*Official Publication of the State Bar of New Mexico*

# Bar Bulletin

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After the Rain, by Claire Hurrey (see page 3) www.cehurrey.com

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State Bar of New Mexico
Est. 1886





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**www.sbnm.org**

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**About Cover Image and Artist**: "As my own vision travels across immense space, over large colorful masses, through atmospheres of beautiful light, I endeavor to share this with the viewer." Claire E. Hurrey. These landscape oil paintings represent Hurrey's interest in how mass occupies space in innumerable variations of weather and reflected light that create atmospheres of beauty. Both plein air studies and photographs were used for these studio works of the New Mexico landscape, painted from 2015-2016. Hurrey said, "My eyes are wide open to New Mexico's vast and immense desert spaces, big skies, and dramatic clouds, set over red rock cliffs with deep violet shadows, all held together by the light of its arid air." Hurrey has a bachlelors in sociology and fine art, a masters in drawing and a Masters of Fine Art in painting. See more about Claire E. Hurrey and her paintings at www.cehurrey.com.

# Notices

## Court News

### New Mexico Supreme Court

#### Rule-Making Activity

To view recent Supreme Court rule-making 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.

#### Publication for Comment Regarding Amendments to the Local Rules of the District Court of the Second Judicial District Court

In accordance with Rule 23-106.1(C) NMRA, the Supreme Court has approved out-of-cycle amendments to Rule LR2-603 NMRA (Court-annexed arbitration). The amendments increase the arbitration limit from $25,000 to $50,000. Under the amended rule, all civil cases filed in the Second Judicial District shall be referred to arbitration when no party seeks relief other than a money judgment and no party seeks an amount in excess of $50,000. The amendments to LR2-603 NMRA are effective for all cases pending or filed on or after June 1. You may view the full text of the amended rule and the associated order on the Supreme Court's website at https://supremecourt.nmcourts.gov/2022-2/. The Supreme Court will be accepting public comment on this rule amendment for 30 days, starting on June 1,. If you wish to comment, you may do so electronically through the Supreme Court's website at http://supremecourt.nmcourts.gov/open-for-comment.aspx, by email to nmsupremecourtclerk@nmcourts.gov, by fax to 505-827-4837 or by mail to Elizabeth A. Garcia, Chief Clerk, with the New Mexico Supreme Court, at PO Box 848 in Santa Fe, N.M. 87504-0848. Your comments must be received by the Clerk on or before June 30 to be considered by the Court. Please note any submitted comments may be posted on the Supreme Court's website for public viewing.

#### Seeking Applications for Family Representation and Advocacy Commission

The Office of Family Representation and Advocacy is a new state agency with the focus of providing high-quality legal representation and services to children and families in the foster care system. The office was created by the Legislature in 2022 to serve children, parents, custodians and guardians in child abuse and neglect cases as well as eligible young adults who benefit from continued care under the Fostering Connections Act. OFRA is an independent adjunct agency of the Executive branch and will be overseen by a 13-member commission. The Family Representation and Advocacy Commission, which will be comprised of five members appointed by the New Mexico Supreme Court Chief Justice, will exercise independent oversight of OFRA and review and approve policies for the operation of OFRA. Persons interested in serving on the Commission may apply by sending a letter of interest to Elizabeth A. Garcia, Clerk of Court, by email to nmsupremecourtclerk@nmcourts.gov or by first class mail to P.O. Box 848, Santa Fe, N.M. 87504. Applicants should limit their letters to two pages, indicate which of these five positions they are seeking and describe why they wish to serve on the Commission, what they bring to the Commission and their experience with the child welfare system. The deadline to apply is June 24.

## *Professionalism Tip*

**With respect to opposing parties and their counsel:**

I will cooperate with opposing counsel's requests for scheduling changes.

#### 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. 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. Library Hours: Monday-Friday 8 a.m.-noon and 1-5 p.m. For more information call: 505-827-4850, email: libref@nmcourts.gov or visit https://lawlibrary.nmcourts.gov.

### Second Judicial District Court

#### Announcement of Applicants

Eight applications were received in the Judicial Selection Office as of May 9 for the vacancy on the Second Judicial District Court, which will exist as of July 1 per the creation of an additional Judgeship by the Legislature. The Second Judicial District Court Nominating Commission will convene at 9 a.m. on June 7 to interview applicants for the position at the Second Judicial District Court, located at 400 Lomas Blvd NW, Albuquerque, N.M. The applicants include **Steven Gary Diamond**, **Michael Philip Fricke**, **Asra I. Elliott**, **Veronica Lee Hill**, **Mekko Mangas Miller**, **David Allen Murphy**, **Rose Osborne** and **Mark Anthony Ramsey**. All attendees of the meeting of the Second Judicial District Court Judicial Nominating Commission are required to wear a face mask at all times during the meeting regardless of their vaccination status.

### Second Judicial District Court Judicial Nominating Commission

#### Proposed Changes to the Rules Governing Judicial Nominating Commissions

The New Mexico Supreme Court's Equity and Justice Commission's subcommittee on judicial nominations has proposed changes to the Rules Governing New Mexico Judicial Nominating Commissions. These proposed changes will be discussed and voted on during the upcoming meeting of the Second Judicial District Court Judicial Nominating Commission. The Commission meeting is open to the public beginning at 9 a.m. on June 7 at the State Bar of New Mexico Center located at 5121 Masthead St. NE, Albuquerque, N.M. 87109. Email Beverly Akin (akin@law.unm.edu) for a copy of the proposed changes. All attendees of the meeting of the Second Judicial District Court Judicial Nominating Commission are required to wear a face mask at all times at the meeting regardless of vaccination status.

### Third Judicial District Court

#### Announcement of Chief Judge Manuel I. Arrieta's Re-Election

The Third Judicial District Court announces the re-election of Chief Judge Manuel I. Arrieta to a new three-year term to serve as Chief Judge and Superintending Authority of the Third Judicial District. Chief Judge Arrieta's upcoming term will last until May 2025, during which he will continue to have superintending authority over all the courts in the District including probate and municipal courts.

### Fifth Judicial District Court

#### Announcement of Vacancy

A vacancy on the Fifth Judicial District Court in Carlsbad, NM will exist as of July 1, due to the creation of an additional judgeship by the Legislature. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Applicants seeking

information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. Members can obtain applications from the Judicial Selection website: https://lawschool.unm.edu/judsel/application.html, or emailed to you by contacting the Judicial Selection Office at akin@law.unm.edu The deadline for applications has been set for June 14 by 5 p.m. Applications received after that date and time will not be considered. The Fifth Judicial District Court Nominating Commission will meet at 9 a.m. on July 19 at the Fifth Judicial District Court Eddy County, 102 N Canal St, Carlsbad, N.M. 88220, to interview the applicants for this position. The Commission meeting is open to the public, and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard. All attendees of the meeting of the Fifth Judicial District Court Judicial Nominating Commission are required to wear a face mask at all times at the meeting regardless of their vaccination status.

## Fifth Judicial District Court Nominating Commission

### Proposed Changes to the Rules Governing Judicial Nominating Commissions

The New Mexico Supreme Court's Equity and Justice Commission's subcommittee on judicial nominations has proposed changes to the Rules Governing New Mexico Judicial Nominating Commissions. These proposed changes will be discussed and voted on during the upcoming meeting of the Fifth Judicial District Court Judicial Nominating Commission. The Commission meeting is open to the public beginning at 9 a.m. on July 19 at the Fifth Judicial District Court Eddy County, 102 N Canal St, Carlsbad, N.M. 88220. Please email Beverly Akin (akin@law.unm.edu) if you would like to request a copy of the proposed changes. All attendees of the meeting of the Fifth Judicial District Court Judicial Nominating Commission will be required to wear a face mask at all times while at the meeting regardless of their vaccination status.

## Thirteenth Judicial District Court Judicial Nominating Commission

### Proposed Changes to the Rules Governing Judicial Nominating Commissions

The New Mexico Supreme Court's Equity and Justice Commission's subcommittee on judicial nominations has proposed changes to the Rules Governing New Mexico Judicial Nominating Commissions. The proposed changes will be discussed and voted on during the upcoming meeting of the Thirteenth Judicial District Court Judicial Nominating Commission. The Commission meeting is open to the public beginning at 9 a.m., June 10 at the Thirteenth Judicial District Court in Sandoval County, located at 1500 Idalia Rd, Bernalillo, N.M. 87004. Email Beverly Akin (akin@law.unm.edu) for a copy of the proposed changes. All attendees of the meeting of the Thirteenth Judicial District Court Judicial Nominating Commission are required to wear a face mask at all times at the meeting regardless of vaccination status.

## Thirteenth Judicial District Court

### Announcement of Vacancy

A vacancy on the Thirteenth Judicial District Court will exist as of July 1 due to the creation of an additional judgeship by the legislature. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Applicants seeking information regarding election or retention, if appointed, should contact the Bureau of Elections in the Office of the Secretary of State. Members can obtain applications by visiting https://lawschool.unm.edu/judsel/application.html or emailed to you by contacting the Judicial Selection Office at akin@law.unm.edu. The deadline for applications was set for May 17. Applications received after that time will not be considered. The Thirteenth Judicial District Court Nominating Commission will meet at 9 a.m. on June 10 at the Thirteenth Judicial District Court in Sandoval County to interview and evaluate the applicants for this position. The Commission meeting is open to the public, and members of the public who wish to be heard about the candidates will have an opportunity to be heard. All attendees of the meeting will be required to wear a face mask at all times at the meeting regardless of vaccination status.

# State Bar News

## 2022 Annual Meeting

### Resolutions and Motions

Resolutions and motions will be heard at 1 p.m. on Aug. 11 at the opening of the State Bar of New Mexico 2022 Annual Meeting at Hyatt Regency Tamaya Resort and Spa in Bernalillo. For consideration, resolutions or motions must be submitted in writing by July 1 to Executive Director Richard Spinello, PO Box 92860, Albuquerque, N.M. 87199; fax to 505-828- 3765; or email Richard.spinello@sbnm.org.



## Annual Awards

### Open for Nominations

Nominations are being accepted for the 2022 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in the past year. The awards will be presented at the 2022 Annual Meeting on Thursday, Aug. 11 at the Hyatt Regency Tamaya Resort & Spa. The deadline is June 6. View previous recipients, instructions for submitting nominations, and descriptions of each award at https://www.sbnm.org/CLE-Events/2022-Annual-Awards.

## Equity in Justice Program

### Have Questions?

Do you have specific questions about equity and inclusion in your workplace or in general? Send in anonymous questions to our Equity in Justice Program Manager, Dr. Amanda Parker. Each month, Dr. Parker will choose one or two questions to answer for the *Bar Bul-*

*letin*. Go to www.sbnm.org/eij, click on the Ask Amanda link and submit your question. No question is too big or too small.

## New Mexico Judges and Lawyers Assistance Program

### NMJLAP Committee Meetings

The NMJLAP Committee will meet at 4 p.m. on July 7, Oct. 16 and Jan. 12, 2023. The NMJLAP Committee was originally developed to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve professionally in the legal field. The NMJLAP Committee has expanded their scope to include issues of depression, anxiety, and other mental and emotional disorders for members of the legal community. This committee continues to be of service to the New Mexico Judges and Lawyers Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

### Employee Assistance Program

NMJLAP contracts with The Solutions Group, the State Bar's EAP service, to bring you the following: FOUR FREE counseling sessions per issue, per year. This EAP service is designed to support you and your direct family members by offering free, confidential counseling services. Check out the MyStress Tools which is an online suite of stress management and resilience-building resources. Visit www. sbnm.org/EAP or call 505.254.3555. All resources are available to members, their families and their staff. Every call is completely confidential and free.

### Free Well-Being Webinars

The State Bar of New Mexico contracts with The Solutions Group to provide a free employee assistance program to members, their staff and their families. Contact the Solutions Group for resources, education, and free counseling. Each month in 2022, The Solutions Group will unveil a new webinar on a different topic. Sign up for "Echopsychology: How Nature Heals" to learn about a growing body of research that points to the beneficial effects that exposure to the natural world has on health. The next webinar, "Pain and Our Brain" addresses why the brain links pain with emotions. Find out the answers to this and other questions related to the connection between pain and our brains. The final webinar, "Understanding Anxiety and Depression" explores the differentiation between clinical and "normal" depression, while discussing anxiety and the aftereffects of COVID-19 related to depression and anxiety. View all webinars at www.solutionsbiz.com or call 505-254-3555.

### Monday Night Attorney Support Group

The Monday Night Attorney Support Group meets at 5:30 p.m. on Mondays by Zoom. This group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Email Pam Moore at pmoore@sbnm.org or Briggs Cheney at bcheney@dsc-law.com for the Zoom link.

### Defenders in Recovery: Additional Meetings You Can Attend in the Legal Community

Defenders in Recovery meets every Wednesday night at 5:30 p.m. The first Wednesday of the month is an AA meeting and discussion. The second is an NA meeting and discussion. The third is a book study, including the AA Big Book, additional AA and NA literature, including the Blue Book, Living Clean, 12x12 and more. The fourth Wednesday features a recovery speaker and monthly birthday celebration. These meetings are open to all who seek recovery. Who we see in this meeting, what we say in this meeting, stays in this meeting. For the meeting link, send an email to defendersinrecovey@gmail.com or call Jen at 575-288-7958.

### The New Mexico Well-Being Committee

The N.M. Well-Being Committee was established in 2020 by the State Bar of New Mexico's Board of Bar Commissioners. The N.M. Well-Being Committee is a standing committee of key stakeholders that encompass different areas of the legal community and cover state-wide locations. All members have a well-being focus and concern with respect to the N.M. legal community. It is this committee's goal to examine and create initiatives centered on wellness. Upcoming meetings of the Committee are 3 p.m., May 31 and July 26.

## Young Lawyers Division

### Help New Mexico Wildfire Victims

In partnership with the Federal Emergency Management Agency and the American Bar Association's Disaster Legal Services Program, the State Bar of New Mexico Young Lawyers Division is preparing legal resources and assistance for survivors of the New Mexico wildfires. A free legal aid hotline will be available soon and we need volunteers! Individuals who qualify for assistance will be matched with New Mexico Lawyers to provide free, limited legal help in areas like securing FEMA benefits, assistance with insurance claims, help with home repair contracts, replacement of legal documents, landlord/tenant issues and mortgage/foreclosure issues. Volunteers do not need extensive experience in any of the areas listed below. FEMA will provide basic training for frequently asked questions. This training will be required for all volunteers. We hope volunteers will be able to commit approximately one hour per week. Visit www.sbnm.org/wildfirehelp for more information and to sign up. You can also contact Lauren E. Riley, ABA YLD District 23, at 505-246-0500 or lauren@batleyfamilylaw.com.

## UNM School of Law

### Law Library Hours

The UNM Law Library facility is currently closed to guests. Reference services are available remotely Monday through Friday, from 9 a.m.-6 p.m. via email at lawlibrary@unm.edu or phone at 505-277-0935.

## Other News

### City of Albuquerque

#### Volunteers Needed for Albuquerque Pro Bono Eviction-Prevention Legal Clinic

The City of Albuquerque is seeking volunteer attorneys to provide advice to low-income tenants facing eviction at an in-person legal clinic on May 25 from 11 a.m.-3:30 p.m. at El Centro de Igualdad y Derechos at 714 4th Street SW. A free Landlord/Tenant Law CLE is included in the clinic schedule, and lunch will be provided. Please contact Pro Bono Coordinator Yajayra Gonzalez to sign up by email at ygonzalez@cabq.gov or phone at 505-738-5794.

# Legal Education

## May

**25** **Lawyer Ethics and Email**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

**25** **A View from the Appellate Bench: An Interactive Discussion**
1.2 G
Web Cast (Live Credits)
Administrative Office of the U.S. Courts
www.uscourts.gov

**26** **REPLAY: An Afternoon of Legal Writing with Stuart Teicher (2021)**
3.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

**31** **Fourth Amendment Webinar Series Part 1 - Anatomy of a Suppression Hearing**
1.2 G
Web Cast (Live Credits)
Administrative Office of the U.S. Courts
www.uscourts.gov

## June

**2** **E-Discovery: Collecting & Analyzing Evidence from Mobile Devices**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

**3** **Master Microsoft Word's Most Useful Hidden Feature - Styles- to Easily Create Better Formatted Documents**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

**3-5** **Mediation Training**
20.0 G, 2.0 EP
In-Person
UNM School of Law
lawschool.unm.edu

**7** **Expungement 101**
1.0 G
Web Cast (Live Credits)
New Mexico Legal Aid/Volunteer Attorney Program
www.sharenm.org

**7** **Why Lawyers Need To Know AI (Artificial Intelligence)**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

**7** **2022 Ethics In Civil Litigation Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

**8** **2022 Ethics In Civil Litigation Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

**9** **Essential Workers, Essential Rights (2022)**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

**10** **The Mentally Tough Lawyer: How to Build Real-Time Resilience in Today's Stressful World**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

**10** **Trust Accounting**
1.0 G
Web Cast (Live Credits)
New Mexico Defense Lawyers Association
www.nmdla.org

**10-12** **Mediation Training**
20.0 G, 2.0 EP
In-Person
UNM School of Law
lawschool.unm.edu

**14** **Drafting Stockholders' Agreements, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

**15** **Drafting Stockholders' Agreements, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

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

**17** **Cowen's Big Boot Camp**
5.5 G
Live Seminar (San Antonio, Texas)
Webinar
Cowen Rodriguez Peacock, P.C.
www.cowenlaw.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@sbnm.org. Include course title, credits, location/course type, course provider and registration instructions.

## June

**22** **Elder Law Summer Series: Probate Overview & Considerations in Estate Planning**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

**24** **30 Things Every Solo Attorney Needs to Know to Avoid Malpractice**
1.5 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

## July

**20** **Elder Law Summer Series: Communicating with Clients that have Cognitive Impairment or Dementia**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

## August

**17** **Elder Law Summer Series: Community Property and Debt Considerations**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

## September

**21** **Elder Law Summer Series: Client Capacity, Diminished Capacity, and Declining Capacity. Ethical Representation and Tools for Attorneys**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

**28** **26 Ethical Tips from Hollywood Movies**
2.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

**28** **Estate Planning for Liquidity**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

**29** **Cybersecurity: How to Protect Yourself and Keep the Hackers at Bay**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

**30** **Ethics of Social Research**
1.5 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

*Call for Nominations*


# STATE BAR OF NEW MEXICO
# 2022 Annual Awards

Nominations are being accepted for the 2022 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in the past year. The awards will be presented at the 2022 Annual Meeting on Thursday, Aug. 11 at the Hyatt Regency Tamaya Resort & Spa. All awards are limited to one recipient per year, whether living or deceased, with the exception of the Justice Pamela B. Minzner Professionalism Award, which can have two recipients, an attorney and a judge. Nominees may be nominated for more than one award category. Previous recipients for the past three years are listed below.

To view the full list of previous recipients, visit **www.sbnm.org/annualmeeting2022**

## Judge Sarah M. Singleton* Distinguished Service Award

Recognizes attorneys who have provided valuable service and contributions to the legal profession, the State Bar of New Mexico and the public over a significant period of time.

**Previous recipients:** Joey D. Moya, Deborah S. Dungan, John P. Burton

**This award was renamed in 2019 in memory of Judge Singleton (1949-2019) for her tireless commitment to access to justice and the provision of civil legal services to low-income New Mexicans. She also had a distinguished legal career over four decades as an attorney and judge.*

## Distinguished Bar Service Award–Nonlawyer

Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

**Previous recipients:** Bernice Ramos, Renee Valdez, Tiffany Corn

## Justice Pamela B. Minzner* Professionalism Award

Recognizes attorneys and/or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism.

**Previous recipients:** Frederick M. Hart *(posthumously)* and F. Michael Hart, William D. Slease, Hon. Stan Whitaker

**Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994–2007.*

## Outstanding Legal Organization or Program Award

Recognizes outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

**Previous recipients:** New Mexico Center on Law and Poverty, New Mexico Immigrant Law Center, Second Judicial District Court Judicial Supervision and Diversion Program

## Outstanding Young Lawyer of the Year Award

Awarded to attorneys who have, during the formative stages of their legal careers by their ethical and personal conduct, exemplified for their fellow attorneys the epitome of professionalism; nominee has demonstrated commitment to clients' causes and to public service, enhancing the image of the legal profession in the eyes of the public; nominee must have practiced no more than five years or must be no more than 36 years of age.

**Previous recipients:** Maslyn K. Locke, Veronica C. Gonzales-Zamora, Rebekah Reyes

## Robert H. LaFollette* Pro Bono Award

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance over his or her career to people who could not afford the assistance of an attorney.

**Previous recipients:** Torri Jacobus, Julia H. Barnes, Robert J. Anderotti

**Robert LaFollette (1900–1977), Director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.*

## Justice Seth D. Montgomery* Distinguished Judicial Service Award

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and the bar; generally given to judges who have or soon will be retiring.

**Previous recipients:** Judge Mary W. Rosner, Judge Alvin Jones (posthumously), Judge Nan G. Nash

**Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989–1994.*

## Excellence in Well-Being Award (NEW!)

Many individuals have made significant contributions to the improvement of legal professional well-being to include destigmatizing mental health, strengthening resiliency and creating a synergic approach to work and life. This award will recognize an individual or organization that has made an outstanding positive contribution to the New Mexico legal community's well-being. As the SBNM is committed to improving the health and wellness of New Mexico's legal community, we strongly encourage self-nominations and peer nominations for any lawyer, judge, or non-lawyer working in some capacity with the NM legal community.

Nominations should be submitted through the following link:
**https://form.jotform.com/sbnm/2022amawards**.

The link to the Jotform can also be found on the Annual Awards page on the State Bar website at **www.sbnm.org/annualmeeting2022**.

Additional information or letters may be uploaded with the form and submitted with the nomination.

## Deadline for Nominations: Monday, June 6th

*For more information or questions, please contact Morgan Pettit at morgan.pettit@sbnm.org or 505-797-6039*

State Bar of New Mexico
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## *"Happiness Isn't What You're Looking For in Your Work"*

# Tapping Into That Which Lights Us Up

*By Caitlin L. Dillon*

At my commencement speech at my law school graduation in 2014, Chief Justice Charles W. Daniels challenged us to consider public service as an essential part of our duty and responsibility as lawyers in New Mexico. He called on us to use our education and unique talents to solve problems that we identified in our community. Many of us would heed his advice, pursuing careers in public service and at non-profits, advocating for those without a voice while seeking to rework systems that no longer serve the greater good. In short, we choose to make working for the greater good our job.

Working in public service is a great honor, however, it can also be a great burden. In her latest book, *The Lightmaker's Manifesto: How to Work for Change Without Losing Your Joy*, Karen Walrond defines activists as "the people who quietly and diligently work behind those turbulent scenes for good and justice–those who daily activate their own gifts and talents and determination as part of a larger cause" (Walrond, 2021, 13-14) Those of us in public service may be freed from the trappings of billable hours, however, the obstacles we face are numerous and systemic.

Each day we are confronted by resources that constantly lag behind demand. Most days, the systems we use do not address the actual problem. Yet, despite these limitations, I consistently see public servants accomplish the seemingly impossible. These advocates tackle the impossible through a combination of grit, teamwork, creativity, and limitless resiliency. We stubbornly hang on to hope, showing up day after day. Walrond writes, "there's no one way to change the world. The world changes when we take inspiration from all the different forms of good and light and make them our own" (Walrond, 2021, 15).

After a long day, week, or year I've often asked myself the question "why am I here?" I think we've all been there. In public service, we have BIG responsibilities. We make sure people are taken care of because that's our job and our calling. We answer tough questions, make decisions, and often work in an adversarial environment. If we don't do our jobs successfully, things break down. In addition to this pressure, we have demonstrable outcomes to prove to the public and legislature that we are worth the investment. Our performance is constantly measured with little recognition of true, inestimable progress. Everything is tracked: outcomes, number of people served, reports generated, salaries, etc. With all of this, how do we continue to work for change without losing our joy and burning out? How do we "proactively take the things that fuel us–our gifts and our passions–and use them to serve the world" (Walrond, 2021, 13)?

Yoga, sleep, time off, meditation, and exercise can only do so much for our state of well-being. We do those things because maybe they'll make us feel better, maybe we'll be happier. You can do all those things right, and still be profoundly unsettled, without direction or purpose. By tapping into the "things that 'light us up'...we can use them in ways that serve the world while…helping us to maintain our determination, cultivate resilience and even tend to our own spirits" (Walrond, 2021,13). Take a moment to think about the things that light you up and recognize what that feels like in your mind, body, and spirit. Walrond hypothesizes that, by "being purposeful in using our gifts and talents as fuel for our commitment to serve, even in a world of tremendous pain and injustice, we can minimize the possibility of burnout–or even avoid it altogether" (Walrond, 2021, 13). However, this process requires a "considerable amount of introspection and forethought" (Walrond, 2021, 14).There's "no one way to change the world. The world changes when we take inspiration from all the different forms of good and light and make them our own" (Walrond, 2021, 15).

*continued on page 16*

**Connor Joy** has joined Modrall Sperling's Albuquerque office as an associate in the firm's litigation group, representing clients in a wide range of matters. Hailing from Gallup, Connor studied English and philosophy at the University of New Mexico for his undergraduate. He returned to the UNM School of Law in 2018, serving as Managing Editor of the New Mexico Law Review.

**George "Dave" Giddens** of Giddens + Gatton Law, P.C., was recently recognized on the 2022 Southwest Super Lawyers website. Giddens was named a Super Lawyer for the 11th time. Giddens is the founder and managing shareholder of Giddens + Gatton Law, P.C., and focuses primarily on creditor/debtor rights across New Mexico. Giddens earned both an undergraduate degree and juris doctor from the University of Kansas.

The **Honorable Vidalia Chavez**, Division XIV, transferred to the Civil Division of the Bernalillo County Metropolitan Court on April 15, 2022 after serving on the criminal bench for the past seven years. Judge Chavez was elected to the court in 2014 and served as Presiding Judge of the Criminal Division from 2017 to 2018. She also presided over the Behavioral Health DWI Court for a number of years.

Five lawyers from Sutin, Thayer & Browne have been selected for inclusion in the 2022 Southwest Super Lawyers list, a ranking of outstanding lawyers who have attained high degrees of peer recognition and professional achievement. The attorneys consist of Southwest Rising Star **Robert J. Johnston** and **Suzanne Wood Bruckner** in Tax law, **Barbara G. Stephenson** and **Benjamin E. Thomas** in Employment and Labor law and **Maria Montoya Chavez** in Family law.

The University Casebook Series of West Publishing/Foundation Press has published the Eighth Edition of *Scientific Evidence in Civil and Criminal Cases* (2021), authored by **Andre A. Moenssens**, **Betty Layne DesPortes** and **Roderick T. Kennedy**, formerly of the New Mexico Court of Appeals. Judge Kennedy just completed a term on the Board of the American Academy of Forensic Sciences, in which he has been a Fellow since 1994, receiving the Jurisprudence Section's Feder Award in 2018. He is also a Fellow and 2003 award recipient in the Chartered Society of Forensic Sciences.

# In Memoriam



**Sean Michael Crowley**, devoted family man, amateur swim meet MC and oft disappointed Cowboys fan, passed away peacefully on Aug. 19, surrounded by loved ones. Sean was born in Austin on Oct. 25, 1977, to Michael Crowley, an Austin attorney, and Nancy Rude Crowley, joining his big sister Lisa. After Nancy passed away in 1981, Mike married Beryl (Berry) Crowley, another Austin attorney, in 1984 and Sean gained more sisters: Pamela, Jessica and Leslie. Sean loved taking epic road trips with his dad, including one where they visited various baseball stadiums in the east, before Mike passed away in 2000. Sean was a lifelong resident of Austin and attended high school at St. Michael's Catholic Academy, lettering in multiple sports, and graduated from St. Edward's University in 2001. Following in his father's footsteps, Sean graduated from Texas Tech Law School in 2008. For the last 11 years, he was a successful attorney, partner and mentor at Thompson Coe in Austin Texas, who was respected by his colleagues, clients and all that encountered him. Sean's most important passion in life was his family. Sean met the love of his life, Alicia (Ali), yet another Austin attorney, in 2002, and embarked on a journey that brought him his children Ireland, Michael and Collin. He was a patient man to put up with all the craziness that his wife and three children brought to him. Sean loved being a Dad and was always there for his kids. He attended their games without fail if they had their uniform on, regardless of how much playtime they got. He got involved in the kid's activities in other ways, such as helping with school work, coaching girls soccer and boys flag football, and even making a name for himself as a color commentator for Travis Country Swim Meets. Even when Sean's kids were not swimming, he kept showing up and having a great time on the mic, making kids and adults laugh while keeping the meet moving along smoothly. In addition to being a husband and father, he was a devoted son, brother, uncle, cousin and friend. He considered himself very close with his Mom, Berry, and his sisters. As the younger brother of four sisters, he showed up for whatever was needed with his infectious sense of humor and unfailing optimism. Sean's extended family was scattered across the country, so when the Crowley family got together for various weddings, Sean would gather up all the cousins and lead the night's excursions. These tended to end in the wee hours of the morning and after numerous bad decisions were made. Just the way Sean liked it. Sean was also always ready to do a silly sketch at the yearly Evans family Reunion. Those who saw the CHICAGO 2004 routine say that it's forever burned in their memory, for better or for worse. There will be a private burial at this time. When it is safe to gather again, there will be a Memorial Celebration of Sean and his life. In lieu of flowers, the family asks friends to consider a donation to the educational fund for Sean's children, or the charity of your choice. Checks should be made payable to: Thompson Coe, Trustee for the Crowley Children's Education Fund and mailed to Attention Mike Jones, 701 Brazos, Suite 1500, Austin, Texas 78701. For more information, please email info@thompsoncoe.com. There will be a brief obituary republished when the Celebration is scheduled.

**Donnie Gale Williams** (born Jan. 10, 1939, Mount Vernon, Ill.) died peacefully at home July 11, 2021 in Henderson, Nev. at the age of 82. Donn ("Big Donn" as he was often called, to distinguish him from his daughter, "Little Dawn," in the Midwestern accent that often caused confusion between the two) was a big man, both physically - at over 6'5" he towered over most - and in personality. His broad sense of humor, his zest for life, his strong work ethic and his generosity of spirit were a joy to everyone who loved him and source of consternation to those who didn't really like him. A talented and driven basketball player from a young age, Donn played Varsity basketball for the Mount Vernon Township High School Rams, and graduated with the Class of '57. He then attended the University of New Mexico in Albuquerque on basketball scholarship for his first year before returning home to help care for his mother, Aline (Wells) Williams, who passed away in the summer of 1960. He graduated from Murray State University in Kentucky in 1962 with a degree in Education, followed by a Masters of Education from Southern Illinois University in 1965, and a Doctorate in Education from the University of Illinois Urbana-Champagne in 1970. He then worked in various educational administrative positions, including Superintendent of Grandview Heights school district in Columbus, Ohio, Associate Superintendent of Amphitheater School District in Tucson, Ariz., and Superintendent of Vail School District in Vail, Ariz.. After leaving the education system, Donn pursued a law degree, obtaining his J.D. from the University of Arizona in 1989, and passing the bar that same year. He joined the Arizona School Boards Association in 1990, working with them until 2009, when he began working with the New Mexico School Boards Association providing policy advice to schools all over the state as Policy Services Director until his death. Over the years, Donn was an active member of a number of philanthropic organizations, including the Masons, the Lions Club and the Rotary Club. He maintained his athletic edge through involvement with basketball leagues, by golfing, and it is rumored that he could whip the younger guys in pickleball well into his 80s. He touched many lives and he will be remembered with love. He is survived by his sister Michelle (Hugh), beloved wife Julie, son Scott (Katie), daughter Dawn (Michael) and granddaughter Caitlin.

**James Lyman Rasmussen**, 74, passed away in his home on Aug. 9, 2021. Jim was born on March 30, 1947, in Richland, Wash., as the second of seven children. From age 19 to 21, he served a mission for the Church of Jesus Christ of Latter-day Saints in Switzerland. He received his B.A., M.B.A., and JD from Brigham Young University, and he practiced as an attorney in Albuquerque, New Mexico. He loved classical music and played many instruments. His organ playing was appreciated in many churches, and he enjoyed arranging music for his family to perform. He also loved books, languages, travel, gardening, and the outdoors. He was a loyal friend, with a talent for maintaining meaningful relationships across many years and long distances. He married his beloved wife, Gail, in 1974 in Provo, Utah. In addition to his wife, he is survived by his two children, their spouses and six grandchildren. A viewing was held on Aug. 14, 2021, at 10 a.m. at 12701 Indian School Road in Albuquerque, followed by funeral service at 11 a.m.

**Sealy Hutchings Cavin**, 90, passed from this life in the early morning hours of Jan. 16, 2020 after a brief illness. "Hutch" was born in Galveston, Texas on Dec. 29, 1929 to his parents Ernest Dillard Cavin, Jr and Elizabeth Hutchings Cavin. He married Marion Reed Keller on Dec. 10, 1948 and, upon her death in 2013, they had been married for 65 years. At the tender age of 13, Hutch attended the New Mexico Military Institute and remained there until his graduation from Junior College in 1948. From there he moved to Waco, Texas and enrolled at Baylor University where he finished with a bachelor's degree in 1950. He then went on to the University of Texas Law School in Austin, Texas where he received a Juris Doctor (JD) degree in 1953.

Following graduation from law school, he accepted a position with Gulf Oil Company in Ft. Worth, Texas. The company then transferred him to their office in Roswell, NM to handle legal affairs associated with operations in the burgeoning Permian Basin. He accepted a position in the legal department with Anderson Oil Company in 1955 and worked with Robert O. Anderson and Donald B. Anderson until his retirement in 2005. His legal expertise came to encompass not only oil and gas, but also extended to sophisticated land transactions, land titles and water law. Hutch was preceded in death by his wife "Cissy" and his sister, Patricia Cavin King. He is survived by his brother, Ernest Dillard Cavin, III of Center Point, Texas. He is also survived by his 5 children Elizabeth Cavin Thomasson and her husband John of Lubbock, Texas, Sealy H Cavin, Jr. and wife Synda of Albuquerque, N.M., Candace Cavin McClelland and husband Jim of Roswell, William E. Cavin and wife Kim of Roswell and M. Blair Cavin and wife Kerry of Roswell. He also had 15 grandchildren and 22 great-grandchildren, two nieces, a nephew and a cousin. Hutch was an intellectual demonstrated by his life-long love of learning and study of the law and many other widely diverse interests such as business, politics and medical issues. He was, however, totally devoted to the love of his wife and family. Their safety, well-being and happiness are what he centered his life around. In the early years, he lovingly entertained his children swimming, playing tennis, golf, backyard baseball or cards and thoroughly enjoyed watching his grandchildren do the same. He was quite a conversationalist in later years and would happily regale anyone with stories of his boyhood in Galveston from swimming at the beach to fishing in the bay and going to the Artillery Club. He also had a wide circle of friends who he loved and treasured including his Wednesday and Friday lunch groups. Many people don't recall that Hutch was elected to the New Mexico State Senate as a Republican in a historically significant election on Nov. 8, 1966. He took office on Jan. 1, 1967 and honorably served Senate District 18 until Dec. 31, 1970. A viewing was held at Ballard Funeral Home on Jan. 24, 2020, followed by a memorial service at the NMMI Chapel on Jan. 26, 2020.

**Patrick Anthony Casey** died in Santa Fe, New Mexico on April 5, 2022. Pat was born in Santa Fe on April 20, 1944 to Eutemia Casados Casey and Ivanhoe Casey. He was raised as an only child by his mother until his half-sister, Ernestine Martinez of Santa Barbara, Calif. found him and was to become one of his best friends. He is preceded in death by his parents, his half-sister, Ernestine Martinez and her husband Dan, his sister-in-law Jennifer Johns, mother-in-law, Claire Johns, father-in-law, Sonny Johns, and many aunts, uncles, cousins and personal friends close to his heart. Pat is survived by his wife of 51 years, Gail, and their two sons, Christopher Gaelen Casey and Matthew Colin Casey, nephew Gabe Johns, his wife Lizette and son Bodhi, niece Susan Martinez and husband Rick, nephew David Martinez of Santa Barbara, Calif. and their children and grandchildren in Santa Barbara. He is also survived by his first cousins, Carlos Gallegos and wife Sophia, Adelita Abeyta and other relatives. Pat received his B.A. degree from New Mexico State University and his law degree from University of Arizona. He was proud to have passed two different state bar exams, Arizona and New Mexico, within three days of each other. Pat refused two different offers of appointment to judgeships under then New Mexico Governor Jerry Apodaca. He felt he was better suited to private practice. His practice in Santa Fe concentrated on representing individuals who had been harmed or injured. It was not uncommon for him to go to court as a sole practitioner to face three or more attorneys on the other side. He was frequently stopped in public and told, "I know I should call and make an appointment, but I just have a very small tiny little question now." Pat proudly served in the Navy in South Vietnam. He was an advisor to the South Vietnamese Air Force and remained a member of different Veteran's organizations until the time of his death. He served as President of the First Judicial District Bar Association, New Mexico Trial Lawyers Association and also President of Western Trial Lawyers Association (twice). He was a Fellow of the American College of Trial Lawyers. In addition to his solo practice, he served on the Supreme Court's Uniform Jury Instructions (UJI) Committee, Rules of Evidence Committee, Disciplinary Board and the Medical Legal Committee of the New Mexico State Bar. Pat enjoyed traveling to make numerous presentations throughout the years at seminars presented by the ATLA National College of Advocacy, Western Trial Lawyers Association and NMTLA. It was important to him to mentor others in the legal profession when asked. He also found time to serve on the Santa Fe Fiesta Council, the Boards of the Santa Fe Animal Shelter and Catholic Social Services. Pat was a fierce advocate for his family, friends, clients, and anyone he thought was unfairly treated. He never met a stranger. He had an uncanny way of seeing people as they are and liking them anyway. His life was filled with laughter, crazy and sometimes silly jokes and outrageous pranks. He was not above pulling a gag or two in the courtroom or with people he just met. He was proud of his Spanish heritage and loved his first language, Spanish, especially the "dichos" of Northern New Mexico. He loved the land, change of seasons, green chile, Mora and Cleveland, New Mexico, the history of New Mexico and its peoples, his Catholic faith and Tia Sophias. A very special thank you to the many people who supported Pat and his family every day on his journey of over two years of hospital stays, assisted living residency, and hospice care. If you wish to make a charitable donation in Pat's memory, he would suggest the Wounded Warriors Project, the Santa Fe Animal Shelter, Rock Steady Boxing Program, or just make an effort to make someone laugh today.

**Benjamin Randolph Allen III (Randy)**, 63, a loving husband and father, went to be with the Lord on Sunday, Feb. 6, 2022. Randy was born July 25, 1958, in Richmond, Va. to Benjamin Randolph Allen, Jr. and Beatrice Perkins Allen. Randy is survived by his wife of 31 years, Kelley Porter Allen, and daughter, Virginia Porter Allen (Porter). Randy received a Bachelor of Science from Virginia Commonwealth University and was a graduate from St. Mary's University where he received his JD and MBA. In 1999, Randy founded his own oil and gas law practice, Allen & Associates L.L.P., which he proudly ran until his passing. As an avid businessman, Randy also founded Abstract and Title Resources, Inc., Legal Title, and Outright Bail Bonds. He also enjoyed his time on the board of the Kendall County Women's Shelter and donating to the Hill Country Youth Ranch. When not in the office, Randy was always outdoors seeking adventure. He was a passionate hunter and fisher who loved all things nature. Randy was fortunate enough to take amazing hunting trips around the world including Botswana, Tanzania, Serbia, Iceland, Spain and his favorite trips were always to Argentina dove hunting with his closest friends. Those who knew Randy knew his quick wit and sense of humor but also his unwavering loyalty. Whether Randy was attending Spurs games, at the office, with his family or hunting, he was always living life to the fullest. "Never cut what you can untie."

The **Honorable Michael E. Martinez** (Ret.) passed away on April 15, 2022. His passing was followed by a memorial service on April 30. In reflection, Scripture says, "Precious in the sight of the Lord is the death of his saints" (Psalms 116:15).

It is with deep sorrow that we announce the death of **John Theodore Palter** (Dallas, Texas), who passed away on April 2, 2022, at the age of 62, leaving to mourn family and friends. Leave a sympathy message to the family in the guestbook on this memorial page of John Theodore Palter to show support.

**Lynn Schwendiman Sharp**, age 66, passed away Dec. 13, 2021 at his home in Sandia Park, New Mexico. Born Jan. 27, 1955 to Hugh and Joan Sharp in Salt Lake City, Utah, Lynn was the second of eight children. He attended Olympus High School, then went on to study at Utah State University. He attended law school at Brigham Young University. After graduating, Lynn was recruited by the FBI and served as a sniper on the Tactical Response Team. He spent three years in the Bureau, then began his law career in Albuquerque, New Mexico at the law firm Hatch, Beitler and Allen. In 1992 Lynn opened his own firm and continued his work until his passing. Lynn was married to Barbara Burr, and had three children; Joshua, Ryan and Rachel. According to his children, he was a master of the "dad joke" and could always get a laugh with his well told stories. He had a passion for serving those less fortunate, and spent much time and energy helping the sisters and children at La Cuidad de Los Ninos orphanage in Mazatlan, Mexico. He married his beloved wife Maria Seimel May 17, 2018, and he became step father to her daughter Pilar. They lived and worked together in Albuquerque until his passing. Lynn is survived by his wife Maria, his children Joshua, Ryan, and Rachel, and his step daughter Pilar. Also survived by his siblings Leo, Lucy, Pauline Blomquist, Hal, Sue Wortley, Marcy Jenkins, and Mary Brown. In lieu of flowers, memorial donations can be made to www.corazondevida.org.

For starters, we need to think about what we want to feel differently. What is joy? What does it look like? What does it feel like? Archbishop Desmond Tutu wrote in *The Book of Joy: Lasting Happiness in a Changing World*, "It's wonderful to discover that what we want is not actually happiness… Joy subsumes happiness. Joy is the far greater thing." (Lama and Tutu, 2016, 32). This is because "joy often sits alongside suffering" (Walrond, 2021, 23). In Atlas of the Heart, Brené Brown defines joy as "an intense feeling of deep spiritual connection, pleasure, and appreciation." (Brown, 2021, 265). Happiness and joy are different. Joy is "sudden, unexpected, short-lasting, and high intensity. It's characterized by connection with others" (Brown, 2021, 264). Happiness is "stable, longer-lasting, and normally the result of effort…With happiness, we feel a sense of being in control…happiness seems more external and circumstantial" (Brown, 2021, 265). When we experience joy, "we don't lose ourselves, we become more truly ourselves" (Brown, 2021, 265). Experiences of joy can be hard to describe, and they are the experiences that we remember and carry with us through our practice. Think about when you have experienced joy and how that felt in the moment. Do you reflect on that experience when things are hard?

> *"Your talents and gifts make a difference in this community.*

A second consideration is integrity and staying rooted in our values. Our values bring us to public service, and they can carry us through our service. Walrond describes integrity as "staying the course even when it seems like things aren't getting better…it means forging your own path with your own skills and gifts" (Walrond, 2021, 68). This is hard enough to do in your personal life, let alone professionally. Brené Brown writes in *Rising Strong: The Reckoning. The Rumble. The Revolution*, "Integrity is choosing courage over comfort. It's choosing what's right over what is fun, fast or easy. It's choosing to practice your values, rather than simply professing them" (Brown, 2015, 123). You don't tackle the big problems in public service without courage. We see and work in some very harsh realities. We stick around because we're here to get it right, and we're here to tackle the big problems. Think about the values that you hold, and how you use those values to practice courage every day. Our values become the path forward. It doesn't have to be perfect, we just have to be committed "to aligning our values with our actions" every single day (Walrond, 2021, 72-73).

The last, and arguably most important consideration, is how empathy, compassion, and kindness are integral to public service and advocacy. "Compassion and empathy are superpowers…empathy and compassion usually manifest themselves…through kindness" (Walrond, 2021, 78). It is very difficult to be kind in public service because we encounter individuals and systems in crisis. We become the sounding board for their feelings and grievances. We end up on separate sides of issues in adversarial proceedings because of the individuals or entities we represent. It can feel isolating. However, kindness can be a way of "affirming our shared humanity," and connecting with people on all sides, including our co-workers (Walrond, 2021, 81). Kindness does not mean "accommodating to a fault" (Walrond, 2021, 82). You can hold someone accountable and do so in a way that does not compromise your integrity. You can mindfully listen to others with empathy. Walrond writes, "to advocate for others in an honorable way, we need to be able to look at ourselves in the mirror and like who likes back" (Walrond, 2021, 82). When we choose to act in alignment with our values by using empathy, kindness, and compassion, we can experience joy.

The experience of joy in public service ebbs and flows. Some days will be harder than others. However, we will experience joy in the most unlikely and unexpected places. There is a rhythm and a flow to this work. Some days you fight really hard, and some days you have to slow down, and settle in for the long haul. "Any moments of joy we can curate and cultivate can counterbalance the stress we face in work" (Walrond, 2021, 138). We can't fix everything all at once. "Be clear on your scope of control and influence, approach your issue with a beginner's mindset, and maintain a sense of curiosity" (Walrond, 2021, 117). Ask yourself, "what will make me feel healthy today? What will make me feel connected today? What will make me feel purposeful today?" (Walrond, 2021, 200). Do the things that you need to do to maintain your emotional, mental, and physical health to have longevity in your practice. Your talents and gifts make a difference in this community.

***Caitlin L. Dillon*** *is a prosecutor in the State of New Mexico.*

2022 "What a *Healthy Legal Community* Looks Like" Campaign

# Opinions

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

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

## Effective April 29, 2022

**PUBLISHED OPINIONS**

| | | | |
|---|---|---|---|
| A-1-CA-38632 | J McKinley v. Interinsurance Exchange of the Automobile | Affirm | 04/25/2022 |
| A-1-CA-38977 | OR&L Construction v. Mountain States Mutual | Affirm | 04/25/2022 |
| A-1-CA-39044 | D McGarrh v. State | Affirm/Reverse | 04/26/2022 |

**UNPUBLISHED OPINIONS**

| | | | |
|---|---|---|---|
| A-1-CA-38956 | Sacred Garden Inc. v. New Mexico Department of Health | Affirm | 04/25/2022 |
| A-1-CA-39449 | State v. J Parrish | Affirm | 04/25/2022 |
| A-1-CA-39936 | State v. O Skeen | Affirm | 04/25/2022 |
| A-1-CA-38000 | State v. G Fazio | Affirm | 04/26/2022 |
| A-1-CA-39896 | M Rorabeck v. NM State Fire Marshal | Affirm | 04/26/2022 |
| A-1-CA-38946 | State v. C Mooney | Reverse/Remand | 04/27/2022 |
| A-1-CA-40143 | In re Adoption Petition of Christian V. | Affirm/Reverse/Remand | 04/28/2022 |
| A-1-CA-38250 | State v. Y Martinez | Affirm/Reverse/Remand | 04/29/2022 |
| A-1-CA-40159 | State v. M Cooper | Affirm | 04/29/2022 |

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

From the New Mexico Supreme Court

**Opinion Number: 2022-NMSC-008**
No: S-1-SC-37722 (filed December 16, 2021)

STATE OF NEW MEXICO,
Plaintiff-Respondent,
v.
BRIAN ADAMS,
Defendant-Petitioner.

**ORIGINAL PROCEEDING ON CERTIORARI**
Daylene Marsh, District Judge

Released for Publication March 1, 2022.

Bennett J. Baur, Chief Public Defender
Caitlin C.M. Smith, Assistant Appellate Defender
John Charles Bennett, Assistant Appellate Defender
Santa Fe, NM

for Petitioner

Hector H. Balderas, Attorney General
John Kloss, Assistant Attorney General
Santa Fe, NM

for Respondent

## OPINION

### VIGIL, Chief Justice.

{1} This case is one of six cases arising under very similar fact patterns.[1] In each case, an "emergency department technician," also licensed as an emergency medical technician (EMT), performed a blood draw test at San Juan Regional Medical Center in Farmington for the purpose of a DWI investigation. The defendants in these cases argue that "emergency department technicians" are not qualified to draw blood under the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2019). Thus, this case presents an issue of statutory construction. Specifically, whether an emergency department technician, licensed as an EMT, with training and experience in drawing blood is authorized to perform legal blood draw tests as a "laboratory technician" under NMSA 1978, Section 66-8-103 (1978), which states, "[o]nly a physician, licensed professional or practical nurse or laboratory technician or technologist employed by a hospital or physician shall withdraw blood from any person in the performance of a blood-alcohol test."[2] As explained herein, we conclude that such medical professionals are qualified to draw blood under the statute so long as they were employed to do so by a hospital or physician and have adequate training and experience.

### I. BACKGROUND

{2} After receiving a report of a drunk driver, a Farmington police officer was dispatched to a local gas station. Upon arriving at the gas station, the police officer found Defendant inflating his car tires. The officer noticed that Defendant's legs were shaking, his eyes were bloodshot, and his speech was slurred. The officer conducted a number of field sobriety tests with Defendant. In performing the tests, Defendant failed to follow directions, swayed back and forth, and struggled to maintain balance. Defendant told the officer that he drank whiskey and took Xanax and Suboxone pills earlier that day.

{3} The officer arrested Defendant for DWI. Pursuant to the Implied Consent Act,[3] the officer then drove Defendant to the San Juan Regional Medical Center in Farmington for a blood test to determine the drug and alcohol content of Defendant's blood. When they arrived, the officer unsealed a Scientific Laboratory Division (SLD) blood draw kit in the presence of emergency department technician and licensed EMT Danica Atwood. He then requested that Atwood draw Defendant's blood using the SLD blood draw kit. An SLD-approved blood draw kit includes

> everything that is needed for a blood draw to ensure continuity and standardization, and to avoid compromising the accuracy and integrity of blood samples. [It] contain[s] instructions, paperwork, an iodine cleaning pad, a needle with attached tube, and two gray-topped, sterile vacuum tubes containing sodium fluoride—a white powder preservative."

*State v. Garcia*, 2016-NMCA-044, ¶ 4, 370 P.3d 791. Defendant then signed the proper paperwork consenting to the procedure, and Atwood drew two vials of blood. The officer placed the vials into the SLD blood draw kit and sealed it in front of Atwood. The officer then submitted Defendant's blood samples for testing by the SLD of the New Mexico Department of Health. The test results revealed that Defendant's blood was negative for alcohol but positive for marijuana-related metabolites, benzodiazepines, and synthetic opioids.

[1] The remaining five cases have been held in abeyance pending the outcome of this case. State v. Garcia, S-1-SC-37719; State v. Riley, S-1-SC-37721; State v. Talk, S-1-SC-37727; State v. Harrison, S-1-SC-37774; State v. Jaramillo, S-1-SC-37775.

[2] The Administrative Code additionally states that "[t]he term laboratory technician shall include phlebotomists." 7.33.2.15 (A)(1) NMAC.

[3] The Implied Consent Act states that

> [a]ny person who operates a motor vehicle within this state shall be deemed to have given consent, subject to the provisions of the Implied Consent Act . . . to chemical tests of his breath or blood or both . . . as determined by a law enforcement officer, or for the purpose of determining the drug or alcohol content of his blood if arrested for any offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while under the influence of an intoxicating liquor or drug.

Section 66-8-107(A).

{4} The State charged Defendant with one count of DWI contrary to NMSA 1978, Section 66-8-102 (2016). In magistrate court, Defendant moved to suppress the blood test results on the basis that Atwood was not qualified to draw blood under Section 66-8-103. The magistrate judge denied Defendant's motion to suppress. Defendant pleaded no contest, reserving his right to appeal the magistrate court's decision.

{5} Defendant then appealed to the district court, which held an evidentiary hearing to determine the issue. After the hearing, the district court granted Defendant's motion to suppress the blood test results because it concluded that Atwood was not qualified to draw blood under the statute. The district court explained that it was bound by the New Mexico Court of Appeals holding in *Garcia*, 2016-NMCA-044, ¶ 20, "that a person's 'license as an EMT does not qualify her to draw blood to determine its alcohol or drug content under the Implied Consent Act.'"

{6} Following the district court's ruling, the State appealed the issue to the Court of Appeals. The Court of Appeals reversed the district court's order and held that the blood test should not have been excluded. *State v. Adams,* 2019-NMCA-043, ¶¶ 1, 29, 447 P.3d 1142. The Court of Appeals explained that *Garcia* stands for the proposition that an EMT license *alone* does not qualify an employee like Atwood to draw blood for legal blood tests. *Id.* ¶ 20. Here, however, the Court of Appeals clarified that Atwood was qualified as a laboratory technician under Section 66-8-103 because she held an EMT license in addition to having experience and training in drawing blood. *Id.* ¶¶ 21, 29. The Court of Appeals held "that an individual qualifies as a laboratory technician, despite her official title, if she has sufficient skills, training, and experience to assure a hospital or physician that she is qualified to perform blood draws in accordance with approved medical practice." *Id.* ¶ 28. Accordingly, the Court of Appeals concluded that even though "Atwood did not have the title 'laboratory technician,' or work in a laboratory," she was a laboratory technician under the statute because of her "assigned duties, skills, training, and experience." *Id. ¶¶ 28, 29*

{7} Defendant appealed the Court of Appeals ruling, and we granted certiorari to resolve the issue of which medical professionals qualify to draw blood as a "laboratory technician" under Section 66-8-103. With this opinion, we affirm the Court of Appeals but write to clarify that, in order for a medical professional to qualify as a laboratory technician for the purposes of performing legal blood draws, the person must be employed by a hospital or physician to perform blood draws, trained to perform legal blood draws, and have on-the-job experience in doing so.

## II. DISCUSSION

{8} We begin by addressing the statutory construction issue and then turn to the issue of whether the district court abused its discretion in suppressing the blood test results.

### A. Statutory Construction

{9} We must first determine the statutory interpretation of the words "laboratory technician" in Section 66-8-103. Statutory construction is a matter of law that is reviewed de novo. *State v. Almanzar*, 2014-NMSC-001, ¶ 9, 316 P.3d 183. In engaging in statutory construction, our "primary goal is to ascertain and give effect to the intent of the Legislature." *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868.

{10} In conducting a statutory construction analysis, we begin by considering the plain meaning of the statute. We "look to the plain language of the statute to determine if the statute can be enforced as written." *State v. Padilla*, 2008-NMSC-006, ¶ 7, 143 N.M. 310, 176 P.3d 299. When words are not otherwise defined in a statute, we "giv[e] those words their ordinary meaning absent clear and express legislative intention to the contrary." *State v. Johnson*, 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d 863 (internal quotation marks and citation omitted). To do so, we consult common dictionary definitions. *See State v. Boyse*, 2013-NMSC-024, ¶ 9, 303 P.3d 830. "A statute must be construed so that no part of the statute is rendered surplusage or superfluous." *Katz v. N.M. Dep't of Hum. Servs.*, 1981-NMSC-012, ¶ 18, 95 N.M. 530, 624 P.2d 39. "Unless ambiguity exists, this Court must adhere to the plain meaning of the language." *State v. Maestas*, 2007-NMSC-001, ¶ 14, 140 N.M. 836, 149 P.3d 933. "A statute is ambiguous when it can be understood by reasonably well-informed persons in two or more different senses." *Maestas v. Zager*, 2007-NMSC-003, ¶ 9, 141 N.M. 154, 152 P.3d 141 (internal quotation marks and citation omitted).

{11} Section 66-8-103 requires that "[o]nly a physician, licensed professional or practical nurse or laboratory technician or technologist employed by a hospital or physician shall withdraw blood from any person in the performance of a blood-alcohol test." We must interpret the Legislature's intended definition of a "laboratory technician" as it is used in this statute. As the Court of Appeals correctly stated, "[t]here is no statutory or regulatory definition of 'laboratory technician'" and "New Mexico courts have not previously addressed the requirements for qualification as a laboratory technician under Section 66-8-103." *Adams*, 2019-NMCA-043, ¶¶ 26-27. Turning to dictionary definitions, the Court of Appeals noted that *Merriam-Webster's Collegiate Dictionary* defines a technician as "'one who has acquired the technique of an . . . area of specialization.' *Technician*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003)." *Id.* ¶ 26 (omission in original). Finding no clear meaning from the plain language of the statute, the Court of Appeals proceeded to consider the legislative purpose in its construal of the term "laboratory technician." *See id.* ¶ 28.

#### 1. The plain meaning of Section 66-8-103 is ambiguous

{12} Defendant argues that the Court of Appeals should have adhered more closely to the plain meaning of the statute before consulting other sources of statutory interpretation. According to Defendant, the Court of Appeals improperly strayed from the plain meaning of the statute by holding that medical professionals without laboratory experience can be "laboratory technicians" under the statute. *See id.* ¶ 29. Citing to a number of sources defining "laboratory technician," Defendant insists that the ordinary definition of the term "laboratory technician" requires actual laboratory experience, a background in laboratory science, or laboratory skills beyond the skill of drawing blood itself. Defendant asserts that the use of the term "laboratory technician" in the statute means that the Legislature intended the employee drawing blood to have had laboratory experience. To hold otherwise, Defendant argues, would be to render the word "laboratory" superfluous.

{13} The State, quoting *City of Eunice v. N.M. Tax'n & Revenue Dept.*, 2014-NMCA-085, ¶ 14, 331 P.3d 986, agrees with Defendant that "[i]n the absence of a statutory definition, [the Court] rel[ies] on a dictionary definition to determine the meaning of the language used." However, the State focuses on the word "technician," rather than "laboratory," emphasizing that, in order to be a technician, a person must have acquired a certain technique around an area of specialization. Specifically, the State cites literature from the Department of Labor, which says, "technicians and technologists perform tests and procedures that physicians and surgeons or other healthcare personnel order."

{14} The State argues that Atwood meets this definition of a "technician" because she was trained and employed to perform specialized tasks for which she utilized technical processes and methods that involved the practical application of specified knowledge. For that reason, the State concludes Atwood was qualified to draw blood under the statute as a phlebotomist, a laboratory technician, or a technologist employed by a hospital.

We note that Atwood herself refuted the contention that she was a phlebotomist and that the evidence does not support an inference that she was a technologist employed by the hospital. We therefore limit our analysis to the plain meaning of "laboratory technician."

{15} We agree with the State that the term "laboratory technician" is ambiguous on its face. This term can be reasonably understood to have more than one meaning, as is evident from the parties' conflicting but reasonable interpretations of the word "technician." Because the Court of Appeals proceeded to address the legislative purpose of the statute, it must have similarly concluded that the plain language does not answer the question presented. Like the Court of Appeals, we turn to address the legislative purpose of the statute's requirement that a person qualified to perform a legal blood draw must be a "laboratory technician."

**2. Allowing EMTs with adequate training and experience in drawing blood to perform legal blood draws is consistent with the legislative purpose of the statute**

{16} Though looking at the plain language of the statute is the first step in statutory construction analysis, this Court has made clear that we "will not be bound by a literal interpretation of the words if such strict interpretation would defeat the intended object of the [L]egislature." *Padilla*, 2008-NMSC-006, ¶ 10 (internal quotation marks and citation omitted). If statutory language "is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity, or contradiction, the court should reject the plain meaning rule in favor of construing the statute according to its obvious spirit or reason." *Id.* ¶ 7 (internal quotation marks and citation omitted). "[L]egislative intent is [this Court's] touchstone when interpreting a statute." *Id.* ¶ 10.

{17} Defendant argues that, by allowing EMTs with training and experience in drawing blood to perform legal blood draws, the Court of Appeals violated the Legislature's intent to authorize blood draws by only limited categories of qualified medical professionals. Defendant says that under Section 66-8-103, in order to be qualified to draw blood, a medical professional must fit under one of the five categories outlined in the statute regardless of how much training or experience the medical professional might have. An EMT, Defendant concludes, does not fall within any of the five enumerated categories.

{18} In its opinion, the Court of Appeals stated, "an individual qualifies as a laboratory technician . . . if she has sufficient skills, training, and experience to assure a hospital or physician that she is qualified to perform blood draws in accordance with approved medical practice." *Adams*, 2019-NMCA-043, ¶ 28. Because the Legislature specifically listed which medical professionals are permitted to draw blood under the statute, Defendant challenges the deference of the Court of Appeals to the opinion of doctors and hospitals to determine who is qualified as a laboratory technician. Defendant asserts that such an interpretation results in the term "laboratory technician" no longer meaning a skilled analyst working in a laboratory, as the plain language indicates, but rather any person who draws blood in a hospital.

{19} Defendant states that if the Legislature had wanted to defer to hospitals to make this decision, it could have so indicated in the statute, but it did not do that. In fact, Defendant thinks that the Legislature did the opposite and tried "to avoid a case-by-case determination about who may draw blood from any particular defendant." Defendant explains that this is demonstrated by the fact that the five categories laid out in Section 66-8-103 fit into two broader categories: (1) medical professionals who are highly educated, such as doctors and nurses, and (2) "laboratory personnel who do extensive work with blood draws and blood analysis." Defendant states that the Legislature could have added a catchall category but did not do so; therefore, the Court of Appeals should not have inserted one.

{20} Defendant further argues, quoting *Garcia*, that the plain language of the statute reveals the legislative intent of the statute, which is "'to insure the safety and protection of the person whose blood is drawn.'" *See Garcia*, 2016-NMCA-044, ¶ 24. Defendant asserts that the Legislature meant to protect patients from having blood drawn by people with inadequate training. Defendant argues that the distinction the Legislature drew to protect the safety of patients is one of credentials, not individual skill level.

{21} In response, the State asks us to extend our analysis beyond the plain meaning of the statutory language to interpret the statute in light of its legislative purpose. Quoting *State v. Wiberg*, 1988-NMCA-022, ¶ 13, 107 N.M. 152, 154 P.2d 529, the State argues that rather than focusing on the lack of an exact match between Atwood's job title and the categories listed in the statute, we should interpret the statute in a way that better "'accomplish[es] the legislative purpose of deterring drunk drivers and aid[s] in discovering and removing the intoxicated driver from the highways.'"

{22} We agree with the State that a strict plain language interpretation is not appropriate in this case. We must analyze the statute through the lens of the Legislature's intended purpose, which we conclude encompasses two goals: (1) to protect patients subject to a blood draw and (2) to ensure the collection of a reliable blood sample for use in DWI prosecutions. Contrary to Defendant's argument, requiring a laboratory technician to have explicit laboratory experience does not achieve these purposes. *See Wiberg*, 1988-NMCA-022, ¶ 14 (listing the purpose of Section 66-8-103 as safety of subject and reliability of sample). Experience working in a laboratory, in and of itself, does not guarantee that a particular medical professional has the necessary skills and qualifications to draw blood safely and reliably. Therefore, we decline to adopt a narrow interpretation of "laboratory technician" to refer to only those professionals who work in a laboratory. Such an interpretation would exclude medical professionals with extensive training and expertise in routinely drawing blood in a medical setting thus defeating the legislative purpose of the statute.

{23} We must construe Section 66-8-103 consistent with "its obvious spirit or reason." *Padilla*, 2008-NMSC-006, ¶ 7 (internal quotation marks and citation omitted). Analysis of prior Court of Appeals opinions indicates that the statute should be broadly interpreted to permit blood draws by qualified medical professionals, even if those professionals are not explicitly identified in the statute. This conclusion is consistent with previous decisions of the Court of Appeals, where that Court interpreted the statute to broaden, not narrow, the category of individuals authorized to draw blood. This analytical approach better meets the goal of the statute.

{24} In *State v. Trujillo*, the Court of Appeals addressed the issue whether a medical professional, trained and experienced in drawing blood but lacking a license, was authorized to draw blood as a "technologist" under the statute. 1973-NMCA-076, ¶ 15, 85 N.M. 208, 510 P.2d 1079. The Court of Appeals held that "the statute [wa]s ambiguous" as to whether "the Legislature intend[ed] that a technologist be licensed[.]" *Id.* ¶¶ 17-18. The Court then pursued "the legislative intent by applying rules of construction." *Id.* ¶ 17. Reasoning that because (1) the Court presumes that the Legislature knows the existing law, (2) the Court should not adopt statutory constructions that lead to absurd results, and (3) the Court should construe statutes according to the purpose for which they were enacted, the Court held that the Legislature did not intend to require that a technologist be licensed. *Id.* ¶¶ 18-22.

{25} In reaching this conclusion, the Court declared the public policy underlying the statute.

"One purpose is to deter driving while intoxicated. Another purpose is to aid in discovering and removing from the highways the intoxicated driver. . . . To hold that a technologist must be licensed when there are no provisions for a license, would defeat the purpose of discovering . . . the intoxicated driver." *Id.* ¶ 21 (omissions in original) (internal quotation marks and citation omitted).

{26} In *Wiberg*, the Court of Appeals considered whether a nurse who was not employed by a hospital or physician but by an Albuquerque Police Department contractor was qualified to draw blood for a blood-alcohol test under Section 66-8-103. 1988-NMCA-022, ¶¶ 2, 5. The Court held that the nurse was qualified under the statute because "[t]he requirement of employment by a hospital or physician applies only to 'technologists.'" *Id.* ¶¶ 8, 9. The Court of Appeals reasoned that the last antecedent doctrine

> provides that relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote. Here, the qualifying words are "employed by a hospital or physician." We apply that phrase to the preceding term "technologist" but not to the more remote terms.

*Id.* ¶ 11 (citation omitted).

{27} The Court of Appeals recognized that its interpretation of this statute should not "significantly and unnecessarily limit the classes of individuals who could assist in furthering the statute's legislative purpose" so as to not "needlessly impose burdens on the discovery and removal of the intoxicated driver and, thus, thwart the legislative policy." *Id.* ¶¶ 13, 15. The Court stated that its holding was consistent with the "purpose of Section 66-8-103, that is, the safety of the subject and the reliability of the sample." *Id.* ¶ 14.

{28} The Court of Appeals addressed a similar issue in *Garcia*. The issue in *Garcia* was "whether an [EMT was] authorized to draw blood for the purpose of determining its alcohol or drug content under the Implied Consent Act." 2016-NMCA-044, ¶ 1. The facts were as follows. While in an ambulance on the way to the hospital, a police officer handed the on-duty EMT an SLD blood draw kit and asked her to draw a blood sample from the defendant. *Id.* ¶¶ 3-4. The EMT agreed and drew blood from the defendant; however, she did not perform the blood draw according to the SLD blood draw procedures because she used the wrong needle to extract the blood sample. *Id.* ¶ 5. The district court suppressed the results of the blood test because the blood draw was improperly performed and the EMT was not qualified. *Id.* ¶¶ 7, 25.

{29} The Court of Appeals reasoned that

> [b]lood draws to determine the content of alcohol or drugs in blood under the Implied Consent Act [did] not fall under the scope [of the EMT's] license . . . . Moreover, her training . . . [did] not include the protocols for performing blood draws that comply with the Scientific Laboratory Division regulations of the Department of Health under the Implied Consent Act.

*Id.* ¶ 22. The Court of Appeals concluded:

> [The d]efendant's blood was drawn by a person who was not qualified to do so, and in accordance with our analysis, the district court properly suppressed the test results on this basis. Section 66-8-103 has a two-fold purpose: to insure the safety and protection of the person whose blood is drawn; and to insure the reliability of the sample. Compliance with Section 66-8-103 advances both of these purposes.

*Id.* ¶ 24 (citation omitted).

{30} In *Garcia*, the Court of Appeals stated that neither the EMT's training nor her "certification . . . authorize[d] her to draw blood for the purpose of determining its alcohol or drug content." *Id.* ¶ 22. In contrast, here, it was Atwood's EMT certification *in addition* to her training and experience that qualified her to draw Defendant's blood.

{31} Atwood's testimony at the district court evidentiary hearing made clear that she was qualified to draw blood for purposes of determining drug and alcohol content. An exhibit detailing Atwood's official job description stated that one of her duties as an "EMT-B/ER Tech" was to "perform[] legal blood-alcohol blood draws at the request of law enforcement personnel." Atwood testified that she was taught how to perform blood draws by other nurses and technicians. She said that before she was allowed to perform blood draws on her own, there was a six-week orientation period during which another employee supervised her work.

{32} Atwood further testified that she had worked for San Juan Regional Medical Center for over a year and during that time had performed "hundreds or thousands" of blood draws. She said that during her most recent hospital shift, she performed twenty-five blood draws. Atwood explained that most of the blood samples she takes from patients are sent to the hospital laboratory and a few go to the police for testing. She then explained the difference between conducting a blood draw for the hospital laboratory versus for the police. She was able to describe the differences between the two processes in detail. At the close of the hearing, Defendant's attorney agreed that, in Defendant's case, Atwood did everything in accordance with the instructions from the sealed blood draw kit and the training that she had received.

{33} Atwood stated during the hearing that she had never worked in a laboratory and did not have any laboratory experience. However, based on what happened in this case, it is clear that her lack of laboratory experience did not prevent her from learning how to properly administer a legal blood draw test under the SLD procedures. Through her training and actual experience in conducting blood draws at the hospital, she developed and practiced the proper technique to perform this procedure.

{34} Prohibiting medical professionals who possess such training in this area from administering blood draws would "needlessly impose burdens on the discovery and removal of the intoxicated driver and, thus, thwart the legislative policy." *Wiberg*, 1988-NMCA-022, ¶¶ 13, 15. Allowing EMTs who, along with their certification, have the training and experience in the skill of drawing blood to perform legal blood draw tests and who are employed by a hospital or physician to do so, furthers the purpose of the statute to ensure the safety of the patient and the reliability of the blood sample. *See Steere Tank Lines, Inc. v. Rogers*, 1978-NMSC-049, ¶ 6, 91 N.M. 768, 581 P.2d 456 (concluding the purpose of Section 66-8-103 is two-fold: (1) to insure the safety and protection of the person being tested and (2) to insure reliability of the sample). It is the Court's responsibility to resolve any ambiguity in Section 66-8-103 in a way that supports the legislative purpose to "deter driving while intoxicated" and "aid in discovering and removing from the highways the intoxicated driver." *Trujillo*, 1973-NMCA-076, ¶ 21 (internal quotation marks and citation omitted). Therefore, consistent with the legislative purpose of this statute, we interpret the statute as allowing EMTs who are employed by a hospital or physician and who possess the proper education and experience to perform blood draws as "laboratory technician[s]." *See* § 66-8-103.

**B. Abuse of Discretion**

{35} Next, we turn to the question of whether the district court abused its discretion by suppressing Defendant's blood test results. "[A] court abuses its discretion if it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." *State v. Sena*, 2020-NMSC-011, ¶ 15, 470 P.3d 227 (internal quotation marks and citation omitted).

"The standard of review for suppression rulings is whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party." *State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted).

{36} As we discussed above, Defendant argues that the district court properly interpreted *Garcia*, 2016-NMCA-044, and correctly applied the law to the facts. The State, on the other hand, argues that the district court misinterpreted *Garcia* and misapplied Section 66-8-103 and therefore abused its discretion in excluding the blood test results.

{37} Based on the foregoing statutory construction analysis, we conclude that the Court of Appeals and the State are correct in their interpretation of the law. It follows then that the district court did indeed abuse its discretion by misinterpreting the law when it suppressed Defendant's blood test results from evidence. Therefore, the Court of Appeals, *Adams*, 2019-NMCA-043, ¶ 34, correctly remanded the case to the district court with instructions for it to render a decision consistent with an accurate interpretation of the law as set forth in its opinion.

**III. CONCLUSION**

{38} We affirm the Court of Appeals.

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

**MICHAEL E. VIGIL, Chief Justice**

**WE CONCUR:**

**C. SHANNON BACON, Justice**

**DAVID K. THOMSON, Justice**

**JULIE J. VARGAS, Justice**

From the New Mexico Supreme Court

**Opinion Number: 2022-NMSC-009**
No: S-1-SC-37589 (filed January 10, 2022)

STATE OF NEW MEXICO,
Plaintiff-Respondent,
v.
SOMER D. WRIGHT,
Defendant-Petitioner.

**ORIGINAL PROCEEDING ON CERTIORARI**
**Matthew G. Reynolds, District Judge**

Released for Publication March 1, 2022.

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for Respondent

## OPINION

## VIGIL, Chief Justice.

{1} Our Legislature has directed, "No person shall be arrested for violating the Motor Vehicle Code or other law relating to motor vehicles punishable as a misdemeanor except by a commissioned, salaried peace officer who, at the time of arrest, is wearing a uniform clearly indicating the peace officer's official status." NMSA 1978, § 66-8-124(A) (2007). We held in *State v. Slayton* that an arrest by a police service aide in violation of Section 66-8-124(A) did not, by itself, amount to a per se violation of the Fourth Amendment to the United States Constitution. *See* 2009-NMSC-054, ¶¶ 1, 33, 147 N.M. 340, 223 P.3d 337. In this case, we are asked to determine whether the arrest of Defendant Somer D. Wright by a noncommissioned, volunteer reserve deputy in violation of the statute was constitutionally unreasonable and therefore in violation of Article II, Section 10 of the New Mexico Constitution. Disagreeing with the opinion of a divided Court of Appeals panel holding that there was no constitutional violation, *State v. Wright*, 2019-NMCA-026, ¶¶ 6, 13, 19, 458 P.3d 604, we reverse.

{2} We hold that the failure to observe the requirements of Section 66-8-124(A) resulted in an illegal arrest of Defendant and violated Article II, Section 10 of the New Mexico Constitution. Suppression of all evidence obtained as a result of the arrest is therefore required. In reversing the Court of Appeals we reiterate that reviewing courts are to give sufficient deference to the findings of fact of our trial courts and not reweigh evidence on appeal. *See State v. Martinez*, 2018-NMSC-007, ¶¶ 13, 18, 410 P.3d 186 ("[T]he Court of Appeals erred by reweighing the evidence on appeal and failing to view the facts in the manner most favorable to the prevailing party.")

### I. BACKGROUND

### A. Factual History

{3} Torrance County Reserve Deputy Roy Thompson testified that around midnight on March 15, 2014, he noticed two vehicles approaching him from behind as he drove south on Highway 41, in uniform and in a marked patrol vehicle belonging to the Torrance County Sheriff's Office. The first vehicle to approach Thompson was a white Dodge truck (Defendant's truck), and the second was a green truck. Thompson testified that the headlights of Defendant's truck appeared to be "going back and forth." Thompson testified that he pulled off the highway, allowing the vehicles to pass, and that as Defendant's truck passed, it crossed the solid white line on the edge of the roadway, nearly striking Thompson's patrol vehicle. Thompson reentered the highway and accelerated to catch Defendant's truck, going as fast as eighty miles per hour on a fifty-five-mile-per-hour stretch of the highway. Thompson testified that during the pursuit, Defendant's truck was weaving repeatedly in the roadway from the center line to the edge line.

{4} While following Defendant, Thompson called Torrance County Sheriff's Deputy Ron Fulfer. Deputy Fulfer instructed Thompson to follow Defendant's truck and told Thompson that he would be "right there." Also while driving, Thompson ran Defendant's license plate number and confirmed that Defendant was the owner of the truck. Thompson did not initiate a stop or activate his emergency lights or equipment. Defendant drove to her residence and pulled into her driveway where she hit a parked car, causing paint transfer. Thompson parked his patrol vehicle, parallel to the property, on the street, behind Defendant's truck. After Defendant hit the car parked in her driveway, she placed her truck in reverse, "backed up pretty far," and "almost" hit Thompson's patrol vehicle as well.

{5} Thompson got out of his patrol vehicle and turned his spotlight on Defendant's truck. Thompson approached Defendant's truck and identified himself as "Reserve Deputy Thompson with the Torrance County Sheriff's Department." "He was dressed in a uniform, displaying a badge of office stating 'Deputy R. Thompson' embroidered onto his shirt." Thompson noticed a "strong odor of alcohol" and asked Defendant if she had been drinking. Defendant stated that she had drunk "four green beers." Thompson told Defendant that he saw her strike the vehicle in her driveway and that she almost backed into his patrol vehicle. Thompson then "asked" Defendant to "hang tight . . . because [he] had another deputy en route." Defendant was not restrained, but Thompson told her to remain in her truck. Defendant obeyed Thompson's order and remained in her truck for four or five minutes until Deputy Fulfer arrived.

{6} Upon arriving at Defendant's house, Deputy Fulfer met with Thompson. Deputy Fulfer then walked to the parked car in front of Defendant's truck and noticed a "small white scratch on the rear bumper." Next, Deputy Fulfer went to the driver's side of Defendant's truck and asked Defendant for her driver's license, which Defendant produced after Deputy Fulfer repeated his request a second time. Deputy Fulfer asked Defendant whether she had been drinking. After Defendant confirmed that she had been drinking, Deputy Fulfer asked Defendant to perform field sobriety tests, which Defendant failed.

Defendant refused to blow into Deputy Fulfer's portable breath tester. Deputy Fulfer arrested Defendant for "driving under the influence of intoxicating liquor or drugs." Subsequently, Defendant had two blood-alcohol-content tests administered at the Torrance County Sheriff's office, for which the "results were .18 and .18."

{7} Defendant was charged with first-offense aggravated driving while intoxicated (DWI), NMSA 1978, § 66-8-102(D)(1), (E) (2016), a misdemeanor, which was later amended to DWI (first offense), *see* § 66-8-102(C)(1), (E).

**B. Procedural History**

**1. District court hearing and order**

{8} Defendant filed a motion to suppress in the district court, "arguing that volunteer Reserve Deputy Roy Thompson's detention of [Defendant] was illegal and [therefore] suppression of the evidence obtained as a result of that illegal detention was warranted under the Fourth Amendment and Article II, Section 10 of the New Mexico Constitution." In response, the State argued that any unlawful detention which occurred did not rise to the level of a Fourth Amendment violation under *Slayton*, 2009-NMSC-054. The State further asserted that any unlawful detention was "in furtherance of an important interest" and was "too brief" to have been "an unreasonable seizure under Article II, Section 10 of the New Mexico Constitution." Specifically, the State argued that the "volunteer deputy had acted as any reasonable citizen would when confronted with a person suspected of driving under the influence of intoxicating liquor, making his conduct constitutionally reasonable" under Article II, Section 10.

{9} In addition to testifying about the stop as described above, Thompson testified about his credentials. Thompson stated that "he had been a volunteer reserve deputy with the Torrance County Sheriff's Department for fifteen to sixteen years" but that he was not a "commissioned, salaried peace officer."

{10} In cross-examination, defense counsel questioned Thompson about two prior cases in which evidence had been suppressed as a result of Thompson's conduct. In one case, Thompson initiated a traffic stop for careless driving and, on appeal from the magistrate court, the seizure of the defendant was held to be illegal and unreasonable. However, Thompson said he did not remember why the evidence was suppressed. The second case involved Thompson detaining someone at a rest stop, and Thompson remembered that in that case some part of the evidence was suppressed. Following Thompson's testimony, the State conceded that Thompson lacked statutory authority to detain Defendant.

{11} After the parties filed their respective requested findings of fact and conclusions of law, the district court filed its findings of fact and conclusions of law. The district court concluded that Thompson arrested Defendant when he ordered her "to stay put" in her truck until Deputy Fulfer arrived and that the arrest was contrary to Section 66-8-124(A) and resulted in an illegal detention because Thompson was not a "'commissioned, salaried peace officer.'" The district court further concluded that based on the totality of the circumstances, "but for the illegal detention, Defendant would have gone inside her house before [Deputy Fulfer] arrived four to five minutes after the illegal detention," and whether "Defendant would have opened the door for" Deputy Fulfer, or whether Deputy Fulfer would have attempted to obtain an arrest warrant or enter Defendant's home without permission, was all speculative. The district court therefore concluded that "Thompson's illegal detention of Defendant violated Article 2, Section 10 of the New Mexico Constitution" and that evidence obtained after Deputy Fulfer arrived on the scene should be suppressed. An order suppressing this evidence was then filed. The State appealed to the Court of Appeals.

**2. Court of Appeals opinion**

{12} A divided panel of the Court of Appeals reversed the district court's suppression order. *Wright*, 2019-NMCA-026, ¶¶ 3, 19. Addressing the Article II, Section 10 argument, the majority acknowledged that there is no bright-line rule for determining constitutional reasonableness of searches and seizures in New Mexico and concluded that an examination of the officer's actions under the circumstances of each case is needed. *Wright*, 2019-NMCA-026, ¶ 11. To analyze the reasonableness of Thompson's actions, the majority used the balancing-of-interest test outlined in *State v. Rodarte*, 2005-NMCA-141, 138 N.M. 668, 125 P.3d 647, and *State v. Bricker*, 2006-NMCA-052, 139 N.M. 513, 134 P.3d 800. *Wright*, 2019-NMCA-026, ¶¶ 11, 13. That test required the Court "to evaluate, on the one hand, the degree to which the seizure intruded upon Defendant's privacy and, on the other, the degree to which the seizure was needed for the promotion of legitimate governmental interests." *Id.* ¶ 13 (brackets, internal quotation marks, and citation omitted).

{13} The majority first determined that "[u]nder the totality of the circumstances, the intrusion on Defendant's privacy was minimal." *Id.* The majority then reasoned that the State's interest in keeping drunk drivers off the roadway "far outweighed whatever brief, minimal privacy intrusion that Defendant may have experienced." *Id.* ¶ 14. Moreover, the majority concluded that exigent circumstances justified the temporary detention because Defendant might have tried to drive away, or alternatively she might have gone into her home and then refused to come out when Deputy Fulfer arrived, thereby allowing for the dissipation of alcohol otherwise detectable through testing. *Id*. Applying the balancing test in this manner and using facts different from those found by the district court, the majority held "that Thompson's temporary detention of Defendant was constitutionally reasonable." *Id*. ¶ 13. The majority therefore reversed the order of the district court. *Id.* ¶ 19.

{14} Dissenting, Judge Vargas agreed that the State had "a compelling interest in deterring drunk driving and maintaining highway safety." *Id.* ¶ 21 (Vargas, J., dissenting). However, adhering to the factual findings of the district court, the dissent disagreed with the majority proposition that Defendant's detention was "'minimal'" as the detention prevented Defendant from going into her own home. *Id*. ¶ 23 (Vargas, J., dissenting). The dissent concluded that the majority failed to properly balance the interest of the public "to be free from arrest by untrained citizens," expressed by legislation directing who can make a traffic stop, and the interest of the public requiring police officers and their volunteers to comply with that law. *Id*. ¶¶ 24-25 (Vargas, J., dissenting). Finally, the dissent noted the majority concession to Thompson's testimony that he did not believe Defendant intended to flee, and the dissent disagreed that exigent circumstances arose from the dissipation of alcohol as but one of the considerations that applies to a reasonableness analysis. *Id*. ¶ 26 (Vargas, J., dissenting). On balance, the dissent agreed with the district court's conclusion that "Thompson's actions were constitutionally unreasonable under Article II, Section 10." *Id*. ¶ 21 (Vargas, J., dissenting).

**II. DISCUSSION**

{15} We granted certiorari on two questions. First, "Did the statutory violation of Section 66-8-124(A) which occurred in this case constitute a violation of [Defendant's] rights under Article II, Section 10 so as to warrant suppression of evidence against [Defendant]?" Second, "In concluding that suppression was not warranted, did the Court of Appeals [m]ajority [o]pinion show sufficient deference to the district court's factual findings or properly balance the privacy and societal interests embodied by Section 66-8-124(A)?"

{16} Defendant argues that the seizure was unreasonable under Article II, Section 10 of the New Mexico Constitution and, as a result of Defendant's unlawful detention, the evidence obtained should be suppressed.

Defendant argues that "the majority did not accord the violation of the statute in this case any significance though it too protects important privacy interests from government overreach."

{17} Defendant also asserts that the majority erred in substituting its factual findings for those of the district court. Specifically, Defendant proffers three examples where the majority failed to give deference. "First, the majority did not defer to the district court's conclusion that Thompson had a history of overstepping his authority even though it was based on testimony the district court had observed and involved a credibility determination the district court was entitled to make." Second, contrary to the factual findings of the district court, the majority determined that Defendant "presented an ongoing danger because she might have driven off again after arriving at her home." Third, "the majority erred in rejecting the district court's finding that Thompson had acted in an unnecessarily aggressive manner in pursuing and detaining [Defendant]."

{18} Although the State concedes that Thompson did not have the statutory authority to detain Defendant under Section 66-8-124(A), the State argues that the Court of Appeals was correct in its determination that Defendant's seizure was reasonable. "Considering that DWI is an arrestable offense, a major offense, [and] a felony for constitutional purposes," the State contends, "the Court of Appeals was correct in not giving the statutory violation [a] dispositive effect in this case involving a DWI." The State asserts that the Court of Appeals correctly concluded that exigent circumstances supported Defendant's brief seizure "based on probable cause that Defendant was DWI." The State argues that "compelling interests promoted by the seizure far outweighed the minimal intrusion on Defendant's privacy under the specific facts of the case."

{19} We agree with the Court of Appeals that the following facts are undisputed. First, "Thompson's actions in temporarily detaining Defendant amounted to an 'arrest' as that term is used in Section 66-8-124(A)." *Wright*, 2019-NMCA-026, ¶ 8. Second, "Thompson was not a commissioned, salaried peace officer under Section 66-8-124(A) and therefore acted without statutory authority." *Wright*, 2019-NMCA-026, ¶ 8. Third, Thompson made the arrest as "a state actor." *Id*. Finally, it is undisputed that the "detention of Defendant, although statutorily unauthorized, did not violate the Fourth Amendment." *Id.*

**A. Standard of Review**

{20} Our "review of a motion to suppress presents a mixed question of law and fact." *Martinez*, 2018-NMSC-007, ¶ 8 (internal quotation marks and citation omitted). We first "look for substantial evidence to support the district court's factual finding, with deference to the district court's review of the testimony and other evidence presented." *Id.* (brackets, internal quotation marks, and citation omitted). "We then review the application of the law to those facts, making a de novo determination of the constitutional reasonableness of the search or seizure." *Id.* (internal quotation marks and citation omitted). The reviewing court does not reweigh evidence on appeal. *See id.* ¶¶ 13, 18 (concluding that the Court of Appeals "contravened the standard of review by independently reweighing the evidence on appeal"). Rather, we view the evidence found by the trial court "in a manner most favorable to the prevailing party." *State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted).

**B. Analysis**

{21} To determine whether the New Mexico Constitution affords greater liberty than the United States Constitution, we use the interstitial approach this Court adopted in *State v. Gomez*, 1997-NMSC-006, ¶¶ 20-22, 33, 122 N.M. 777, 932 P.2d 1. Under the interstitial approach, we ask "(1) whether the right being asserted is protected under the federal Constitution; (2) whether the state constitutional claim has been preserved; and (3) whether there exists one of three reasons for diverging from federal precedent." *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 6, 130 N.M. 386, 25 P.3d 225. Under *Gomez*, "A state court . . . may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Gomez*, 1997-NMSC-006, ¶ 19.

{22} Applying the interstitial approach, we first observe that the right being asserted here is not protected by the Fourth Amendment. *Wright*, 2019-NMCA-026, ¶ 8; *see also Slayton*, 2009-NMSC-054, ¶¶ 32-33 (concluding that under the Fourth Amendment the only inquiry is whether the state actor had reasonable suspicion to detain or probable cause to arrest). Secondly, the state constitutional claim asserted by Defendant was preserved. We therefore turn to the third inquiry: whether there is a reason to depart from federal precedent.

{23} Article II, Section 10 of the New Mexico Constitution provides, "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures." This Court has interpreted this clause to provide a broad right to be free from unwarranted governmental intrusions, *State v. Garcia*, 2009-NMSC-046, ¶ 29, 147 N.M. 134, 217 P.3d 1032, which often results in significantly greater protections than those afforded under the Fourth Amendment. *See, e.g.*, *Gomez*, 1997-NMSC-006, ¶¶ 39, 44 (rejecting the federal, exigency-based automobile exception to the warrant requirement in favor of greater protections under Article II, Section 10); *Cardenas-Alvarez*, 2001-NMSC-017, ¶¶ 2, 5 (holding that extended detention of a defendant at border checkpoint was unlawful under Article II, Section 10 and suppressing evidence seized thereby). Specifically, New Mexico courts have provided an "extra layer of protection from unreasonable searches and seizures" to cases involving automobiles based on the "distinct characteristic of New Mexico constitutional law," which dismissed the notion that an individual lowers his or her expectation of privacy when the individual enters an automobile. *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 15.

{24} In addition to greater search and seizure protections afforded by Article II, Section 10, "New Mexico courts have consistently rejected federal bright-line rules in favor of an examination into the reasonableness of officers' actions under the circumstances of each case." *State v. Ochoa*, 2009-NMCA-002, ¶ 24, 146 N.M. 32, 206 P.3d 143; *see State v. Paul T.*, 1999-NMSC-037, ¶ 9, 128 N.M. 360, 993 P.2d 74 ("[T]his Court has avoided bright-line, per se rules in determining the reasonableness of searches under Article II, Section 10."). Based on the greater protections afforded under Article II, Section 10 and the disfavor for bright-line categorical rules, our Court of Appeals in *Rodarte* adopted a standard for determining when "an officer may arrest an individual solely on the basis of probable cause that a minor criminal offense for which jail time is not authorized has been committed." 2005-NMCA-141, ¶ 1. That standard is based on Justice O'Connor's dissent in *Atwater v. City of Lago Vista*, 532 U.S. 318, 360-74 (2001), which balances "on the one hand, the degree to which [the arrest] intrudes upon an individual's privacy and, on the other, the degree to which [the arrest] is needed for the promotion of legitimate governmental interests." *Id.* at 361 (O'Connor, J., dissenting) (internal quotation marks and citation omitted); *see Rodarte*, 2005-NMCA-141, ¶¶ 8, 14 (adopting the *Atwater* dissent standard).

{25} In *Rodarte*, the defendant was the passenger in a vehicle that ran a stop sign. *Id.* ¶ 2. After stopping the vehicle, the officer arrested the defendant and transported him to jail on the suspicion of being a minor in possession of alcohol, a nonjailable offense. *See id.* ¶¶ 1, 3. Subsequently, upon searching the back seat of the patrol car, the officer found drugs, and the defendant was charged with possession of a controlled substance. *See id.* ¶¶ 3, 4.

In looking to the governmental interests promoted by the arrest, the *Rodarte* Court determined that because the defendant was calm, he was not driving, and he complied with all of the officer's requests, the arrest "was unreasonable because there were no circumstances justifying the officer's choice to arrest . . . rather than issue a citation." *Id.* ¶ 15.

{26} The next year in *Bricker*, our Court of Appeals applied the same balancing-of-interest test that it adopted in *Rodarte*. *Bricker*, 2006-NMCA-052, ¶ 26. In *Bricker*, the defendant was arrested for driving on a suspended license. *Id.* ¶ 1. The arrest violated a New Mexico statute that required a citation and release under these circumstances. *Id.* ¶¶ 2, 14. After applying the balancing test, the *Bricker* Court held that the defendant's arrest, made without statutory authority, "was unreasonable and the seizure was unconstitutional under Article II, Section 10." *Id.* ¶ 30. The Court reasoned that because the Legislature "zeroed in on the traffic offense at issue," requiring citation and release,[1] there was "evidence of an intent to protect individual liberty over perceived governmental need." *Id.* ¶ 29.

{27} In this case, because the detention of Defendant amounted to an "arrest," *see Slayton*, 2009-NMSC-054, ¶ 20 (concluding that "temporary detentions are covered under the term 'arrest' as used in Chapter 66"), and because Thompson acted without statutory authority and in violation of Section 66-8-124(A), we conclude that the balancing-of-interests test employed in *Rodarte* and *Bricker* to determine constitutional reasonableness under Article II, Section 10 applies here. As a result, we evaluate, "on the one hand, the degree to which [the arrest] intrudes upon [Defendant]'s privacy and, on the other, the degree to which [the arrest] is needed for the promotion of legitimate governmental interests." *Atwater*, 532 U.S. at 361 (O'Connor, J., dissenting) (internal quotation marks and citation omitted). In applying the balancing test to this case, we emphasize that our Legislature has specifically determined in Section 66-8-124(A) that an arrest can only be made by "a commissioned, salaried peace officer." This reflects the Legislature's determination that the liberty to be free from an arrest by anyone other than "a commissioned, salaried peace officer" for violating a law relating to motor vehicles that is punishable as a misdemeanor outweighs the State's perceived governmental interests in allowing an arrest to be made by anyone else.

{28} In its attempt to weigh the interests in favor of the State to validate the arrest, the majority of the Court of Appeals overlooked the district court's findings, engaged in its own fact findings, and overlooked undisputed facts. As mentioned previously, the majority concluded that the State's interest in removing drunk drivers from its roadways outweighed whatever "privacy intrusion that Defendant may have experienced." *Wright*, 2019-NMCA-026, ¶ 14. The majority also concluded that the exigent circumstances of avoiding dissipation of alcohol and the potential that "Defendant might have tried to drive away," weighed in favor of detention. *Id.*

{29} What the Court of Appeals majority overlooked is that when Thompson arrested Defendant, she posed no danger whatsoever to the motoring public. She was parked in her driveway at home, and her truck was blocked in by Thompson's patrol vehicle. Where was the danger? In analyzing the governmental interests we look at "the degree to which [the arrest] is needed for the promotion" of those interests. *Atwater*, 532 U.S. at 361 (O'Connor, J., dissenting) (internal quotation marks and citation omitted). We agree that the State has an interest in deterring drunk driving and maintaining highway safety, but that interest was not promoted by the arrest of Defendant, who was off of the road, parked at her home, and blocked in. The majority ignores the finding made by the district court that, "but for the illegal detention, Defendant would have gone inside her house before the certified deputy arrived four to five minutes after the illegal detention." The majority also ignored having acknowledged Thompson's own testimony that he did not believe Defendant was attempting or intending to flee, *Wright*, 2019-NMCA-026, ¶ 4 n.1, when it speculated as an "exigency" that "Defendant might have tried to drive away." *Id.* ¶ 14. The majority identified the remaining exigent State interest as the dissipation of alcohol. *Id.* This too is based on speculation, and is but one consideration in the reasonableness analysis. *See State v. Nance*, 2011-NMCA-048, ¶ 23, 149 N.M. 644, 253 P.3d 934 (rejecting the conclusion that dissipation of alcohol alone is exigency enough to justify warrantless entry into the home).

{30} We add that the district court's written findings of fact did not state that Thompson had seen Defendant "speeding" or "driv[ing] over the speed limit." *Wright*, 2019-NMCA-026, ¶¶ 13, 14. Further, the district court's written findings of fact did not state facts, discussed in the Court of Appeals opinion, that Thompson had seen Defendant driving "erratic[ally] on a public highway" or "weav[ing] back and forth on the highway" or that Defendant "nearly hit [Thompson's] patrol car." *Id.* ¶¶ 13, 14. Rather, the district court found that Thompson "claimed" his patrol vehicle was almost struck by Defendant's truck as it passed while Thompson was parked off the roadway. Finally, the district court's written findings did not state that Thompson had heard Defendant say anything about consuming alcohol. *See id.* ¶ 14. These omissions from the district court findings should be construed in favor of suppression, not against it. As such, we conclude the majority did not show sufficient deference to the district court's factual findings or construe them as required on appeal. *See Martinez*, 2018-NMSC-007, ¶¶ 12-13, 18 ("On appeal, we must review the totality of the circumstances and must avoid reweighing individual factors in isolation.").

{31} For the foregoing reasons, we conclude that the Court of Appeals erred in determining that Defendant's arrest was needed for the promotion of the State's interest in deterring drunk driving and maintaining highway safety. *See Wright*, 2019-NMCA-026, ¶ 14. We now turn to the degree to which the arrest intruded upon Defendant's privacy.

{32} The district court's findings of fact provide that Thompson "closely followed and pursued Defendant up and to her driveway" in a "marked patrol vehicle." He then parked the patrol vehicle behind Defendant and shined a spotlight on Defendant's truck. In uniform and badge, Thompson approached Defendant on foot and instructed her to remain in her truck. Like the defendant in *Rodarte*, 2005-NMCA-141, ¶¶ 2-3, 15, Defendant obeyed these instructions and remained in her truck for four to five minutes. *Wright*, 2019-NMCA-026, ¶ 5. Based on the district court's finding that "but for the illegal detention, Defendant would have gone inside her house," the arrest also intruded upon Defendant's ability to enter her home and move freely within her property.

{33} In balancing the State's interests with Defendant's privacy interests, on the one hand we have an unauthorized arrest that promoted neither the State's interest in deterring drunk driving nor the State's interest in maintaining highway safety.

[1] See, e.g., NMSA 1978, § 66-8-123(A) (2013) (providing that "whenever a person is arrested for any violation of the Motor Vehicle Code or other law relating to motor vehicles punishable as a misdemeanor, the arresting officer . . . shall . . . prepare a notice to appear in court, specifying the time and place to appear, have the arrested person sign the agreement to appear as specified, give a copy of the citation to the arrested person and release the person from custody").

On the other hand, we have an unauthorized arrest that intruded upon Defendant's privacy by Thompson shining a spotlight into her property, lighting up her parked truck, ordering Defendant to remain in her truck, and preventing her from entering her home.

{34} When viewing the facts found by the district court in the manner most favorable to Defendant as required by the standard of review, *see Martinez*, 2018-NMSC-007, ¶¶ 8, 12, and balancing the degree to which the arrest intruded upon Defendant's privacy with the degree to which the arrest was needed to promote legitimate governmental interests, we conclude that Thompson's actions were constitutionally unreasonable under Article II, Section 10 of the New Mexico Constitution. The evidence and the fruits obtained following the unconstitutional arrest must be suppressed.

**III. CONCLUSION**

{35} We reverse the Court of Appeals and remand the case to the district court for further proceedings in accordance with this opinion.

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

**MICHAEL E. VIGIL, Chief Justice**

**WE CONCUR:**

**C. SHANNON BACON, Justice**

**DAVID K. THOMSON, Justice**

From the New Mexico Court of Appeals

**Opinion Number: 2022-NMCA-005**
No: A-1-CA-38623 (filed August 26, 2021)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
GERALD NOTAH,
Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY**
Lyndy D. Bennett, District Judge

Certiorari Denied, January 11, 2022, No. S-1-SC-39016.
Released for Publication February 22, 2022.

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## OPINION

## BOGARDUS, Judge.

{1} Defendant Gerald Notah appeals his conviction, following a jury trial, for attempt to commit second-degree criminal sexual contact of a minor (CSCM) under thirteen years of age, NMSA 1978, § 30-9-13(B)(1) (2003), in violation of NMSA 1978, Section 30-28-1(B) (1963). Defendant argues that (1) insufficient evidence supports his conviction, (2) the district court erred by denying his request for a jury instruction for a lesser included offense of attempt to commit third-degree CSCM under thirteen years of age, (3) the jury instruction listing the elements of second-degree CSCM constitutes fundamental error, and (4) Defendant's sentence to sex offender probation amounts to an illegal sentence. The State concedes that the district court erred by sentencing Defendant to sex offender probation and additionally raises the issue and concedes that the district court erred by sentencing Defendant to sex offender parole. The State also contends that the district court imposed an illegal sentence by sentencing Defendant to a period of incarceration less than the minimum required by the Criminal Sentencing Act. For the reasons that follow, we reverse Defendant's sentence, remand to the district court for resentencing, and otherwise affirm.

### BACKGROUND

{2} The following was presented at trial. Victim was seven years old in December 2016. On the night in question, Victim's parents were out of town. Victim's grandmother and her step-grandfather, Defendant, were babysitting Victim and her siblings, including Victim's baby brother.

{3} Victim testified that Defendant entered the room where she was sleeping, lifted the blanket off her, pulled down her pajama pants and underwear, pulled down his own pants, and rubbed her arm while masturbating. Victim further testified that Defendant then walked to the other side of the bed, laid down next to her, and continued masturbating while rubbing her upper ribs over her shirt. Victim testified that she was afraid that Defendant was going to "touch [her] private parts and . . . do weird stuff" to her. When she moved her body and pretended to wake up, Defendant got up quickly and left the bedroom.

{4} Victim's father (Father) testified that after he returned home, Victim told him about the incident with Defendant. At Father's request, Defendant and Victim's grandmother met with Father at Father's office the next day to discuss what happened. According to Father, Defendant admitted to trying to touch Victim and to masturbating in front of Victim.

{5} Defendant's version of events differed significantly from Victim's. He testified that on the night in question, he entered the room where Victim was sleeping because he needed to change the baby's diaper and the supplies were stored in that bedroom. Defendant claimed he merely touched Victim on the arm to move her aside and make room to change the baby's diaper on the bed. Defendant denied undressing Victim, masturbating in front of her, and touching her anywhere other than on her arm. Additionally, Defendant denied confessing to any wrongdoing when Father accused him of "playing with [him]self" in front of Victim.

### DISCUSSION

#### I. Sufficient Evidence Supports Defendant's Conviction for Second Degree CSCM

{6} Defendant claims that insufficient evidence supports his conviction for attempt to commit second-degree CSCM under thirteen years of age. Specifically, he contends there was "no evidence" and "only speculation" that Defendant intended to touch Victim on an unclothed intimate part, pointing to Victim's testimony that Defendant only actually touched her on non-intimate parts.

{7} "Whether there is sufficient evidence to support a conviction is a question of law which we review de novo." *State v. Neal*, 2008-NMCA-008, ¶ 20, 143 N.M. 341, 176 P.3d 330. "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." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and citation omitted), *overruled on other grounds by State v. Martinez*, 2021-NMSC-002, 478 P.3d 880. We "view 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. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We measure the sufficiency of the evidence against the jury instructions given, which become the law of the case. *State v. Jackson*, 2018-NMCA-066, ¶ 22, 429 P.3d 674.

{8} "The inchoate crime of attempt to commit a felony 'consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.' " *State v. Green*, 1993-NMSC-056, ¶ 21, 116 N.M. 273, 861 P.2d 954 (quoting Section 30-28-1). In this case, the felony at issue was second-degree CSCM under thirteen years of age. Accordingly, the State had the burden to prove three elements beyond a reasonable doubt in order for the jury to convict Defendant of attempt to commit second-degree CSCM under thirteen: (1) Defendant intended to commit the crime of second-degree CSCM under thirteen years of age; (2) Defendant began to do an act, which constituted a substantial part of second-degree CSCM under thirteen years of age, but failed to commit second-degree CSCM under thirteen years of age; and (3) the attempt happened in New Mexico on or about December 8 and 9, 2016. Defendant challenges the first element, arguing that there was "no evidence [rather] only speculation" that Defendant intended to touch any of Victim's intimate parts.

{9} We look to the evidence presented at trial to determine whether sufficient evidence supports the jury's finding that Defendant intended to commit the crime of second-degree CSCM under thirteen years of age. "The crime of attempt to commit a felony is a specific intent crime." *State v. Johnson*, 1985-NMCA-074, ¶ 10, 103 N.M. 364, 707 P.2d 1174. We recognize that "[s]pecific intent . . . can seldom be proven by direct evidence[.]" *Green*, 1993-NMSC-056, ¶ 21. Therefore, we analyze Defendant's intent through "the reasonable inferences shown by the evidence and the surrounding circumstances. If there are reasonable inferences and sufficient circumstances then the issue of intent becomes a question of fact for the [fact-finder]." *Id.* (internal quotation marks and citation omitted). Proof of a fact may be based on reasonable inferences from the evidence, but it may not be based on pure speculation. *See State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930 (explaining that "an inference must be linked to a fact in evidence" and "is more than a supposition or conjecture" (internal quotation marks and citation omitted)); *see also* UJI 14-6006 NMRA (explaining that a "verdict should not be based on speculation, guess or conjecture").

{10} In this case, Victim testified that Defendant entered the room where she was sleeping, lifted the blanket off her, pulled down her pajama pants and underwear, pulled down his own pants, and rubbed her arm while masturbating. Victim testified that Defendant then walked to the other side of the bed, laid down next to her, and continued masturbating while rubbing her upper ribs over her clothing. Victim testified that she was afraid that Defendant was going to "touch [her] private parts and . . . do weird stuff" to her. When she moved her body and pretended to wake up, Defendant got up quickly and left the bedroom.

{11} From this conduct—partially undressing Victim, masturbating next to her, touching her, and lying down next to her while continuing to masturbate and touch her—the jury could conclude beyond a reasonable doubt that Defendant intended to commit second-degree CSCM by touching Victim's unclothed intimate parts. We note that although Defendant's admissions to Father were certainly relevant, Victim's testimony alone provided sufficient evidence to support Defendant's conviction. *See State v. Hunter*, 1933-NMSC-069, ¶ 6, 37 N.M. 382, 24 P.2d 251 ("[T]he testimony of a single witness may legally suffice as evidence upon which the jury may found a verdict of guilt."); *see also State v. Soliz*, 1969-NMCA-043, ¶ 8, 80 N.M. 297, 454 P.2d 779 (stating that the testimony of a single witness is sufficient for a conviction).

## II. The District Court Properly Denied Defendant's Proposed Jury Instruction for Attempt To Commit Third-Degree CSCM as a Lesser Included Offense

{12} Defendant argues that the district court erred by denying Defendant's request for a jury instruction for a lesser included offense of attempt to commit third-degree CSCM under thirteen years of age. Specifically, Defendant contends that (1) third-degree CSCM under thirteen years of age is a necessarily included offense for second-degree CSCM under thirteen years of age because the lesser charge criminalizes "all" contact with a child victim's intimate parts and the greater charge criminalizes contact with a child victim's "unclothed" intimate parts; and (2) because Victim testified that Defendant touched her ribs while masturbating, the evidence "tends to better prove an intent to touch [Victim's] breast area, which . . . [remained] clothed[,]" thus supporting a third-degree rather than second-degree charge. Even assuming without deciding that Defendant's tendered jury instruction properly preserved this issue, we remain unpersuaded.

{13} "We review the propriety of a district court's refusal to instruct on a lesser[] included offense under a de novo standard." *State v. Munoz*, 2004-NMCA-103, ¶ 10, 136 N.M. 235, 96 P.3d 796. On review, we view the evidence "in the light most favorable to the giving of the requested instruction." *State v. Henley*, 2010-NMSC-039, ¶ 25, 148 N.M. 359, 237 P.3d 103 (internal quotation marks and citation omitted).

{14} As this Court previously explained, the purpose behind a defendant's request for a lesser included offense instruction

> is to protect the defendant from the possibility that jurors who are not convinced of his guilt of the charged offense would nonetheless convict him of the offense because they are convinced that he committed a crime (the lesser[] included offense) and believe that he should be punished but are presented with an all-or-nothing choice between convicting of the charged offense or acquittal.

*State v. Andrade*, 1998-NMCA-031, ¶ 11, 124 N.M. 690, 954 P.2d 755. Accordingly, when a court fails to give an appropriate lesser included offense instruction, "[t]here is a legitimate concern that conviction of the greater offense may result because acquittal is an alternative that is unacceptable to the jury." *Id.* (internal quotation marks and citation omitted).

**{15}** In *State v. Meadors*, our Supreme Court endorsed the cognate approach to determine whether a lesser included offense instruction should be given. 1995-NMSC-073, ¶ 12, 121 N.M. 38, 908 P.2d 731. Under the cognate approach, a trial court should grant a request for the instruction if

> (1) the defendant could not have committed the greater offense in the manner described in the charging document without also committing the lesser offense, and therefore notice of the greater offense necessarily incorporates notice of the lesser offense; (2) the evidence adduced at trial is sufficient to sustain a conviction on the lesser offense; and (3) the elements that distinguish the lesser and greater offenses are sufficiently in dispute such that a jury rationally could acquit on the greater offense and convict on the lesser.

*Id.*

**{16}** We need only analyze the first and third factors to conclude that Defendant was not entitled to a lesser included offense instruction on third-degree CSCM under thirteen. We explain.

**{17}** Examining the first factor, whether Defendant could have committed the greater offense without also committing the lesser offense, we conclude that the elements of the crimes differ in such a way that each may be committed without necessarily committing the other.

**{18}** In *State v. Arvizo*, our Supreme Court discussed the differences between third-degree and second-degree CSCM with child victims aged thirteen to eighteen years. 2018-NMSC-026, ¶ 14, 417 P.3d 384.

Our Supreme Court stated that "[t]hird-degree CSCM is identical to second-degree CSCM except that the child victim is clothed." *Id.* In relevant part, the CSCM statute states:

> Criminal sexual contact of a minor in the *second degree* consists of all criminal sexual contact of the *unclothed* intimate parts of a minor perpetrated:
>
> (1) on a child under thirteen years of age; or
>
> (2) on a child thirteen to eighteen years of age when [certain aggravating factors are met.] . . .
>
> Criminal sexual contact of a minor in the third degree consists of all criminal sexual contact of a minor perpetrated:
>
> (1) on a child under thirteen years of age; or
>
> (2) on a child thirteen to eighteen years of age when [certain aggravating factors are met.]

Section 30-9-13(B), (C) (emphases added). Thus, the statutory language that creates a greater crime based on the unclothed status of the child victim's intimate parts for CSCM thirteen to eighteen also distinguishes between the degrees of CSCM under thirteen years of age. See id. Because the statutory language is the same, we presume it has the same meaning when differentiating between degrees of CSCM committed against children under thirteen as it does when differentiating between degrees of CSCM committed against children thirteen to eighteen. Therefore, we follow our Supreme Court's interpretation of this statutory language in Arviso, 2018-NMSC-026, ¶ 14, and conclude that third-degree CSCM under thirteen years of age is identical to second-degree CSCM under thirteen years of age except that the child victim is clothed.

{19} Having determined that third-degree and second-degree CSCM under thirteen years of age differ solely on the element of whether the child victim was clothed or unclothed, we apply the first element of the cognate approach from Meadors, 1995-NMSC-073, ¶ 12. As the State succinctly points out, "[a] body part is either clothed or it is unclothed." Because a body part is either clothed or unclothed, second and third-degree CSCM under thirteen years of age contain separate elements. Therefore, the statutory elements of the lesser crime are distinct and not merely "a subset of the statutory elements of the charged crime[,]" id., and, consequently, we hold that third-degree CSCM under thirteen is not a lesser included offense of second-degree CSCM under thirteen.

{20} Examining the third factor, we conclude that, based on the evidence presented at trial, a rational juror could not acquit Defendant of the greater offense and convict him of the lesser offense. As described above, the element distinguishing between the two degrees of CSCM under thirteen years of age is whether the child victim's intimate part was clothed or unclothed. Thus, in order for Defendant to be entitled to a lesser included instruction, the element of whether the attempted touching was of clothed or unclothed intimate parts must be sufficiently in dispute for a rational juror to acquit Defendant of the greater offense and convict him of the lesser offense. See id.

{21} Here, the jury was presented with two differing accounts of the incident. Victim testified that Defendant undressed her from the waist down and laid next to her on the bed, masturbating, and touching her arm and ribs. Victim further testified that she was afraid that Defendant was going to "touch [her] private parts." In contrast, Defendant claimed he never undressed Victim, never masturbated in her presence, and never touched her anywhere other than on her arm. Although Defendant presented arguments to the district court about the applicability of a charge based on an attempt to touch a clothed body part, no evidence was presented to the jury supporting a theory of an attempt to touch only clothed and not unclothed intimate parts. "We will not fragment the testimony to such a degree as to distort it in order to construct a view of the evidence which would support the giving of the instruction." State v. Gaitan, 2002-NMSC-007, ¶ 24, 131 N.M. 758, 42 P.3d 1207 (omission, internal quotation marks, and citation omitted). Because we will not fragment Victim's testimony, we see no reasonable view of the evidence that would support a jury finding that Defendant partially undressed Victim in an attempt to touch a clothed intimate part of her body but not an unclothed intimate part.

{22} For these reasons, we conclude that the district court did not err in denying Defendant's requested jury instruction to include attempt to commit third-degree CSCM under thirteen years of age as a lesser included offense to the charged crime of attempt to commit second-degree CSCM under thirteen years of age.

## III. The Jury Instruction for Attempt to Commit Second-Degree CSCM Under Thirteen Does Not Amount to Fundamental Error

{23} Defendant argues that the jury instruction describing the elements of second-degree CSCM under thirteen failed to properly state the "unclothed" element because the language describing attempted contact with "the unclothed mons veneris and/or the undeveloped breast area" allowed the jury to convict Defendant based on attempted contact with Victim's clothed undeveloped breast area. Specifically, Defendant argues that because "undeveloped breast area" is preceded by the word "the," the word "unclothed" modifies only "mons veneris" and does not modify "undeveloped breast area." "The standard of review we apply to jury instructions depends on whether the issue has been preserved. If the error has been preserved[,] we review the instructions for reversible error. If not, we review for fundamental error. Under both standards we seek to determine whether a reasonable juror would have been confused or misdirected by the jury instruction." State v. Benally, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (internal quotation marks and citations omitted). Defendant concedes that he did not preserve the issue by objecting to the language of the given instruction, therefore, we review for fundamental error.

{24} We remain unpersuaded that the given jury instruction amounts to fundamental error because (1) the instruction was consistent with the applicable Uniform Jury Instruction (UJI); (2) each time that the instruction was read aloud to the jury, the word "the"—which Defendant claims created fundamental error—was omitted; and (3) to the extent that the instruction may have been erroneous, such error was technical in nature.

{25} "Under the doctrine of fundamental error, an appellate court has the discretion to review an error that was not preserved in the trial court to determine if a defendant's conviction shocks the conscience because either (1) the defendant is indisputably innocent, or (2) a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused." State v. Astorga, 2015-NMSC-007, ¶ 14, 343 P.3d 1245 (alteration, internal quotation marks, and citation omitted). "Under this standard, we must determine whether a reasonable juror would have been confused or misdirected . . . from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." State v. Samora, 2016-NMSC-031, ¶ 27, 387 P.3d 230 (internal quotation marks and citation omitted). We exercise our discretion to apply the doctrine of fundamental error "very guardedly, and only where some fundamental right has been invaded, and never in aid of strictly legal, technical, or unsubstantial claims[.]" Cunningham, 2000-NMSC-009, ¶ 12 (internal quotation marks and citation omitted).

{26} First, the given jury instruction was consistent with the UJI for second-degree CSCM under thirteen years of age. The use note for UJI 14-925 NMRA for second-degree and third-degree CSCM under thirteen years of age directs the district court to "[n]ame one or more of the following parts of the anatomy touched[,]"and the UJI itself includes the term "unclothed" in brackets, consistent with the unclothed element of second-degree CSCM under thirteen years of age. UJI 14-925 use note 2 (emphasis added); UJI 14-925. Thus, for second-degree CSCM under thirteen years of age, the UJI requires a finding beyond a reasonable doubt that Defendant "touched or applied force to the unclothed" intimate part or parts at issue. UJI 14-925. Here, evidence implicated Defendant's intent to touch multiple intimate parts on Victim's body, and the given instruction reflected the multiple intimate parts at issue. Therefore, the given instruction was consistent with the applicable UJI.

{27} Second, the instruction at issue was read aloud to the jury three times—once by the district court and twice by the State during closing arguments—each time omitting the word "the" before the phrase "undeveloped breast area." Stated differently, the district court and the State's recitation of the instruction omitted the word that Defendant claims constituted fundamental error. When reviewing jury instructions, we seek to "determine whether a reasonable juror would have been confused or misdirected . . . [and] consider jury instructions as a whole, not singly." State v. Montoya, 2003-NMSC-004, ¶ 23, 133 N.M. 84, 61 P.3d 793 (citation omitted). Even assuming without deciding that the addition of the word "the" before the phrase "undeveloped breast area" modified the meaning of the instruction in any way, we look to the instructions given as a whole and conclude that a reasonable juror would not have been confused or misdirected by the addition of the word "the" in the written version of the jury instruction.

{28} Third, to the extent that the inclusion of the word "the" before the phrase "undeveloped breast area" may have been in error, such error was technical in nature, and we do not exercise our discretion to apply the doctrine of fundamental error "in aid of strictly legal, technical, or unsubstantial claims[.]" Cunningham, 2000-NMSC-009, ¶ 12 (internal quotation marks and citation omitted).

{29} For the above reasons, we hold that the given instruction did not constitute fundamental error.

## IV. The District Court Imposed an Illegal Sentence

{30} Defendant contends that his sentence to sex offender probation amounts to an illegal sentence. The State concedes that the district court erred by sentencing Defendant to sex offender probation and additionally raises the issue and concedes that the district court erred by sentencing Defendant to sex offender parole. The State also contends that the district court imposed an illegal sentence by sentencing Defendant to a period of incarceration less than the basic sentence for a third-degree felony for a sexual offense against a child, as required by NMSA 1978, Section 31-18-15(A)(9) (2016, amended 2019).

{31} "A trial court's power to sentence is derived exclusively from statute." State v. Martinez, 1998-NMSC-023, ¶ 12, 126 N.M. 39, 966 P.2d 747. "Statutory interpretation is a question that this Court reviews de novo." State v. Martinez, 2006-NMCA-068, ¶ 5, 139 N.M. 741, 137 P.3d 1195. "In interpreting a statute, our primary objective is to give effect to the Legislature's intent." State v. Trujillo, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125. "When the language in a statute is clear and unambiguous, we give effect to that language and refrain from further statutory interpretation." State v. Duhon, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50.

{32} "In imposing a sentence or sentences upon a defendant, the trial judge is invested with discretion as to the length of the sentence, whether the sentence should be suspended or deferred, or made to run concurrently or consecutively within the guidelines imposed by the Legislature." State v. Duran, 1998-NMCA-153, ¶ 41, 126 N.M. 60, 966 P.2d 768 (emphasis added), abrogated on other grounds by State v. Laguna, 1999-NMCA-152, ¶ 23, 128 N.M. 345, 992 P.2d 896. "Because a trial court does not have subject-matter jurisdiction to impose a sentence that is illegal, the legality of a sentence need not be raised in the trial court." State v. Trujillo, 2007-NMSC-017, ¶ 8, 141 N.M. 451, 157 P.3d 16.

### A. The District Court Erred by Sentencing Defendant to Sex Offender Parole and Probation

{33} Although we are not bound by the State's concessions, we conclude that Defendant's sentence to sex offender parole and probation must be reversed. See State v. Guerra, 2012-NMSC-027, ¶ 9, 284 P.3d 1076 (stating that an appellate court is not bound by the state's concession of an issue).

{34} NMSA 1978, Sections 31-20-5.2(F) (2003) and 31-21-10.1(I) (2007) define a "sex offender," for the purposes of sex offender probation and parole, as "a person who is convicted of, pleads guilty to or pleads nolo contendere to any one of [a list of enumerated] offenses[.]" While CSCM is among the enumerated offenses triggering a sentence to sex offender probation or parole, attempt to commit CSCM is not included among the offenses. Because "the language in [the] statute is clear and unambiguous, we give effect to that language and refrain from further statutory interpretation." Duhon, 2005-NMCA-120, ¶ 10. Given that attempt to commit CSCM under thirteen years of age is not among the enumerated offenses triggering sex offender probation or parole, we hold that the district court erred when it imposed a sentence to sex offender probation and parole instead of a sentence in accordance with the general probation and parole statutes.

### B. The District Court Erred by Failing to Comply With the Criminal Sentencing Act

{35} The State also contends that the district court imposed an illegal sentence by sentencing Defendant to a period of incarceration less than the basic sentence for a third-degree felony for a sexual offense against a child. Defendant argues that this Court lacks jurisdiction to address the issue raised by the State. Concluding, for the reasons stated below, that this Court has jurisdiction to review the issue, we hold that Defendant's term of incarceration amounts to an illegal sentence because the district court imposed the incorrect basic sentence.

{36} As a preliminary matter, we note that this Court maintains the authority to correct an illegal sentence because "[a district] court does not have jurisdiction to impose an illegal sentence on a defendant and, therefore, any party may challenge an illegal sentence for the first time on appeal." State v. Paiz, 2011-NMSC-008, ¶ 33, 149 N.M. 412, 249 P.3d 1235 (emphasis added). In order to promote "judicial economy and to avoid the necessity for an additional appeal," this Court may address the State's illegal sentence claim when made on appeal, despite the State's failure to file a cross appeal. See State v. Bachicha, 1991-NMCA-014, ¶ 18, 111 N.M. 601, 808 P.2d 51.

{37} To the extent that Defendant relies on the Rules of Criminal Procedure for District Courts to argue that this Court lacks the jurisdiction to address the State's claim regarding an illegal sentence, we remain unpersuaded. The district court rules on which Defendant relies—rules regarding motions for a reduction of sentence, a writ of habeas corpus, or a petition for post-sentence relief—by their very nature apply to district courts and not this Court. Although

a district court's ability to correct an illegal sentence is limited, see Rule 5-801 NMRA, this Court is not similarly restrained when reviewing a claim of an illegal sentence, which may be raised for the first time by any party on appeal. Paiz, 2011-NMSC-008, ¶ 33. Having determined that this Court has jurisdiction to address the issue, we turn to Defendant's sentence.

{38} "The appropriate basic sentence of imprisonment shall be imposed upon a person convicted" of a noncapital felony. Section 31-18-15(B). In relevant part, the Criminal Sentencing Act mandates that a basic sentence for a third-degree felony shall be three years imprisonment, § 31-18-15(A)(11), unless the third-degree felony is "a sexual offense against a child," in which case the basic sentence shall be six years imprisonment. Section 31-18-15(A)(9).

{39} The jury found Defendant guilty of attempt to commit second-degree CSCM under thirteen years of age, a third-degree felony, § 30-9-13(B)(1), contrary to Section 30-28-1(B). See § 30-28-1(B) ("[I]f the crime attempted is a second[-]degree felony, the person committing such attempt is guilty of a third[-]degree felony[.]"). Based on the plain language of the CSCM statute and the Criminal Sentencing Act, Defendant's crime, although incomplete, was "a sexual offense against a child." See § 31-18-15(A)(9); § 30-9-13(B)(1). Thus, the district court was required to impose a basic sentence of six years. Because the district court imposed only a basic sentence of three years, we hold that Defendant's basic sentence was an illegal sentence.

**CONCLUSION**

{40} For the above reasons, we reverse Defendant's sentence, remand to the district court for resentencing consistent with this opinion, and otherwise affirm.

{41} IT IS SO ORDERED.

**KRISTINA BOGARDUS, Judge**

**WE CONCUR:**

**SHAMMARA H. HENDERSON, Judge**

**GERALD E. BACA, Judge**

From the New Mexico Court of Appeals

**Opinion Number: 2022-NMCA-006**
No: A-1-CA-37797 (filed October 1, 2021)

D.W.,
Petitioner-Appellant,
v.
B.C.,
Respondent-Appellee.

**APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY**
Jarod K. Hofacket, District Judge

Released for Publication March 1, 2022.

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## OPINION

## YOHALEM, Judge.

{1} D.W. (Grandmother) appeals the district court's dismissal of her petition for kinship guardianship of her then twelve-year-old granddaughter, M.C. (Child), pursuant to the New Mexico Kinship Guardianship Act, NMSA 1978, Sections 40-10B-1 to -15 (2001, as amended through 2015) (the Act).[1] Grandmother sought kinship guardianship pursuant to Section 40-10B-8(B)(3) of the Act after the unexpected death of Child's mother, alleging that there were extraordinary circumstances warranting the appointment. Section 40-10B-8(B)(3) states that the district court may appoint a kinship guardian when "the child has resided with the petitioner without the parent for a period of ninety days or more immediately preceding the date the petition is filed and a parent having legal custody of the child is currently unwilling or unable to provide adequate care, maintenance and supervision for the child or there are extraordinary circumstances." Grandmother's petition discloses that Child had resided with her for fourteen days, less than the full ninety days prior to the filing of the petition required by Section 40-10B-8(B)(3).

{2} Grandmother contends on appeal that (1) the district court erred in strictly construing the ninety-day residence requirement as a mandatory prerequisite to the filing of a kinship guardianship petition pursuant to Section 40-10B-8(B)(3), even when extraordinary circumstances are alleged; and (2) the district court erred in dismissing her petition on the alternative basis that the petition failed to allege facts sufficient to establish "extraordinary circumstances" under the Act as a matter of law. We reverse and remand for a full evidentiary hearing and a decision on the merits of Grandmother's kinship guardianship petition.

**BACKGROUND**

{3} Grandmother's verified petition seeking appointment as Child's kinship guardian was filed days after the unexpected death of Child's mother. Child had been living with Grandmother for fourteen days, since her mother was injured, when the petition was filed. Prior to her mother's injury, Child had lived since her birth in a house on the same property as Grandmother. Grandmother alleged a close relationship with Child based on daily contact since Child's birth. Grandmother reported that she currently was acting as Child's kinship caregiver, as defined by Section 40-10B-3(A) of the Act.

{4} Grandmother's petition alleged that Child suffered from severe mental and emotional problems that predated her mother's death; these symptoms had been exacerbated by deep grief; B.C. (Father) had proved unwilling to engage in psychotherapy and parenting instruction, which had been ordered by the court during parents' divorce; the divorce court had denied Father any contact with Child during the year preceding Mother's death; and the opinion of Child's therapist and the findings of the divorce court were that it would be detrimental to Child's mental and physical health to be placed in Father's care. Grandmother pleaded that extraordinary circumstances made serious detriment to Child likely if she was returned immediately to Father's custody and care. Grandmother also alleged that Father "is unable to provide adequate care, maintenance[,] and supervision for the child[,]" but did not rely on this as an independent basis for her petition for kinship guardianship.

{5} The district court granted Father's motion to dismiss Grandmother's petition for kinship guardianship, "[b]ecause the Petition does not meet the requirement of Section 40-10B-8[(B)(3)]" that Child has resided with Grandmother without a parent for a minimum of ninety days before the filing of the petition. The district court also dismissed the petition on the basis that the sudden death of a parent and Child's severe mental illness were each too common an occurrence to qualify as "extraordinary circumstances" under Section 40-10B-8(B)(3).

{6} Although the district court dismissed the petition and affirmed legal custody of Child in Father, the court nonetheless refused to immediately return Child to Father's physical custody. Exercising its parens patriae authority, *see Ridenour v. Ridenour*, 1995-NMCA-072, ¶ 8, 120 N.M. 352, 901 P.2d 770, the district court retained limited jurisdiction, concluding that it was in Child's best interest for the court to supervise Child's transition from Grandmother to Father.

[1] All references to the Act in this opinion are to the 2001 version of the statute, as amended through 2015. Grandmother's petition was filed prior to the 2020 amendments to the Act.

The district court ordered Father to work with a reunification specialist to repair his relationship with Child, set a court-ordered goal of returning Child to Father's care within ninety days, and ordered Grandmother to cooperate with Child's transition to Father's care.[2]

{7} Grandmother filed an appeal to this Court from the order of dismissal of her kinship guardianship petition, together with a petition for writ of error. The appeal and the writ of error have been consolidated for decision by this Court.

**DISCUSSION**

**I. Our Legislature Did Not Intend the Ninety-Day Residence Requirement to Be Strictly Applied When There Are Extraordinary Circumstances**

{8} A district court may appoint a kinship guardian when "[u]pon hearing, . . . the court finds that a qualified person seeks appointment, the venue is proper, the required notices have been given, the requirements of [Section 40-10B-8(B)] . . . have been proved and the best interests of the minor will be served by the requested appointment[.]" Section 40-10B-8(A). In this case, there was no dispute that Grandmother was a qualified person, that venue was proper, and that required notices had been given. Grandmother sought kinship guardianship solely pursuant to Section 40-10B-8(B)(3).

{9} The primary ground stated by the district court for dismissing the petition was Grandmother's failure to satisfy what the court concluded was a mandatory prerequisite for the appointment of a kinship guardian under Section 40-10B-8(B)(3)—that Child had resided with Grandmother without a parent for a period of ninety days before the petition was filed.

{10} Grandmother argued in the district court, and continues to argue on appeal, that Section 40-10B-8(B)(3) should be read so that the ninety-day residence requirement applies only when a child's parents are alleged to be "currently unwilling or unable to provide adequate care, maintenance and supervision for the child[,]" and not when the petition alleges instead that there are extraordinary circumstances requiring appointment of a kinship guardian. Grandmother supports her claim with a close textual analysis, contending that the word "or" divides the phrase "there are extraordinary circumstances," from all of the language preceding that phrase. Grandmother reads the statute as follows:

> the district court may appoint a kinship guardian when
> [(a)] [C]hild has resided with the [P]etitioner without the parent for a period of ninety days or more immediately preceding the date the petition is filed and a parent having legal custody of . . . [C]hild is currently unwilling or unable to provide adequate care, maintenance and supervision for . . . [C]hild
> or
> [(b)] there are extraordinary circumstances.

{11} The district court rejected Grandmother's construction of the statute, applying its own close textual analysis of the statutory language. The district court read the extraordinary circumstances requirement as an alternative only to a finding of parental unfitness, concluding that the first clause of the statute requiring residence for ninety days applied to both alternatives: when parents are unable or unwilling to provide adequate care, or when there are extraordinary circumstances. The district court read the statute as follows:

> the district court may appoint a kinship guardian when
> child has resided with the petitioner without the parent for a period of ninety days or more immediately preceding the date the petition is filed
> and
> a parent having legal custody of the child is currently unwilling or unable to provide adequate care, maintenance and supervision for the child or there are extraordinary circumstances.

{12} The district court stated that it was basing its conclusion that the ninety-day requirement applied to "both the provision regarding a parent who is unable to parent *and* extraordinary circumstances" (emphasis added), on a strict reading of the text. The district court relied as well, on how easy it would have been, in the court's view, for the Legislature to have created an additional subsection of Section 40-10B-8(B), without the ninety-day predicate, if the Legislature had intended "extraordinary circumstances," to be an independent basis for a kinship guardianship.

{13} The very question raised here about the construction of Section 40-10B-8(B)(3), whether the ninety-day residence requirement applies when kinship guardianship is sought based on "extraordinary circumstances," has arisen previously in this Court. *Stanley J. v. Cliff L.*, 2014-NMCA-029, ¶ 10 n.2, 319 P.3d 662 (internal quotation marks omitted). The majority in *Stanley J.*, however, did not reach this issue, instead concluding that there were no extraordinary circumstances that justified the appointment of a kinship guardian. *Id.* ¶ 16. This remains, therefore, an issue of first impression.

{14} We review questions of statutory construction de novo. *State v. Smith,* 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022. Our ultimate goal in construing a statute "is to ascertain and give effect to the intent of the Legislature." *Id.* Statutory language must be interpreted and applied to meet the objective our Legislature sought to accomplish. *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346, 871 P.2d 1352. We analyze a statute's function within a comprehensive legislative scheme, with reference to the statute as a whole and in reference to statutes dealing with the same general subject matter. *See id.* ¶ 26. Although we begin by looking to the plain language of the statute, we cannot neglect our obligation to interpret that language in light of "the purpose to be achieved and the wrong to be remedied." *State ex rel. Children, Youth & Families Dep't v. Djamila B.* (*In re Mahdjid B.*), 2015-NMSC-003, ¶ 21, 342 P.3d 698 (internal quotation marks and citation omitted).

{15} We do not agree with the district court that the language of Section 40-10B-8(B)(3) is so plain that it should be applied as written, without further analysis of the policies and purposes of the Act, and of Section 40-10B-8(B)(3) in particular. The competing constructions suggested by Grandmother and the district court are both grammatically correct, so that either reading could be the construction intended by our Legislature. Nor are Grandmother's and the district court's conflicting readings of the statute the only options: the extraordinary circumstances phrase, appended to the end of Section 40-10B-8(B)(3), could also be construed to apply separately to each preceding phrase of the statute.

{16} When the statutory language is "doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction" we construe the statute "according to its obvious spirit or reason." *State v. Tafoya*, 2010-NMSC-019, ¶ 10, 148 N.M. 391, 237 P.3d 693 (internal quotation marks and citation omitted).

[2] The supplemental district court record submitted to this Court, along with a review of the district court record in Odyssey, shows that Child currently remains with Grandmother by court order, pursuant to the district court's general parens patriae authority to act in the best interest of the child.

{17} Instead of turning to the spirit and reason of the Act, the district court turned to the ease with which the Legislature might have clarified its meaning by creating a separate subsection for "extraordinary circumstances," if the Legislature had intended to adopt Grandmother's construction. The application of this rule of statutory construction does not relieve us of the responsibility to carefully assess the purpose and objectives of the statutory language our Legislature chose to use. *See Perea v. Baca*, 1980-NMSC-079, ¶ 22, 94 N.M. 624, 627, 614 P.2d 541 ("A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration." (internal quotation marks and citation omitted)).

{18} Although the relationship between Section 40-10B-8(B)(3)'s "extraordinary circumstances" language and the ninety-day length of residence requirement is an issue of first impression, both our Supreme Court and this Court have previously explored the intent of our Legislature in enacting the Act. Our Supreme Court has also previously construed Section 40-10B-8(B)(3)'s "extraordinary circumstances" language in relation to the requirement that the child reside with the petitioner "without the parent," and the requirement that the parent have legal custody of the child. *See In re Guardianship of Patrick D.*, 2012-NMSC-017, ¶¶ 24-30, 280 P.3d 909. This Court has construed "extraordinary circumstances" in relation to the requirement that the parent be shown to be "unwilling or unable to care for [the c]hild." *In re Guardianship of Victoria R.*, 2009-NMCA-007, ¶ 3, 145 N.M. 500, 201 P.3d 169; *see Stanley J.*, 2014-NMCA-029, ¶¶ 10-28. We are guided in our analysis by these opinions.

{19} In *Patrick D.*, our Supreme Court identified the central purpose of the Act as "ensur[ing] that children in New Mexico have the opportunity to be raised by their relatives when both of their parents are unwilling and/or unable to care for them." 2012-NMSC-017, ¶ 7; *see* **§ 40-10B-2(A). The Act establishes "procedures and substantive standards for effecting legal relationships between children and adult caretakers who have assumed the day-to-day responsibilities of caring for a child," authorizing kinship caregivers to make decisions for a child generally made by parents, and providing legal authority to obtain medical care and make educational decisions.** *In re Mahdjid B.*, 2015-NMSC-003, ¶ 21 (internal quotation marks and citation omitted). The Act is intended to ensure that a child who "is not residing with either parent" has "a stable and consistent relationship with a kinship caregiver, that will enable the child to develop physically, mentally and emotionally to the maximum extent possible when the child's parents are not willing or able to do so." Section 40-10B-2(C). As our Supreme Court has stated, the Act should be applied, in addition, "to allow the parents to maintain or rebuild their relationship with the child when doing so would be in the child's best interests." *Patrick D.*, 2012-NMSC-017, ¶ 15.

{20} The central requirement, then, for a kinship guardianship, pursuant to Section 40-10B-8(B)(3), is that the child's parents be "unwilling and/or unable to care for [the child]." *Patrick D.*, 2012-NMSC-017, ¶ 7; *see* **§ 40-10B-2(A). The Act's purpose is to keep the child with relatives or kinship caregivers with whom they have a significant bond, which our Legislature found is the best possible alternative to parental care. Section 40-10B-2(A). The phrase "or there are extraordinary circumstances," has been construed by this Court in light of the legislative purposes of a kinship guardianship to allow the creation of a kinship guardianship when a parent is not currently "unwilling or unable" to provide adequate care, but where there is instead "a substantial likelihood of serious physical or psychological harm or serious detriment to the child," if the child is placed with the parent.** *Victoria R.*, 2009-NMCA-007, ¶ 28 (Pickard, J., specially concurring) (internal quotation marks and citation omitted). This definition is drawn from our Supreme Court's decision in *In re Adoption of J.J.B.*, 1995-NMSC-026, ¶ 68, 119 N.M. 638, 894 P.2d 994, which adopted this exception to the parental preference doctrine.

{21} The construction of "extraordinary circumstances," in Section 40-10B-8(B)(3), as an exception to parental unfitness, however, does not resolve the question raised in this case about the relationship of the ninety-day requirement to "extraordinary circumstances." Our Supreme Court, in its decision in *Patrick D.*, held that our Legislature intended the phrase "extraordinary circumstances" to apply to other requirements found in Section 40-10B-8(B)(3), as well as to the parental unfitness requirement. *Patrick D.*, 2012-NMSC-017, ¶ 29 (internal quotation marks omitted). Our Supreme Court has construed the phrase, "or there are extraordinary circumstances" to demonstrate legislative intent to reject a rigid reading of the threshold requirements of that section. *Id.* **¶¶ 10, 24. Although the length of time the child had resided with the petitioner was not at issue in** *Patrick D.*, the related requirement that the child reside with the petitioner "without the parent" for the ninety-day period prior to filing the petition; and the requirement that the parent "ha[ve] legal custody of the child" were at issue. *Id.* **¶¶ 24-30 (internal quotation marks and citation omitted).**

{22} In this context, our Supreme Court rejected a "rigid textual interpretation," of the threshold requirements of Section 40-10B-8(B)(3), holding that the phrase "or there are extraordinary circumstances," was intended by our Legislature to create a "fail safe to allow courts to ensure that the Act is applied in a manner that adheres to the spirit of the Act." *Patrick D.*, 2012-NMSC-017, ¶ 29. Recognizing that cases where a kinship guardianship is sought "often involve unconventional family structures and unconventional facts[,]" our Supreme Court held that a case may fall within the spirit of the Act, and therefore within the intended scope of Section 40-10B-8(B)(3), "even though the Legislature may have failed to contemplate [the case's] precise facts when it passed the Act." *Patrick D.*, 2012-NMSC-017, ¶ 29.

{23} The family circumstances in *Patrick D.* provide a useful example of the construction by our Supreme Court of the requirements of Section 40-10B-8(B)(3). One of the child's parents in *Patrick D.* had consented to the kinship guardianship, the other parent had previously been found by the district court to be unfit to care for the child, resulting in legal custody of the child being vested in the child's grandparents by court order. 2012-NMSC-017, ¶ 1. At the time the petition was filed, the child was residing and being cared for day-to-day by grandparents, pursuant to a custody order. *Id.* **¶¶ 4-6. The child had lived with the petitioning grandparents for more than ninety days at the time the petition was filed, so the length of residence was not at issue.** *Id.* **¶ 21. The child's mother, however, had resided with grandparents during that ninety-day period, and participated in the child's care.** *Id.* **¶ 2. The father, who had been found to be "unwilling or unable" to parent child,** *id.* **¶ 28, objected to the kinship guardianship, claiming that both Section 40-10B-8(B)(3)'s requirement that the child had resided with the petitioner "without the parent for a period of ninety days[,]"** *Patrick D.*, 2012-NMSC-017, **¶¶ 10, 24 (emphasis, internal quotation marks, and citation omitted), and the requirement that the parents have legal custody of the child at the time the petition is** filed—neither of which were met—are mandatory and that the kinship guardianship petition should be dismissed on that basis. *See id.* **¶ 29.**

{24} Although recognizing that the plain language of the threshold requirements for kinship guardianship was not satisfied, our Supreme Court held that the district court had authority to appoint grandparents as the child's kinship guardians because the case involved "unconventional family structures and unconventional facts" falling within the spirit of the Act. *Id.* **¶¶ 27-29, 32. Noting that "even though the Legislature may have failed to contemplate these precise facts when it passed the Act[,]"** *id.* ¶ 29, several essential purposes of the Act were served: the mother living in the grandparents' home under the facts of this case facilitated reunification of the child with the child's parents, as intended by the Act, *id.* **¶¶ 33, 35, and it would be an unreasonable reading of the Act to exclude a child from the benefits of the Act because of the technicality that parents were subject to a court order removing legal custody.** *Id.* **¶¶ 28-29.**

{25} Based then on the purposes and objectives our Legislature sought to serve, and on our Supreme Court's construction of the phrase "or there are extraordinary circumstances[,]" we see no indication that our Legislature intended the ninety-day requirement to be construed differently than the other threshold requirements of Section 40-10B-8(B)(3). Where there is no parent who is able or willing to care for child, or where placement in the care of the parent will result in significant harm or deprivation to the child; where the child is living with the petitioner; and where an unconventional family structure satisfies the objectives of the ninety-day residency requirement, the petition adequately states a claim and dismissal without a full hearing is not appropriate.

## II. The Unusual Facts and Circumstances Alleged Here State a Claim for a Kinship Guardianship, Pursuant To Section 40-10B-8(B)(3)

{26} In this case, Grandmother alleged both extraordinary circumstances satisfying the purposes of the ninety-day residency requirement, and extraordinary circumstances involving serious detriment to Child if returned to Father's care, as an alternative basis to unfitness of the parent. We conclude that the extraordinary circumstances pleaded by Grandmother, if accepted as true, although not directly included in the language of the Act, are the type of unconventional family circumstances that bring Child's situation within the spirit of the Act and that Grandmother pleaded facts, which, if accepted as true, were sufficient to state a claim for extraordinary circumstances based on the detriment to Child.

{27} We first discuss the standard of review applicable to the district court's decision granting Father's motion to dismiss. We then apply that standard of review to the allegations which bring this case within the policy and purposes served by the ninety-day residence requirement. We next address Grandmother's claim that "extraordinary circumstances" provided an alternative to a finding that Father was unable or unwilling to provide adequate care for Child under the standard established by the *J.J.B.* decision.

### A. Standard of Review

{28} We review a district court's decision to dismiss a complaint for failure to state a claim de novo. *Healthsource, Inc. v. X-Ray Assocs. of N.M., P.C.*, 2005-NMCA-097, ¶ 16, 138 N.M. 70, 116 P.3d 861. We test "the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for purposes of ruling on the motion, the court must accept as true." *Herrera v. Quality Pontiac,* **2003-NMSC-018, ¶ 2, 134 N.M. 43, 73 P.3d 181.B.**[3] "[T]he motion may be granted only when it appears the plaintiff cannot be entitled to relief under any state of facts provable under the claim." *Runyan v. Jaramillo*, 1977-NMSC-061, ¶ 21, 90 N.M. 629, 567 P.2d 478.

### B. The Extraordinary Circumstances Alleged By Grandmother Are Consistent With the Spirit and Purposes of the Ninety-Day Residence Requirement

{29} When we apply our Supreme Court's construction of "extraordinary circumstances" to the facts and circumstances alleged by Grandmother, we conclude that the unusual facts and circumstances and unconventional living arrangement in this case are an example of "extraordinary circumstances" not specifically contemplated by our Legislature, that nonetheless satisfy the purposes and spirit of Section 40-10B-8(B)(3). Although not living with Grandmother in Grandmother's house, without her mother, for ninety days prior to the filing of the petition, Child had lived on the same property as Grandmother since Child's birth. Grandmother had been involved with Child on a daily basis. Grandmother alleged that she had formed the kind of close bond the ninety-day requirement was intended to ensure. The sudden death of Child's mother, who had been Child's physical custodian, and with whom Child had been living, created a crisis not anticipated by the statutory language. Given the unusual living arrangement, where Grandmother had seen Child daily and assisted in her care since her birth, Child's lack of contact with Father for nearly a year based on his noncompliance with an order of a domestic relations court requiring him to improve his parenting skills, and Child's fraught relationship with Father, Child naturally turned to Grandmother and Grandmother stepped in to provide parental care to Child.

{30} These allegations, if accepted as true, as they must be for purposes of a motion to dismiss, describe unusual family circumstances that fall within the spirit of the Act and satisfy the purposes of the ninety-day residence requirement; Grandmother and Child have a strong bond, Grandmother has demonstrated her willingness and ability to care for Child, and Grandmother is currently caring for Child. The district court erred in dismissing the petition for failure to allege extraordinary circumstances sufficient to meet the threshold requirements of Section 40-10B-8(B)(3).

### C. The Petition Sufficiently Alleged Facts Supporting Both Father's Inability or Unwillingness to Care for Child and Extraordinary Circumstances Resulting in Serious Detriment to Child, as Defined in *J.J.B.*

{31} Grandmother sufficiently alleged facts, which if accepted as true, established that Father was either unable or unwilling to provide adequate care for Child. Grandmother pleaded, and introduced to supplement her petition, the findings of the domestic relations court that contact with Father was severely detrimental to Child's mental health, and that Father refused to comply with court-ordered therapy and parenting instruction designed to remedy Father's inability to provide parenting appropriate to meet Child's needs. Grandmother also alleged that, in the opinion of Child's therapist, Child was likely to suffer serious detriment to her physical and mental health if the district court precipitously returned her to Father's custody and care.

[3] In its decision on Father's motion to dismiss and for immediate custody of Child, the district court considered evidence presented at the hearing on that motion. To the extent that testimony supplemented and updated the petition, substituting for an amended petition, the district court did not err in considering that testimony, and we follow suit. We disregard, however, any findings of fact based on the evidence at that hearing as inconsistent with the law requiring the district court to decide a motion to dismiss treating the facts alleged as true, and drawing all inferences in favor of Grandmother.

This allegation was supplemented at the hearing on Father's motion to dismiss with testimony describing Child's severe anxiety and depression, refusal to eat if forced to have contact with Father, and threats to harm herself.

{32} The allegations of the petition, as supplemented by the hearing on the motion to dismiss, therefore, are sufficient to state a claim for kinship guardianship based on Grandmother's allegations of "extraordinary circumstances," as defined in *J.J.B.*

{33} Where the petition states a claim for kinship guardianship, the district court must conduct the evidentiary hearing required by Section 40-10B-8(A) of the Act, and then, considering all of circumstances, determine whether the objectives of the statute, and whether the best interests of child would be served by granting the petition. The district court erred in failing to proceed to a hearing and decision.

**CONCLUSION**

{34} We reverse the dismissal of Grandmother's petition for kinship guardianship and remand for a hearing on whether, under the current circumstances, the appointment of Grandmother as Child's kinship guardian satisfies the requirements of the Act and is in Child's best interests.

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

**JANE B. YOHALEM, Judge**

**WE CONCUR:**

**KRISTINA BOGARDUS, Judge**

**MEGAN P. DUFFY, Judge**

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Sutin, Thayer & Browne is seeking a full-time Civil Litigation Associate. The candidate must have at least 3 years of experience relevant to civil litigation, and must have excellent legal writing, research, and verbal communication skills. Competitive salary and full benefits package. Visit our website https://sutinfirm.com/ to view our practice areas. Send letter of interest, resume, and writing sample to sor@sutinfirm.com.

### Public Regulation Commission Chief Hearing Examiner (PRC # 49593)

Santa Fe; Salary $36.47-$58.36 Hourly; $75,862-$121,379 Annually; Pay Band LJ; This position is continuous and will remain open until filled. The Chief Hearing Examiner serves as the point of contact between the NMPRC Commissioners and the individual Hearing Examiners relating to public utility regulation cases. We need an experienced hearing examiner familiar with NMPRC litigation to effectively and efficiently manage the resources of the Hearing Examiner office. The Chief Hearing Examiner assigns cases to individual Hearing Examiners based upon experience, strengths, interests and existing schedules; monitors the progress of cases and provides guidance as requested; presides over the Chief Hearing Examiner's own caseload; and manages and performs supervisory functions for the Hearing Examiner office. The ideal candidate will have strong writing skills, experience in public utility regulation; experience as an administrative law judge or hearing officer; demonstrated interest and familiarity with recent NMPRC litigation and decisions; familiarity with NMPRC hearing procedures; educational experience in economics, accounting or engineering; and supervisory or managerial experience. Minimum Qualifications include a J.D. degree from an accredited school of law and eight years of experience in the practice of law. Licensed as an attorney by the Supreme Court of New Mexico or qualified to apply for limited practice license (Rules 15-301.1 and 15-301.2 NMRA). For more information on limited practice licenses, please visit http://nmexam.org/limited-license/ To apply please visit www.spo.state.nm.us .

### Request For Proposal – Prosecutor Legal Services

Pueblo of Laguna seeks proposals from any law firm or individual practicing attorney to provide prosecutorial legal services for adult criminal or juvenile delinquency cases when there is conflict of interest or unavailability of regular prosecutor. Reply by June 15, 2022. RFP details at: www.lagunapueblo-nsn.gov/rfp_rfq/

### Public Regulation Commission Hearing Examiner (Attorney IV, PRC #53612)

Job ID: 120627, Santa Fe; Salary $34.18-$54.68 Hourly; $71,084-$113,734 Annually Pay Band LI; This position is continuous and will remain open until filled. The NMPRC regulates electric, natural gas and water utilities, telecommunications carriers, and motor carriers. NMPRC Hearing Examiners manage complex, multi-issue cases; preside over evidentiary hearings; and issue independent recommended decisions similar to court opinions for final action by the Commission. Cases involve the traditional issues of utility rate requests and service adequacy. They also increasingly include issues relating to climate change such as the future of coal plants, utilities' acquisitions of renewable energy resources, energy efficiency programs, plans to increase the use of electric vehicles, and the challenges water utilities face with declining water supplies. Applicants should enjoy administrative litigation and have strong writing skills. They should also be capable of understanding and working with economic, accounting, and engineering evidence. Minimum qualifications include a J.D. from an accredited law school, five years of experience in the practice of law, and licensure as an attorney by the Supreme Court of New Mexico or qualified to apply for a limited practice license under Rules 15-301.1 and 15-301.2 NMRA. For more information on limited practice license please visit http://nmexam.org/limited-license/. Substitutions may apply. To apply please visit www.spo.state.nm.us .

### Supervisory City Attorneys

The City of Albuquerque Legal Department is hiring Supervisory City Attorneys for a number of positions. The work includes management, oversight and development of Assistant City Attorneys, paralegals and staff. Roles may require legal expertise in areas of municipal law such as: administrative and civil litigation; contract law; ordinance drafting; regulatory law; Inspection of Public Records Act; procurement; public works and construction law; real property; finance; labor law; and risk management. Attention to details, timelines and strong writing skills are essential. Five years' experience including at least one year of management experience is preferred. Applicants must be an active member of the State Bar of New Mexico in good standing. Please apply online at www.cabq.gov/jobs and include a resume and writing sample with your application. Current open positions include: Deputy Director of Policy; Deputy City Attorney of Operations; Managing City Attorney of Property and Finance.

### Request For Proposal – Defense Legal Services

Pueblo of Laguna seeks proposal from any law firm or individual practicing attorney to provide legal services for adult criminal defense or representation of juveniles in delinquency proceedings when there is conflict of interest or unavailability of regular defender. Reply by June 15, 2022. RFP details at: www.lagunapueblo-nsn.gov/rfp_rfq/

### Various Assistant City Attorney Positions

The City of Albuquerque Legal Department is hiring for various Assistant City Attorney positions. The Legal Department's team of attorneys provides a broad range of legal services to the City, as well as represent the City in legal proceedings before state, federal and administrative bodies. The legal services provided may include, but will not be limited to, legal research, drafting legal opinions, reviewing and drafting policies, ordinances, and executive/administrative instructions, reviewing and negotiating contracts, litigating matters, and providing general advice and counsel on day-to-day operations. Attention to detail and strong writing and interpersonal skills are essential. Preferences include: Five (5)+ years' experience as licensed attorney; experience with government agencies, government compliance, real estate, contracts, and policy writing. Candidates must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Current open positions include: Assistant City Attorney - APD Compliance; Assistant City Attorney – Litigation (Tort/Civil Rights); Assistant City Attorney – Employment/Labor. For more information or to apply please go to www.cabq.gov/jobs. Please include a resume and writing sample with your application.

### Legal Secretary

The City of Albuquerque Legal Department (Litigation Division) is seeking a Legal Secretary to assist assigned attorneys in performing a variety of legal secretarial/administrative duties, which include but are not limited to: preparing and reviewing legal documents; creating and maintaining case files; calendaring; provide information and assistance, within an area of assignment, to the general public, other departments and governmental agencies. Please apply at https://www.governmentjobs.com/careers/cabq.

### Paralegal or Legal Assistant

Paralegal or legal assistant needed for busy litigation firm. Please submit resumes to admin@millichlaw.com

### Legal Assistant

Well established Santa Fe personal injury law firm is in search of an experienced paralegal/legal assistant. Candidate should be honest, highly motivated, detail oriented, organized, proficient with computers & excellent writing skills. Duties include requesting and reviewing medical records and bills, meeting with clients, opening claims with insurance companies and preparing demand packages. We offer a very competitive salary, a retirement plan funded by the firm, full health insurance benefits, paid vacation and sick leave, bonuses and opportunities to move up. We are a very busy law firm and are looking for an exceptional assistant who can work efficiently. Please submit your resume to personalinjury2020@gmail.com

### Litigation Secretary

Lewis Brisbois is seeking secretaries to join our growing office. Qualified candidates will have a thorough knowledge of legal terminology, State and Federal court procedures; Advanced experience in E-Filing with both State and Federal Courts; Calendaring; Ability to manage and maintain high volume of work flow; 5+ years of litigation experience, including trial preparation; Skills will include strong law and motion background. Must be organized, reliable, and attention to detail is a must; Excellent communication and organizational skills. Please submit your resume to rob.henderer@lewisbrisbois.com and indicate "New Mexico Secretary Position". All resumes will remain confidential.

### Litigation Paralegal

The Law Offices of Erika E. Anderson is looking for an experienced litigation paralegal for a very busy and fast-paced firm of four (4) attorneys. The candidate must be highly motivated and well organized, pay close attention to detail, be willing to take on multiple responsibilities, and be highly skilled when it comes to both computer software and written communication. This is a wonderful opportunity to join an incredible team that works hard and is rewarded for hard work! The position offers a great working environment, competitive salary, and a generous benefits package including medical coverage, 401K, paid holidays, and over 2 weeks of paid time off. If interested, please send a resume to erika@eandersonlaw.com.

## Office Space

### Purpose-Built Law Office For Lease

Modern office. 6 professional offices and 10 staff workstations. Stunning conference room, reception, kitchen. Fully furnished. Lots of file storage. Phones and copier available. 1011 Las Lomas Road NE, Albuquerque. Available immediately. Inquiries: admin@kienzlelaw.com

### Two Santa Fe Offices Available April 1, 2022

Two adjacent offices in a conveniently located professional office complex. The building has six offices, large reception area, kitchenette, and ample parking for clients and professionals. Four offices are currently occupied by two attorneys. Rent includes alarm, utilities, and janitorial services. $950/mo Basement storage available. Call Donna 505-795-0077

### Office Space For Rent

Newly renovated office space for rent. Two large offices and reception area available at 12th and Lomas. Please call Lisa for more information 505-979-7080.

### Sun Valley Executive Office Suites

Conveniently located in the North Valley with easy access to I-25, Paseo Del Norte, and Montano. Quick access to Downtown Courthouses. Our all-inclusive executive suites provide simplicity with short term and long-term lease options. Our fully furnished suites offer the best in class amenities. We offer a move-in ready exceptional suites ideal for a small law firm. Visit our website SunValleyABQ.com for more details or call Jaclyn Armijo at 505-343-2016.

## Miscellaneous

### Search for Will Albuquerque Area Attorneys

Searching for any will executed for DOUGLAS R. LUTE,deceased, for probate. Please contact James Lute : jalute@gmail.com or call 219-241-5066.

# Help New Mexico Wildfire Victims

In partnership with the **Federal Emergency Management Agency** and the **American Bar Association's Disaster Legal Services Program**, the **State Bar of New Mexico Young Lawyers Division** is preparing legal resources and assistance for survivors of the New Mexico wildfires.

**A free legal aid hotline will be available soon and we need volunteers!**
Individuals who qualify for assistance will be matched with New Mexico Lawyers to provide free, limited legal help.

- Assistance with securing FEMA and other benefits available to disaster survivors
- Assistance with life, medical, and property insurance claims
- Help with home repair contracts and contractors
- Replacement of important legal documents destroyed in the disaster
- Assistance with consumer protection matters, remedies, and procedures
- Counseling on landlord/tenant and mortgage/foreclosure problems

**Volunteer Expectations**
Volunteers do not need extensive experience in any of the areas listed below. FEMA will provide basic training for frequently asked questions. This training will be required for all volunteers. We hope volunteers will be able to commit approximately one hour per week.

Visit **www.sbnm.org/wildfirehelp** for more information and to sign up.
You can also contact Lauren E. Riley, ABA YLD District 23,
at 505-246-0500 or lauren@batleyfamilylaw.com.

FEMA

ABA AMERICANBARASSOCIATION

State Bar *of* New Mexico
Young Lawyers Division

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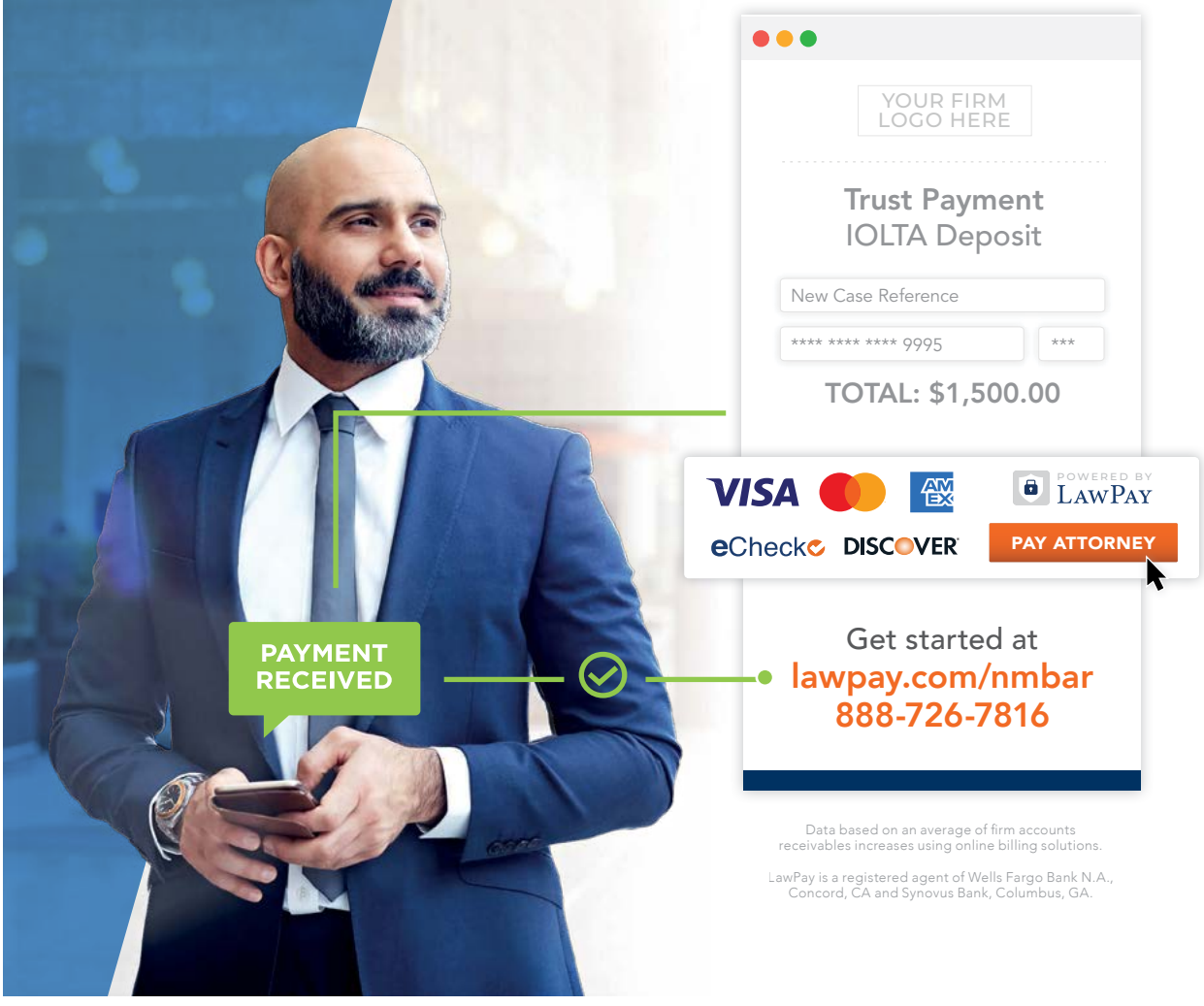


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