litigation as well as day-to-day legal matters from governmental sector and private corporate clients. Applicant must possess strong legal research and writing skills, have a positive attitude, strong work ethic, desire to learn, and have a current license to practice law in New Mexico. We offer competitive benefits to include health insurance, a profit sharing plan, and an excellent work environment. Please send letter of interest, resume, references, and writing sample via email to deena@carrillolaw.org. All responses are kept confidential.

Full Time Associate Attorneys

Cuddy & McCarthy, LLP, a 23 attorney law firm with offices in Santa Fe and Albuquerque, New Mexico, has immediate openings in our Santa Fe and Albuquerque offices for full-time Associate Attorneys. This is a great opportunity to work in the firm's general civil practice, handling a caseload pertaining to litigation, insurance defense, real estate, and labor & employment matters. Candidates must have 2-3 years of relevant attorney experience. Our ideal candidate will be responsible, organized, a team player, possess strong people skills, as well as excellent time management skills. Strong research, writing, and oral communication skills are required. Candidates must be committed to serving the diverse needs of our clients. Salary based upon qualifications and experience. Please send cover letter, resume, law school transcript and a writing sample to:ejaramillo@cuddymccarthy.com. All replies will be kept confidential…we promise.

Attorney Wanted

Small AV-rated firm seeks attorney with trial experience interested in civil litigation, primarily insurance defense. Must do high-quality work, use good judgment, possess strong work ethic, work efficiently, and take initiative. Email resume to Nathan H. Mann at nmann@gcmlegal.com.

Attorney

Butt Thornton & Baehr PC seeks an attorney with at least 5 years' legal experience. Our growing firm is in its 60th year of practice. We seek an attorney who will continue our tradition of excellence, hard work, and commitment to the enjoyment of the profession. Please send letter of interest, resume, and writing samples to Ryan T. Sanders at rtsanders@btblaw.com.

Associate Attorney

The Albuquerque office of Hinkle Shanor LLP seeks to hire an associate attorney for its medical malpractice defense practice. Candidates should have a strong academic background, excellent research and writing skills, and the ability to work independently. Please send resume and writing sample to bdp@hinklelawfirm.com.

Attorney Associate

The Eleventh Judicial District Court has an immediate career opportunity for an Attorney Associate (Staff Attorney). This position provides highly complex and diverse legal work and support for District Court Judges in San Juan and McKinley Counties, with primary duties in McKinley County. The candidate may live in either County, but travel between the District Court offices in Gallup, Farmington, and Aztec will be required. Salary for this position will be based upon the New Mexico Judicial Branch Salary Schedule with a target starting pay rate of $70,863.52 annually $34.069 p/hr. For a full job description and to download the required forms or application, please visit the Judicial Branch Career page at https://www.nmcourts.gov/careers.aspx . Resumes, with the required Resume Supplemental Form or Application, and supporting documentation may be emailed to www.11thjdchr@nmcourts.gov, faxed to 505-334-7761, or mailed to Human Resources, 103 S. Oliver Drive, Aztec NM 87410. Required documentation along with Resume must be received by 5:00 pm on Wednesday, July 31, 2019.

Regional Solicitor for the Southwest Region in Albuquerque, NM

U.S. Department of the Interior, Office of the Solicitor seeks candidates for the position of Regional Solicitor for the Southwest Region in Albuquerque, NM. This is a Senior Executive attorney position with a salary range of $152,763 to $192,300 per year. The announcement closes on 8/26/2019 (SOL-SES-2019-0003). The Regional Solicitor provides executive leadership over the technical and administrative program activities and staff in the Southwest Region. Qualified candidates must have a law degree and be a member in good standing of a state, territory of the U.S., District of Columbia, or Commonwealth of Puerto Rico bar, meet the OPM criteria for senior executives, and meet the technical qualifications below. Technical Qualifications: 1. Expert knowledge of and competency in the application of the full range of laws and regulations related to most of these areas: land and water resources; Indian and territorial affairs; fish and wildlife; parks; energy; minerals; mining; grazing; natural resource damage assessment and restoration; procurement; patents; grants; contracts; tort claims; environmental impact; equal employment opportunity; personnel; freedom of information; and, litigation. 2. Demonstrated executive level ability to manage a legal program with diverse activities, including experience developing, implementing, monitoring and reviewing policies, procedures, and operations. 3. Demonstrated executive level ability to coordinate and oversee both litigation and administrative proceedings. For important information about this position, including details on duties, qualifications, and how to apply, go https://www.usajobs.gov/GetJob/ViewDetails/540738900.

Associate Attorney

Stiff, Keith & Garcia is a successful and growing law firm representing national clients, looking for a lawyer to work as an associate in the areas of insurance defense and civil litigation. Flexible work environment available. Minimum of 2 years of litigation experience. Strong academic credentials, and research and writing skills are required. We are a congenial and professional firm. Excellent benefits and salary. Great working environment with opportunity for advancement. Send resume to resume01@swcp.com

Senior Trial Attorney Positions Available in the Albuquerque Area

The Thirteenth Judicial District Attorney's Office is seeking Senior Trial attorneys. Positions available in Sandoval, Valencia, and Cibola Counties, where you will enjoy the convenience of working near a metropolitan area while gaining valuable trial experience in a smaller office, which provides the opportunity to advance more quickly than is afforded in larger offices. Salary commensurate with experience. Contact Krissy Fajardo kfajardo@da.state.nm.us or 505-771-7411 for an application. Apply as soon as possible. These positions will fill up fast!

Full-Time Receptionist/ Legal Assistant

Downtown criminal defense law firm is seeking a full-time receptionist/legal assistant with superior telephone, computer, clerical, and organizational skills. This position involves manning the front desk of law offices for multiple small firms and will also involve entry-level paralegal work. Applicant should possess strong Microsoft Word, Outlook, and Excel skills. Please email resume to susan@rrcooper.com.

Full-Time Paralegal

Adams+Crow seeks experienced (5+ years) full-time paralegal for busy litigation practice. Send materials to anita@adamscrow.com.

Legal Assistant – Full-Time

Hinkle Shanor, LLP – Albuquerque office – is searching for a reliable legal assistant for the medical malpractice defense department. The legal assistant will work directly with attorneys and paralegals to assist in preparing cases, get involved in legal projects and research, be responsible for maintaining case files, and draft and/or transcribe routine correspondence and legal documents. The ideal candidate will be organized, professional, responsible, thorough, have good time management skills, understand confidentiality requirements with knowledge of HIPPA compliance, and be committed to helping meet our clients' needs. Candidates should: Have a minimum of 2 years of administrative legal experience; Have proficient communication skills both written and oral; Have excellent proofreading skills; Be proficient with Microsoft Word, Excel, and Outlook; Possess a High School Diploma (an Associates Degree or higher is preferred). Outstanding benefits package includes: PTO; Paid Holidays; Medical Insurance (low deductibles); Life Insurance; 401K Matching. Salary range $50,000 based on experience. Please send resumes to: apuckett@hinklelawfirm.com

Legal Secretary

Well-established Albuquerque civil litigation firm seeking a full-time Legal Secretary. The ideal candidate should have a minimum of 2 years civil litigation experience, be highly motivated, detail oriented, well-organized, strong work ethic, knowledge of State and Federal court rules, and proficient in Odyssey and CM/ECF e-filing. We offer an excellent fully funded health insurance plan, 401(K) and Profit Sharing Plan, paid designated holidays and PTO, and a professional and team-oriented environment. Please submit your resume to: becky@madisonlaw.com.

F/T Receptionist

F/T receptionist needed for busy solo practitioner downtown ABQ criminal/personal injury firm. Must be bilingual (Spanish), professional, reliable self-starter. Phones, basic drafting in Word Required. Salary DOE. Send Resume and inquiries to sklopez1311@outlook.com 505-261-7226

Office Space

620 Roma N.W.

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

Downtown Office Space For Lease:

1001 Luna Circle. Charming 1500 sq. ft. home converted to office, walking distance to Courthouses and government buildings. Open reception/secretarial area, 4 offices, kitchenette, free parking street-front and in private lot. Security system. Lease entire building $1600/mo. or individual office $500/mo. Call Ken 238-0324

110 12th Street NW

Beautiful, 2-story office for rent in Historic Downtown Albuquerque. Formerly Kathy Townsend Court Reporters. Upstairs: four private offices; one bath; small break area with small refrigerator. Downstairs: waiting area with fireplace; large office or open work area; generous breakroom area with large refrigerator; one bath; furnished conference room with table and 8 chairs. High ceilings, large windows, modern light fixtures throughout. Functioning basement, onsite parking. $3,000.00/month. Contact Shane Youtz, (505) 980-1590 for an appointment.

503 Slate NW
503 Slate NW, Affordable, three beautiful large offices for rent, with secretarial area, located within one block of the courthouses. Rent includes parking, utilities, fax, wireless internet, janitorial services, and part-time bilingual receptionist. All offices have large windows and natural lighting with views of the garden and access to a beautiful large conference room. Call 261-7226 for appointment.

500 Tijeras NW
Beautiful office space is available with reserved on-site tenant and client parking. Walking distance to court-houses. Two conference rooms, security, kitchen, gated patios and a receptionist to greet and take calls. Please email esteffany500tijerasllc@gmail.com or call 505-842-1905.

644 Don Gaspar
Walk to state capitol and courthouse in Santa Fe. Several offices available. Access to conference room and kitchenette. Off-street parking. Monthly $750-$850. Call (505) 982-5929

For Sale Or Lease
Large individual office suites with support staff stations, a small kitchen/breakroom, men's and women's baths, large windows for natural lighting, and located at Louisiana & Candelaria. Will lease all or part. $800/Mo. Full service Mike Contreras, CCIM Owner/Broker Office: 505-888-1500 mike@sentinelrealestate-inv.com

Miscellaneous

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

Dormant Judgments?
Client is looking to buy judgments for cash. E-mail ops@lzamzok.com or 898-6311 X3014

Law Firm Office for Sale
The Twelfth Judicial District, and Alamogordo in particular, is experiencing a shortage of attorneys who engage in a general civil practice. This is a great opportunity for an attorney to establish a practice in an established location. The building is the location of the former Robert M. Doughty II, PC, 1207 New York Ave., Alamogordo, NM. The office is one block from the Otero County Courthouse. Furnished. OWNER WILL FINANCE. You can take a virtual tour at https://my.matterport.com/show/?m=Ce9XzkSNbht&mls=1https://my.matterport.com/show/?m=Ce9XzkSNbht&mls=1 For information, please contact Molly Pattillo, Future Real Estate, at molly@futurerealestate.com.

William F. Davis Is Retiring and is Closing His Office.
We have available office furniture for sale including: Large Conference Table w/Chairs, Desks, Chairs, Credenzas, Bookshelves, File Cabinets, Law Books, etc. Please call (505) 243-6129 to make an appointment to view.

Chafin v Chafin, 568 U.S. 165 (2013)

IN INTERNATIONAL CUSTODY, WHOSE COUNTRY RULES?

Which country's courts determine custody is often the **major issue in international custody disputes**. In Chafin v Chafin, a Scottish wife successfully sought to have the parties' daughter returned to Scotland from the couple's last marital residence in Alabama. Her husband, an American in the United States military, wanted the United States courts to decide custody.

The case made it all the way to the United States Supreme Court, but SCOTUS was not deciding custody, but rather "**mootness**", "**stays**" and "**expeditious handling**" - complex points of law that, at first blush, do not seem to have much to do with "**the best interests of the child**."

Read more about this case and WBMH's POV on our blog at wbmhlaw.com/category/news/

Custody issues between parents from different countries become complex quickly. The **Hague Convention** sets the rules and dictates swift resolution of such disputes so that, if wrongfully removed or retained, a child **is returned quickly to the country of his/her habitual residence**. A speedy ruling that allows one parent to immediately take the child to another country can leave the other parent without recourse for an appeal. This is what happened in Chafin v Chafin, when Alabama's 11th Circuit **ruled the appeal brought by the father was moot since the child had already left the county**.

While SCOTUS held that appeals cannot be denied based on the absence of the child in the United States, **it may not always be possible to enforce rulings of United States Courts in other countries**. Sgt. Chafin prevailed in court, yet still could not be sure that his child would be returned to the United States.

Multi-national families would do well to acquaint themselves with international custody rulings with an eye to preventing issues ahead of time, rather than prevailing in court.

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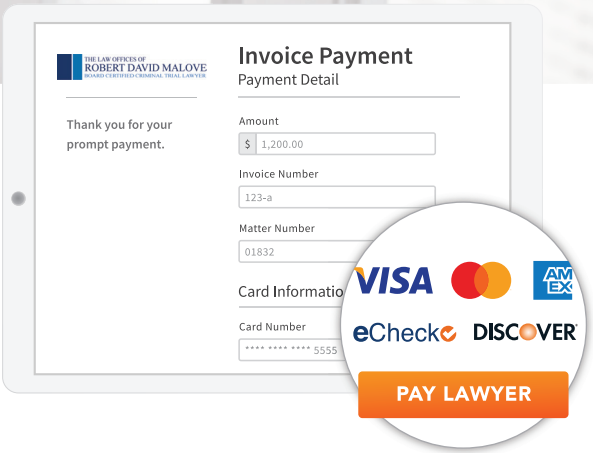

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