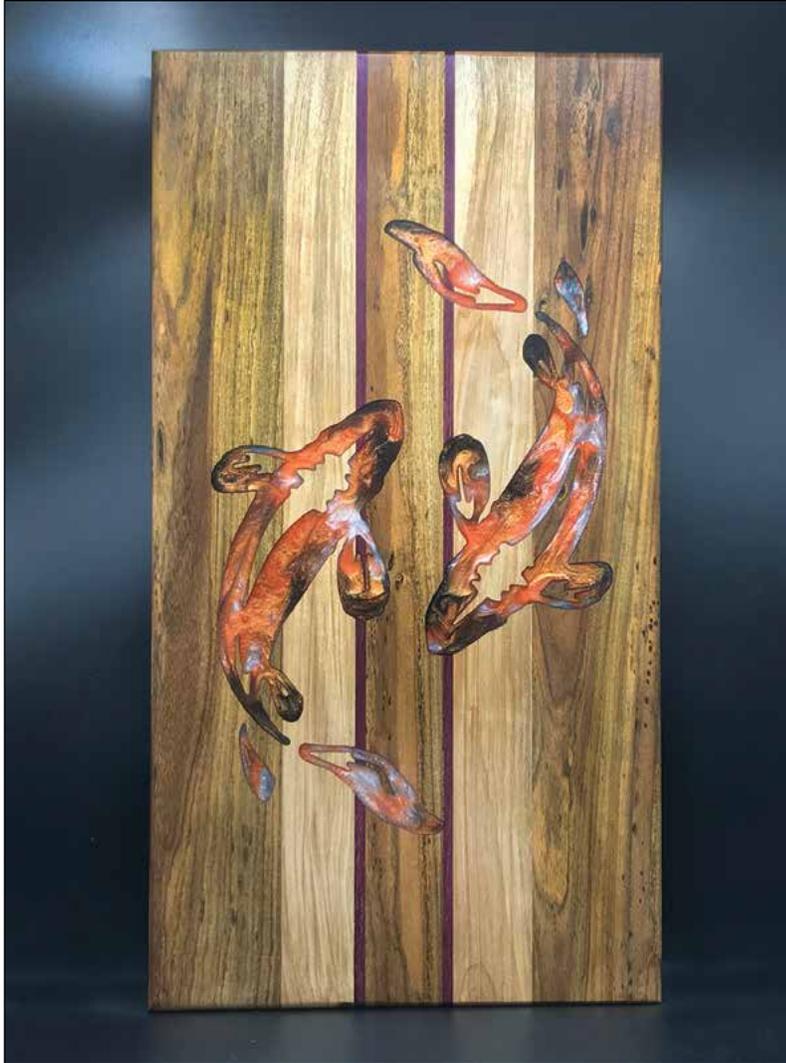


BAR BULLETIN

September 14, 2022 • Volume 61, No. 17



Koi Fish, by Samuel and Julie Sandoval (see page 4) www.blackgrovedesigncompany.com

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New Mexico State Bar Foundation
Center for Legal Education

CLE PROGRAMMING

from the Center for Legal Education



In-person programs subject to current public health guidelines. Should changing guidance make meeting in-person not possible, registrants will be transferred to virtual format or given a refund. All visitors to the State Bar Center are encouraged to read the latest COVID information at the CDC website and take any actions to keep themselves and others comfortable and healthy as we continue to transition out of the pandemic.

SEPTEMBER 15

Webinar

2022 Employment and Labor Law Institute—Day 1

2.8 G, 1.0 EP

1–5 p.m.

\$184 Standard Fee

SEPTEMBER 16

Webinar

2022 Employment and Labor Law Institute—Day 2

2.8 G, 1.0 EP

12:30–5 p.m.

\$184 Standard Fee

SEPTEMBER 20

In-Person or Webcast

Basic Financial Literacy for Lawyers

2.0 G

11 a.m.–1 p.m.

\$98 Standard Fee

SEPTEMBER 21

Webinar

Elder Law Summer Series: Client Capacity, Diminished Capacity, and Declining Capacity. Ethical Representation and Tools for Attorneys

1.0 EP

Noon–1 p.m.

\$49 Standard Fee

SEPTEMBER 22

Webinar

Overview of Workers' Compensation Issues

1.0 G

9–10 a.m.

\$49 Standard Fee

SEPTEMBER 23

In-Person Only

IP Institute: United States Patent and Trademark Office in New Mexico

5.25 G, 1.0 EP

8:30 a.m.–4:35 p.m.

\$282 Standard Fee

SEPTEMBER 29

In-Person or Webcast

2022 Family Law Fall Institute—Day 1

4.5 G, 1.0 EP

9 a.m.–4 p.m.

\$259 Standard Fee

SEPTEMBER 30

In-Person or Webcast

2022 Family Law Fall Institute—Day 2

6.0 G

9 a.m.–4:30 p.m.

\$282 Standard Fee

OCTOBER 5

Webinar

Basics to Trust Accounting: How to Comply with Disciplinary Board Rule 17-204

1.0 EP

9–10 a.m.

\$55 Standard Fee

OCTOBER 6

Webinar

Communication Breakdown: It's Always The Same (But It's Avoidable)

1.0 G

9–10 a.m.

\$49 Standard Fee

OCTOBER 7

In-Person or Webcast

2022 Health Law Symposium

3.5 G, 2.0 EP

10 a.m.–4:30 p.m.

\$259 Standard Fee

OCTOBER 12

Webinar

Mandatory Succession Planning: It Has To Happen, But It Doesn't Have To Be That Difficult

1.0 EP

9–10 a.m.

\$49 Standard Fee

OCTOBER 19

Webinar

Essential Law Firm Technology: The Best Of What's Out There Presented by Baron K. Henley, Esq.

1.0 G

2–3 p.m.

\$49 Standard Fee

OCTOBER 20

In-Person or Webcast

2022 Solo & Small Firm Institute

2.0 G, 4.0 EP4

9 a.m.–4:30 p.m.

\$282 Standard Fee

OCTOBER 27

Webinar

Law Practice Management for New Lawyers

1.0 G

2–3 p.m.

\$49 Standard Fee

Register online at www.sbnm.org/CLE or call 505-797-6020



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New Mexico**
Est. 1886

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www.sbnm.org



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Meetings

September

15
Public Law Section
noon, virtual

16
Family Law Section
9 a.m., virtual

22
Elder Law Section
noon, virtual

23
Immigration Law Section
noon, virtual

28
Intellectual Property Law Section
noon, JAlbright Law LLC

October

4
Health Law Section
9 a.m., virtual

5
Employment and Labor Law Section
noon, virtual

13
Children's Law Section
noon, virtual

14
Prosecutors Section
noon, virtual

18
Solo and Small Firm Section
noon, virtual/State Bar Center

Workshops and Legal Clinics

September

28
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

October

5
Divorce Options Workshop
6-8 p.m., virtual
26
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

November

2
Divorce Options Workshop
6-8 p.m., virtual

December

7
Divorce Options Workshop
6-8 p.m., virtual
14
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

About Cover Image and Artist: Samuel and Julie Sandoval, both Albuquerque natives, work as a team to design and create original wood and resin wall hangings, charcuterie boards and other artistic home décor. They enjoy finding unique and exotic wood and transforming it into artwork with colorful resin inlays. Their work is displayed at The ABQ Collective at 1321 Eubank NE, Albuquerque, NM.

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>.

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>.

Bernalillo County Metropolitan Court Announcement of Vacancy

A vacancy on the Bernalillo County Metropolitan Court (Criminal) will exist as of Oct. 1, due to the retirement of the Hon. Judge Sandra Engle, effective Sept. 30. 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. Applicants can access application forms at <https://lawschool.unm.edu/judsel/application.html> or have forms emailed to them by contacting the Judicial Selection Office at akin@law.unm.edu. The deadline for applications has been set for Sept. 22 at 5 p.m. Applications received after that time will not be considered. The Bernalillo County Metropolitan Court Judicial Nominating Commission will meet at 9:30 a.m. on Oct. 11 to interview applicants at the State Bar of New Mexico, located at 5121 Masthead Street N.E., Albuquerque, New Mexico, in their conference rooms, with no mask or social distancing requirement. The Committee meeting is open to the public and those who wish to be heard about any of the candidates will have an opportunity to be heard.

Professionalism Tip

With respect to the courts and other tribunals:

I will be a vigorous and zealous advocate on behalf of my client, but I will remember that excessive zeal may be detrimental to my client's interests or the proper functioning of our justice system.

New Assignment for Judge Nina Safier

Upon the retirement of Metropolitan Court Judge Sandra Engel, effective Oct. 1, Judge Nina Safier, Division XVII, will be assigned the misdemeanor criminal docket previously assigned to Judge Engel, Division XI.

New Assignment for Judge Claire A. McDaniel

With Gov. Lujan Grisham's appointment of Claire A. McDaniel to Division XVI of the Metropolitan Court, effective Sept. 6, Judge McDaniel will be assigned to the Felony Division.

Bernalillo County Metropolitan Court Judicial Nominating Commission Candidate Announcement

The Bernalillo County Metropolitan Court Judicial Nominating Commission convened on Aug. 19 at the Bernalillo County Metropolitan Courthouse, located at 401 Lomas NE, Albuquerque, New Mexico and completed its evaluation of the 10 candidates for the one vacancy on the Bernalillo County Metropolitan Court due to the appointment of the Hon. Judge David Murphy to the Second Judicial District Court, effective July 22. The Commission's recommended candidates for Gov. Michelle Lujan Grisham's consideration include **Shonetta Estrada**, **Michael Philip Fricke**, **Claire Ann McDaniel** and **Daniel Roberson**.

Second Judicial District Court Appointment to Second Judicial District Court Bench

Gov. Michelle Lujan Grisham has announced the appointment of David A. Murphy to the Second Judicial District Court bench. Effective July 23, Judge Murphy has been assigned to fill Division XXX, the new judgeship created when Gov. Lujan Grisham recently signed into law House Bill 68. Judge Murphy will be assigned Criminal Court cases previously assigned to Judge Alisa Hart, Division XXI. Pursuant to New Mexico Supreme Court Order

22-8500-007, peremptory excusals have been temporarily suspended during the COVID-19 Public Health Emergency.

STATE BAR NEWS

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

Board of Bar Commissioners Meeting Summary

The Board of Bar Commissioners of the State Bar of New Mexico met on Aug. 11 at the Hyatt Regency Tamaya Resort & Spa. Action taken at the meeting follows:

- Approved the May 20, 2022 meeting minutes;
- Presented a draft of Three-Year Strategic Plan for 2023-2025 from the Board Retreat in May;
- Nominated Commissioner Aja Brooks as Secretary-Treasurer and Commissioners Erin Atkins as President-Elect for 2023; the Board will vote on the nominations at the October meeting;
- Approved the revised Memorandum of Understanding between the State Bar and the NM State Bar Foundation;
- Received a report on and ratified action taken by the Executive Committee, including: 1) approved the Annual Awards Committee recommendations for the 2022 recipients; 2) approved a late fee waiver; 3) approved an inflation adjustment for staff; 4) approved a resolution for the 401(k) Plan which was required due to the new laws; and 5) update regarding a response to the AOC's RFP for the Medical Review Commission administration;
- Received a report from the Annual Awards Committee on the 2022 award recipients, which were presented during the State Bar's Annual Meeting;
- Received a report from the Finance Committee about the Committee's Aug.

- 10 meeting in which the Committee: 1) reviewed and accepted the June 2022 Financials; 2) reviewed the Client Protection Fund, Access to Justice and Judges and Lawyers Assistance Program Second Quarter 2022 Financials; and 3) the next meeting will be in October to approve the 2023 Budget, which will be held separately from the Board meeting;
- Received a report from the Policy and Bylaws Committee and approved amendments to the State Bar Bylaws regarding an automatic carryover of section funds and the sunset provision for sections and committees to an evaluation process every four years;
 - Received an update on the Legal Specialization Commission, which established two paths to specialization; one path encourages attorneys to partner with national legal specialization organizations that offer an exam component, while the other path invites attorneys to write their own specialized exam specific to their practice area. The extensive accomplishments of the Commission included writing Specialization specific policies and procedures and establishing relationships with testing experts, the ABA Legal Specialization Commission and other state Legal Specialization programs;
 - Reported that the ATJ Fund Grant Commission met in May and awarded \$900,000 to 10 civil legal service providers;
 - Received the President's Report as follows: 1) she appointed Quinn Lopez to the Risk Management Advisory Board for a four-year term; 2) she provided an overview on the Annual Meeting programming and events; and 3) she reported on her attendance at the Jackrabbit Bar Conference in Deadwood, South Dakota, in June;
 - Received a report on the NM State Bar Foundation Board's August meeting when it approved the revised MOU between the organizations. The fundraising consultant met with all of the board members and will present his final report at their November meeting;
 - Received reports from the Senior Lawyers, Young Lawyers and Paralegal Divisions;
 - Reported that the Bar Foundation submitted a response to the RFP regarding the VAP Program and was selected to take on the program, which is currently run by NM Legal Aid; it will be an expanded program and assist those who don't qualify under the current program;
 - Received a written report on the ABA House of Delegates from the State Bar's representative;

- Received an update on the Cannabis Law Section, which held its Annual Institute during the Annual Meeting;
- The 2023 Annual Meeting will be held again at the Hyatt Regency Tamaya Resort and Spa and the dates are July 26-29; and
- The remainder of the Board meetings are scheduled for Oct. 21 with a Member Appreciation Reception following the meeting and Dec. 14 in Santa Fe, which was moved from Dec. 7.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the Oct. 21 meeting.

New Mexico Judges and Lawyers Assistance Program The Suicide and Crisis Lifeline

Started July 16, the 988 Suicide and Crisis Lifeline is now available nationwide. The Lifeline provides 24/7 all year round, free and confidential support for people in distress, prevention and crisis resources for you or your loved ones and best practices for professionals. For more information, visit www.988nm.org.

NMJLAP Committee Meetings

The NMJLAP Committee will meet at 4 p.m. on 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.

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

— *Featured* —

Member Benefit



Defined Fitness offers State Bar members, their employees and immediate family members a discounted rate. Memberships include access to all five club locations, group fitness classes and free supervised child care. All locations offer aquatic complex (indoor pool, steam room, sauna and hot tub), state-of-the-art equipment, and personal training services. Bring proof of State Bar membership to any Defined Fitness location to sign up.
www.defined.com

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 pmmoore@sbnm.org or Briggs Cheney at bcheney@dsc-law.com for the Zoom link.

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.

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 providing legal resources and assistance for survivors of the New Mexico wildfires. The free legal aid hotline opened on June 6 and we need more volunteers. Fire survivors can call the hotline toll free at 888-985-5141 Monday through Friday, 9 a.m. to 1 p.m. MST. 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 BARS The Center for Civic Values Judges Needed for Middle School Mock Trial Program at Bernalillo County Metropolitan Court

The upcoming New Mexico Middle School Mock Trial Program is an innovative, hands-on experience in the law for seventh and eighth grade middle school students, and it needs judges. This inaugural year, 20 teams from New Mexico will head to Albuquerque to try a case and learn about the judicial system. The trials will be held Nov. 11-12 at the Bernalillo County Metropolitan Court in Albuquerque. Those interested in attending may sign up at <https://civicvalues.org/mock-trial/registration/middle-school-judge-volunteer-registration/> by Nov. 1. If you have any questions, please contact Kristen Leeds at the Center for

Civic Values at 505-764-9417 or Kristen@civicvalues.org.

Judges Needed for Gene Franchini New Mexico High School Mock Trial Competition

The Gene Franchini New Mexico High School Mock Trial Competition, open to high school students of all ages and abilities, needs judges for its next event. The qualifier competitions will be held Feb. 17-18, 2023 at the Bernalillo County Metropolitan Court in Albuquerque and the Third Judicial District Court in Las Cruces. Those interested in attending the event may sign up at <https://civicvalues.org/mock-trial/registration/judge-volunteer-registration/> by Feb. 4, 2023. You may direct any questions to Kristen Leeds by email at Kristen@civicvalues.org or by phone at 505-764-9417.

New Mexico Workers' Compensation Administration Notice of Public Hearing

The New Mexico Workers' Compensation Administration will conduct an in-person public hearing on the adoption of new WCA Rules on Oct. 21 at 1:30 p.m. at the Workers' Compensation Administration at 2410 Centre Ave. S.E., Albuquerque, NM, 87106. The proposed rule amendments are available at <https://www.workerscomp.nm.gov/>. Written comments on the changes can be sent to gc.clerk@state.nm.us and will be accepted until 5 p.m. on Oct. 28. The WCA proposes to repeal and replace Parts 4 and 7 and other changes to Parts 1, 5, 6, 12 and 13.

DID YOU KNOW?

Pursuant to Rule 16-119 NMRA, effective October 1, 2022, every lawyer practicing law in the State of New Mexico must have a written succession plan, either alone or as part of a law firm plan.

As part of your annual registration statement beginning in the Fall of 2022, you will have to certify compliance with the Rule.

Beginning July 27, 2022 listen to a Succession Planning podcast on *SBNM is Hear*, and look for Succession Planning CLEs at the State Bar Annual Meeting in August 2022, and by webinar on September 13, 2022 and October 12, 2022.

For more information, please contact the State Bar Professional Development Program at 505-797-6079 or the State Bar Regulatory Programs at 505-797-6059.



Legal Education

September

- 14 **Ethics for Business Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org
- 15 **Law & Technology Series: Techniques in Electronic Case Management (TECM) Workshop**
16.2 G
Live Program
Administrative Office of the US Courts
www.uscourts.gov
- 15 **2022 Employment and Labor Law Institute - Day 1**
2.8 G, 1.0 EP
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org
- 16 **2022 Employment and Labor Law Institute - Day 2**
2.8 G, 1.0 EP
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org
- 16 **2022 Annual Meeting & Luncheon**
1.0 EP, 1.0 G
Live Program
New Mexico Defense Lawyers Association
www.nmdla.org
- 20 **Basic Financial Literacy for Lawyers**
2.0 G
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org
- 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
- 22 **Overview of Workers' Compensation Issues**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 23 **IP Institute: United States Patent and Trademark Office in New Mexico**
1.0 EP, 5.25 G
In-Person
Center for Legal Education of NMSBF
www.sbnm.org
- 27 **Selling to Consumers: Sales, Finance, Warranty, & Collection Law, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org
- 28 **Selling to Consumers: Sales, Finance, Warranty, & Collection Law, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org
- 29 **2022 Family Law Fall Institute - Day 1**
1.0 EP, 4.5 G
In-Person or Webcast
Center for Legal Education of NMSBF
www.sbnm.org
- 30 **2022 Family Law Fall Institute - Day 2**
6.0 G
In-Person or Webcast
Center for Legal Education of NMSBF
www.sbnm.org

October

- 5 **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
- 6 **Trust and Estate Planning for Family Businesses, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org
- 6 **Communication Breakdown: It's Always The Same (But It's Avoidable)**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org
- 7 **Trust and Estate Planning for Family Businesses, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org
- 7 **2022 Health Law Symposium**
2.0 EP, 3.5 G
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org
- 12 **Mandatory Succession Planning: It Has To Happen, But It Doesn't Have To Be That Difficult**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

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.

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Elizabeth A. Garcia, Chief Clerk of the New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

CLERK'S CERTIFICATE OF LIMITED ADMISSION

On August 5, 2022:
Felicia Ann Norvell
New Mexico Regulation and Licensing Department
Boards and Commissions Division
P.O. Box 25101
2550 Cerrillos Road (87505)
Santa Fe, NM 87504
505-476-4622
felicia.norvell@state.nm.us

Jennifer S. Sterling
Office of the Second Judicial District Attorney
520 Lomas Blvd., N.W.
Albuquerque, NM 87102
505-222-1079
505-241-1000 (fax)
jennifer.sterling@da2nd.state.nm.us

CLERK'S CERTIFICATE OF NAME CHANGE

As of July 11, 2022:
Petria Nicole Pennington f/k/a Petria Nicole Bengochea
Office of the City Attorney
1376 E. Ninth Street
Alamogordo, NM 88310
602-369-2983
ppennington@ci.alamogordo.nm.us

As of July 25, 2022:
Shelby Lynne Crockett f/k/a Shelby Lynne Carlson
P.O. Box 77211
Fort Worth, TX 76177
817-771-1600
crockett.shelbyl@gmail.com

As of July 29, 2022:
Ramona J. Martinez f/k/a Ramona J. Martinez-Salopek
230 S. Alameda Blvd., Bldg. B
Las Cruces, NM 88005
575-541-0329
575-527-8183 (fax)
ramona@smslawnm.com

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective May 27, 2022:
Tuesday Kaasch
8420 California Avenue, S.W.
Seattle, WA 98136

Effective May 31, 2022:
Cathy Dawn Kennard
6536 Jazmin Place, N.W.
Albuquerque, NM 87114

Larry D. Maldegen
1440 S. St. Francis Drive,
Suite B
Santa Fe, NM 87505

Effective June 1, 2022:
Wade D. Price
1601 N. 7th Street, Suite 250
Phoenix, AZ 85006

Kristin Marie Oberst Bradford
2900 Vista Del Rey, N.E. #35B
Albuquerque, NM 87112

Effective June 10, 2022:
Kyle C. Simpson
25331 IH 10 W., Suite 207
San Antonio, TX 78257

Effective June 15, 2022:
Nicholas A. Blodgett
3400 W. 38th Avenue, Apt. 202
Denver, CO 80211

Effective June 30, 2022:
Kelley A. Brennan
613 Old Taos Highway
Santa Fe, NM 87501

Effective July 1, 2022:
Christopher R. Johnston
311 Montana Avenue, Suite A-102
El Paso, TX 79902

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CLERK'S CERTIFICATE OF WITHDRAWAL

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Effective August 3, 2022:
Calla Rose Wilson-Traisman
3901 Magnolia Avenue
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Effective August 12, 2022:
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#A-265
Rio Rancho, NM 87144

Board of Bar Commissioners Election Notice 2022



Pursuant to Supreme Court Rule 24-101, the Board of Bar Commissioners is the elected governing board of the State Bar of New Mexico. Notice is hereby given for the 2022 Board of Bar Commissioners election of nine (9) commissioners for the State Bar of New Mexico. Nominations of active status members to fill the vacancies caused by the expiration of the term of such Commissioners shall be made by petition of any 10 or more active status members of the State Bar who are in good standing and whose principal place of practice (address of record) is in the respective district. Active status members whose principal place of practice (address of record) is in El Paso County, Texas, may nominate members for the Third and Sixth Judicial Districts (see footnote at the end of the Nomination Petition). Emails in lieu of signatures will be accepted. Members of the State Bar may nominate and sign for more than one candidate. (See the Nomination Petition on the next page.)

The below terms will expire Dec. 31 and need to be filled in the upcoming election. All of the positions are three-year terms and run from Jan. 1, 2023-Dec. 31, 2025, except for one position in the Third and Sixth Judicial Districts which is a one-year term. The election opens Nov. 10 and closes at noon Nov. 30.

Primary Responsibilities of the Board of Bar Commissioners:

- › Carry out the organization's mission and purposes.
- › Ensure effective organization planning and evaluate the State Bar's programs and operations in line with the strategic plan and budget.
- › Ensure financial accountability for the organization.
- › Promote the programs and activities of the State Bar and communicate regularly with constituents regarding State Bar activities.
- › Attend Board meetings (up to six per year), including the Annual Meeting of the State Bar.
- › Establish and enforce bylaws and policies.
- › Represent the State Bar at local bar-related meetings and events.
- › Select, support and annually evaluate the Executive Director.
- › Participate on internal Board and Supreme Court committees and boards

Second Judicial District – Two Positions

Bernalillo County

- › One currently held by Carla C. Martinez (*ineligible for reelection*)
- › One currently held by Lucy H. Sinkular

Third and Sixth Judicial Districts – Three Positions

Dona Ana, Grant, Hidalgo and Luna counties

- › One currently held by Concepcion J. Flores
- › One currently held by Robert Lara, Jr. (*one-year term*)
- › One currently held by David P. Lutz

Fifth Judicial District – One Position

Chaves, Eddy and Lea counties

- › Currently held by Parker B. Folse

Seventh and Thirteenth Judicial Districts – Two Positions

Catron, Sierra, Socorro, Torrance, Cibola, Sandoval, and Valencia counties

- › One currently held by Catherine A. Cameron
- › One currently held by Simone M. Seiler

Eleventh Judicial District – One Position

McKinley and San Juan counties

- › Currently held by Joseph F. Sawyer

Send nomination petitions to:

Executive Director Richard B. Spinello, Esq.
State Bar of New Mexico
PO Box 92860, Albuquerque, NM 87199-2860
5121 Masthead St. NE, Albuquerque, NM 87109
or Email: bbc@sbnm.org

— PETITIONS MUST BE RECEIVED BY 3 P.M., OCT. 11 —

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

Nomination Petition for Board of Bar Commissioners

We, the undersigned, members in good standing and who have a principal place of practice (address of record) in the _____ Judicial District¹, hereby nominate _____, whose principal place of practice (address of record) is located in the _____ Judicial District. Emails in lieu of signatures will be accepted.

(1) _____
Signature _____ *Type or print name*

Address

(2) _____
Signature _____ *Type or print name*

Address

(3) _____
Signature _____ *Type or print name*

Address

(4) _____
Signature _____ *Type or print name*

Address

(5) _____
Signature _____ *Type or print name*

Address

(6) _____
Signature _____ *Type or print name*

Address

(7) _____
Signature _____ *Type or print name*

Address

(8) _____
Signature _____ *Type or print name*

Address

(9) _____
Signature _____ *Type or print name*

Address

(10) _____
Signature _____ *Type or print name*

Address

¹Members whose principal place of practice is located in El Paso County, Texas, are represented by, nominate and vote in the Third and Sixth Judicial Districts.

A Message from Chief Justice C. Shannon Bacon



Dear Colleagues:

The Supreme Court of New Mexico is currently seeking applications to fill vacancies on committees, boards, and commissions. Our committees, boards, and commissions are integral to ensuring equity and justice for those who participate in our judicial system—

members of the public and the broader legal community—by assisting the Court with the regulation of the practice and procedures within our courts. These panels have a wide range of responsibilities and functions. They regulate the practice of law, expand resources for civil legal assistance to New Mexicans living in poverty, oversee continuing legal education for lawyers, foster improved communication between tribal, federal, and state courts to improve legal services to tribal communities, administer funds to assist individuals unable to pay for legal services, and advise on long-range planning, just to name a few. Anyone who has ever served on one of the Court's committees, boards, or commissions can attest to how challenging and rewarding this work can be.

In filling these vacancies, the Court strives to appoint non-attorneys, attorneys and judges who are able to regularly attend

committee meetings and who are committed to generously volunteering their time, talent, and energy to this important work. The Court also endeavors to bring diversity, geographical and practice area balance to these committees, boards, and commissions by soliciting volunteers from throughout the state and from the various practice segments of our bar. To achieve these goals, we need volunteers representing the broad spectrum of our bench and bar who come from all corners of this great state, and are requesting that applicants voluntarily disclose demographic information to ensure the committees, boards and commissions reflect our diverse community.

If you would like to be considered to serve on a committee, board, or commission, please send your application and resume by **October 14, 2022**, to Elizabeth A. Garcia, Chief Clerk of Court at supeag@nmcourts.gov. The application and a complete list of vacancies on committees, boards, and commissions can be found on the Supreme Court's website at <https://supremecourt.nmcourts.gov/current-vacancies.aspx>.

On behalf of the Supreme Court, I extend our sincere appreciation to all of you who volunteer and serve in this important function within our legal system.



New Mexico Supreme Court Committees, Boards, and Commissions NOTICE OF 2022 YEAR-END VACANCIES

The Supreme Court of New Mexico is seeking applications to fill upcoming year-end vacancies on many of its committees, boards, and commissions. Applicants will be notified of the Court's decisions at the end of the year. Unless otherwise noted below, any person may apply to serve on any of the following committees, boards, and commissions:

- Appellate Rules Committee** (1 general member position)
- Board Governing the Recording of Judicial Proceedings** (1 reporter member position)
- Children's Court Rules Committee** (3 general member positions)
- Client Protection Fund Commission** (1 general member position)
- Code of Judicial Conduct Committee** (1 district judge position)
- Code of Professional Conduct Committee** (3 general member positions)
- Disciplinary Board** (1 attorney position)
- Domestic Relations Rules Committee** (1 general member position)
- Judicial Standards Commission** (1 municipal judge position, 1 magistrate judge position)
- Judicial Technology Council** (1 magistrate judge position)
- NM Children's Court Improvement Commission** (1 position for a public defender in Children's Court, 1 position for a district attorney in Children's Court, 1 position for an attorney representing youth, 1 position for a guardian ad litem)

NM Commission on Access to Justice

(2 general member positions)

NM Supreme Court Commission on Equity and Justice

(1 position for a judge from medium-sized district or metropolitan court)

Rules of Civil Procedure for State Courts Committee

(1 general member position)

Rules of Criminal Procedure for State Courts Committee

(2 general member positions)

Rules of Evidence Committee (1 general member position)

Statewide Alternative Dispute Resolution Commission

(1 general member position, 2 district judge positions, 1 magistrate judge position, 1 metropolitan court ADR representative position, 1 position for a member of the business community)

Tribal-State Judicial Consortium (1 state judge position)

Uniform Jury Instructions-Civil Committee

(2 general member positions)

Uniform Jury Instructions-Criminal Committee

(2 general member positions)

Anyone interested in volunteering to serve on one or more of the foregoing committees, boards, or commissions may apply by submitting an application, along with a resume, to Elizabeth A. Garcia, Chief Clerk, by email to nmsupremecourtclerk@nmcourts.gov, or by first class mail to P.O. Box 848, Santa Fe, NM 87504. The application can be found on the Supreme Court's website (supremecourt.nmcourts.gov) – Committees, Board and Commissions – Current Vacancies.

The deadline for applications is Friday, October 14, 2022.

Advance Opinions

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-015
No: A-1-CA-36924 (filed December 8, 2021)

JEREMIAH SIPP a/k/a SAGE RADER,
and HELLA RADER,
Plaintiffs-Appellants,

v.

BUFFALO THUNDER, INC.; BUFFALO
THUNDER DEVELOPMENT AUTHORITY;
PUEBLO OF POJOAQUE; PUEBLO OF
POJOAQUE GAMING COMMISSION; and
POJOAQUE GAMING, INC.,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

David K. Thomson, District Judge

Certiorari Granted, February 8, 2022, No. S-1-SC-39169.

Released for Publication March 22, 2022.

Valdez and White Law Firm, LLC
Timothy L. White
Albuquerque, NM

for Appellants

Rey-Bear McLaughlin, LLP
Daniel I.S.J. Rey-Bear
Spokane, WA

for Appellees

OPINION

DUFFY, Judge.

{1} Plaintiff Jeremiah Sipp sued the Pueblo of Pojoaque and several Pueblo-owned entities in New Mexico state district court after he was injured at the Buffalo Thunder Resort and Casino. The district court dismissed the case for lack of subject matter jurisdiction, ruling that Sipp did not fall within the limited waiver of sovereign immunity contained in the Pueblo's Tribal-State Class III Gaming Compact. We reverse.

BACKGROUND

{2} Sipp (also known as Sage Rader) was an employee of Dial Electric, a vendor that sold lights to Buffalo Thunder for the facility's parking lot. Sipp delivered the lights and alleged that while he was moving in and out of a receiving area, a Buffalo Thunder employee abruptly lowered a garage door, causing Sipp to hit his head. Sipp claimed that he was knocked unconscious and suffered severe injuries, including a cervical spine injury that required major surgery.

{3} Buffalo Thunder is operated by the Pueblo of Pojoaque pursuant to a Tribal-State Class III Gaming Compact with the State of New Mexico, as required by the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 to 2721. Section 8(A) of the Compact addresses subject matter jurisdiction over claims for "bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise" and contains both a waiver of sovereign immunity for such claims and an express agreement to state court jurisdiction.

{4} Sipp and his wife, Hella Rader, filed a complaint for damages in state district court, naming Buffalo Thunder, Inc., Buffalo Thunder Development Authority, the Pueblo of Pojoaque, the Pueblo of Pojoaque Gaming Commission, and Pojoaque Gaming, Inc. as Defendants. Plaintiffs sought damages for Sipp's injuries and for Hella Rader's derivative tort claims. Defendants filed a motion to dismiss for lack of subject matter jurisdiction under Rule 1-012(B)(1) NMRA, arguing that the Pueblo's sovereign immunity precluded the district court from hearing the suit

and that the limited waiver of sovereign immunity in Section 8(A) of the Compact was inapplicable in the present case.

{5} The district court held a hearing and issued a brief order finding that Plaintiffs' allegations did not fall within Section 8(A)'s immunity waiver. The court dismissed the case, concluding that "Plaintiffs have not established an express abrogation or waiver of Defendants' sovereign immunity as required to establish subject matter jurisdiction here." Plaintiffs appeal.

DISCUSSION

{6} Plaintiffs contend the district court erred in granting Defendants' motion to dismiss because Section 8(A) of the Compact expressly waives sovereign immunity and provides for state court jurisdiction over Plaintiffs' claims. Section 8(A), entitled "Protection of Visitors," states:

The safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation. To that end, in this Section, and subject to its terms, the Tribe agrees to carry insurance that covers such injury or loss, agrees to a limited waiver of its immunity from suit, and agrees to proceed either in binding arbitration proceedings or in a court of competent jurisdiction, at the visitor's election, with respect to claims for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise. For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land, unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court.

See also Doe v. Santa Clara Pueblo, 2007-NMSC-008, ¶¶ 7-8, 141 N.M. 269, 154 P.3d 644 (holding that under Section 8(A), the Pueblos consented to state court jurisdiction and waived sovereign immunity for personal injury claims concerning visitor safety unless IGRA does not permit it); *Guzman v. Laguna Dev. Corp.*, 2009-NMCA-116, ¶ 17, 147 N.M. 244, 219 P.3d 12 (stating that there is no question that this section "create[s] an express and unequivocal waiver under the Compact").

{7} Defendants argue that Section 8(A) does not permit the district court to exercise jurisdiction in this case for two reasons. First, Defendants assert that the termination clause at the end of Section 8(A) was triggered by two federal court decisions, *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254 (D.N.M. 2013) (memorandum and order), and *Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018), such that Section 8(A) no longer provides for state court jurisdiction. Second, Defendants claim that Sipp does not qualify as a visitor to a gaming facility under Section 8(A) because (1) he had a business purpose for visiting Buffalo Thunder and not a gaming purpose, and (2) he was not injured in a “gaming facility.” We conclude that the termination clause has not been triggered and, applying New Mexico precedent interpreting Section 8(A), hold that Plaintiffs’ amended complaint sufficiently pleaded claims that fall within the Compact’s waiver of sovereign immunity for visitors to a gaming facility.

I. Standard of Review

{8} “In reviewing an appeal from an order granting or denying a motion to dismiss for lack of jurisdiction, the determination of whether jurisdiction exists is a question of law which an appellate court reviews de novo.” *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207, 46 P.3d 668. We apply the same standard to a determination of tribal sovereign immunity. *Kosiba v. Pueblo of San Juan*, 2006-NMCA-057, ¶ 7, 139 N.M. 533, 135 P.3d 234. “For purposes of a motion to dismiss, we accept all well-pleaded facts as true and question whether the plaintiff might prevail under any state of facts provable under the claim.” *Guzman*, 2009-NMCA-116, ¶ 16 (internal quotation marks and citation omitted).

II. The Compact’s Termination Clause

{9} The threshold issue is whether the termination clause in Section 8(A) was triggered by federal court decisions in *Nash* or *Dalley*. The termination clause states, “For purposes of this Section, any [personal injury] claim may be brought in state district court, including claims arising on tribal land, *unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors’ personal injury suits to state court.*” (Emphasis added.)¹ Because neither *Nash* nor *Dalley* finally determined that IGRA does not permit

jurisdiction shifting over personal injury suits, we hold that the termination clause has not been triggered and the jurisdiction-shifting provision remains in force.

{10} In *Nash*, the Pueblo of Santa Ana brought an action in federal court seeking a declaration that a New Mexico state court lacked subject matter jurisdiction over a wrongful death claim against the Pueblo. 972 F. Supp. 2d at 1257-58. The underlying lawsuit alleged that three people died in a car crash after being over-served alcohol at the Santa Ana Star Casino. *Id.*; see also *Mendoza v. Tamaya Enters., Inc.*, 2011-NMSC-030, 150 N.M. 258, 258 P.3d 1050 (underlying state case). In the state court proceedings, the Pueblo of Santa Ana challenged the state court’s jurisdiction to hear the case under Section 8 of the Compact. On appeal, the New Mexico Supreme Court held that Section 8 waived immunity and permitted jurisdiction in state court. *Nash*, 972 F. Supp. 2d at 1258 (citing *Mendoza*, 2011-NMSC-030, ¶¶ 3, 15). After remand, the Pueblo of Santa Ana filed a declaratory judgment action in federal court seeking to enjoin the state district court judge from exercising jurisdiction over the case. *Id.*

{11} *Nash* noted that Congress may provide express authorization to shift jurisdiction, but reasoned that the plain language of IGRA only permits a tribe to allocate jurisdiction to state courts for the enforcement of laws directly related to the licensing and regulation of class III gaming. *Id.* at 1264. Applying that standard, the court concluded that IGRA does not authorize an allocation of jurisdiction in state court for a wrongful death claim arising from the negligent serving of alcohol because the litigation did not involve licensing or regulation of Indian gaming activities. *Id.* at 1267. However, the court specifically restricted its judgment to “the type of personal injury claim involved in the underlying court case (*i.e.*, a claim arising from the allegedly negligent serving of alcohol on Indian land).” *Id.*

{12} Similarly, in *Dalley*, the Tenth Circuit Court of Appeals considered whether a tort claim occurring within a Navajo Nation casino could be heard in New Mexico state court under Section 8(A) of the Compact. *Dalley*, 896 F.3d at 1200. The underlying state lawsuit arose when a man slipped and “fell on a wet bathroom floor

in the Navajo Northern Edge Casino.” *Id.* at 1202. The procedural posture of the case mirrored *Nash*: the plaintiffs filed suit against the Navajo Nation in state court and defeated the defendants’ motion to dismiss for lack of subject matter jurisdiction, at which point the defendants filed for injunctive relief in federal court. *Dalley*, 896 F.3d at 1202-03. After the federal district court denied the defendants’ requested relief, they appealed, and the Tenth Circuit addressed the same substantive question raised in *Nash*—whether IGRA permitted the Pueblo of Santa Ana to shift jurisdiction for personal injury claims not directly related to gambling activity. *Dalley*, 896 F.3d at 1203. The Tenth Circuit reasoned that IGRA authorized tribes to shift jurisdiction for tort claims to state court only when the claims arose from gaming activity—*i.e.* “the stuff involved in playing class III games.” *Dalley*, 896 F.3d at 1207 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792 (2014)). The Tenth Circuit concluded that the slip-and-fall on a wet bathroom floor—an act that involved no class III gaming activity—could not be heard in state court because IGRA did not authorize the Navajo Nation to shift jurisdiction for the claim. *Id.* at 1218.

{13} Like *Nash*, the Tenth Circuit’s opinion in *Dalley* was narrow. The court confined its holding to the circumstances presented in the case: a personal injury tort claim arising in a tribal casino but unrelated to the actual playing of class III games. *Dalley*, 896 F.3d at 1210 n.7. The court went on to state, “[W]e do not intend . . . to categorically negate the possibility that certain classes of tort or personal-injury claims stemming from conduct on Indian land might conceivably satisfy the statutory conditions for tribal allocation of jurisdiction to the states under . . . IGRA.” *Id.*; see also *id.* at 1209 (“While we are comfortable assuming that tort, and more specifically personal-injury lawsuits, constitute a type of regulation, we are unable to discern how applying this form of regulation to a slip-and-fall event, like [the plaintiff]’s, is ‘directly related to, and necessary for the licensing and regulation,’ of Class III gaming activity, as *Bay Mills* conceives of it.” (citation omitted)).

¹ The relevant portion of IGRA, 25 U.S.C. § 2710(d)(3)(C), states:

Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

- (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of [Class III gaming activity];
- (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
-
- (vii) any other subjects that are directly related to the operation of gaming activities.

This language leaves the door open to other tort claims directly related to class III gaming.

{14} Because both *Nash* and *Dalley* explicitly restricted their holdings to their case-specific facts, and both cases left open the possibility that IGRA permits jurisdiction shifting for tort claims under different circumstances, neither can be said to have “finally determined . . . that IGRA does not permit the shifting of jurisdiction over visitors’ personal injury suits to state court.” Accordingly, under the plain language of the Compact, the jurisdiction-shifting provision has not terminated by its own terms, and the district court in this case was not stripped of subject matter jurisdiction on these grounds.

{15} We also reject Defendants’ argument that the United States Supreme Court’s decision in *Bay Mills*, 572 U.S. 782, requires us to adopt a similar view of the extent to which IGRA allows tort-claim jurisdiction shifting. The holding in *Bay Mills* was limited to the question of whether a different IGRA provision, § 2710(d)(7)(A)(ii), abrogates a tribe’s sovereign immunity for “class III gaming activity” conducted off Indian lands. *Bay Mills*, 572 U.S. 785-86. The State of Michigan alleged that the Bay Mills Indian Community had tried to open a casino outside of Indian land and sought an injunction in federal court under § 2710(d)(7)(A)(ii), which vests United States district courts with jurisdiction over causes of action to enjoin class III gaming activity on Indian lands in violation of any Tribal-State compact. *Bay Mills*, 572 U.S. at 787. Michigan argued that even though the casino was not located on Indian land, the Tribe operated and administered the casino from within its own reservation, thereby engaging class III gaming activity on Indian land. *Id.* at 791-92. The United States Supreme Court rejected Michigan’s argument, holding that offsite administration of class III gaming did not constitute “gaming activity” for purposes of § 2710(d)(7)(A)(ii). *Bay Mills*, 572 U.S. at 791-92. While the Supreme Court explained that “numerous provisions of IGRA show that ‘class III gaming activity’ means just what it sounds like—the stuff involved in playing class III games[.]” *id.* at 792, the Court did not pass upon the question addressed by *Dalley* and *Nash*—“whether IGRA permits an Indian tribe to allocate jurisdiction over a tort claim arising on Indian land to a state court[.]”

Dalley, 896 F.3d at 1200; *Nash*, 972 F. Supp. 2d at 1264. Consequently, *Bay Mills* is not dispositive of the question before us. We continue to adhere to our Supreme Court’s decision in *Doe* and its holding that IGRA does not prevent the tribes from negotiating the choice of law or venue for personal injury suits against casinos. 2007-NMSC-008, ¶ 47.²

III. Sipp’s Status as a “Visitor”

{16} We turn now to whether Sipp sufficiently alleged claims that fall within the Compact’s immunity-waiver for visitors to a gaming facility. Defendants focus on the business purpose of Sipp’s visit to Buffalo Thunder, arguing that the immunity-waiver only applies to casino patrons and not persons on the premises for other purposes. Defendants also assert that the waiver is inapplicable because Sipp was not injured in a gaming facility. We hold that Sipp’s status as a visitor was sufficiently pleaded.

A. Plaintiffs Sufficiently Alleged Sipp Was a Visitor Under the Compact

{17} Plaintiffs urge us to evaluate Sipp’s status as a visitor using the longstanding definition set forth in UJI 13-1302 NMRA, which states that “[a] visitor is a person who enters or remains upon the premises with the [express or implied] permission of the [owner or occupant] of the premises.” See also UJI 13-1302 comm. cmt. (noting that in *Ford v. Bd. of Cnty. Comm’rs*, 1994-NMSC-077, 118 N.M. 134, 879 P.2d 766, our Supreme Court “eliminated the distinction, for purposes of defining the landowner’s duty of care, between licensees and business visitors or invitees”). However, this Court has twice considered the term “visitor” as used in Section 8(A) and concluded that the drafters of the Compact intended a more limited usage that excludes business entities who enter into business transactions with the Pueblo. See *Guzman*, 2009-NMCA-116, ¶ 16 (“Business entities who enter into business transactions with the Pueblo are not considered visitors to whom the waiver applies.” (internal quotation marks and citation omitted)); *R & R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, ¶ 24, 139 N.M. 85, 128 P.3d 513 (noting that the plaintiff, a restaurant business, fell within the definition of “visitor” in UJI 13-1302, but that the term “visitor” as used in Section 8(A) of the Compact was not intended to include business entities). This Court’s distinction between individual and entity claims in those cases forms the crux of the dispute in this appeal.

{18} We addressed entity claims in *R & R Deli, Inc.* There, the plaintiff, a restaurant business, had entered a lease with Tamaya Enterprises, Inc. that allowed the plaintiff to operate a restaurant in a casino owned by the Pueblo of Santa Ana and required the plaintiff to maintain a Pueblo-issued liquor license. 2006-NMCA-020, ¶¶ 2, 5. After one year of operation, the Pueblo refused to renew the liquor license, essentially terminating the lease. *Id.* ¶ 5. The plaintiff sued, alleging breach of contract and a variety of business torts. *Id.* ¶ 6. The defendants filed a motion to dismiss that argued the Compact did not waive sovereign immunity for the lawsuit. *Id.* The district court granted the motion and dismissed the complaint. *Id.* On appeal, this Court affirmed, holding that the plaintiff was not a visitor under the Compact. *Id.* ¶ 19. Noting that the language used in Section 8 refers to the types of claims it encompasses as “personal injury” claims, this Court concluded that the waiver provision was unambiguous and was geared toward casino patrons and guests who suffer physical injuries to their person or property, not business entities or corporations who enter into business transactions with the Pueblo. *Id.* ¶¶ 21-25. This Court also agreed with the Pueblo’s asserted policy rationale for that distinction—that business entities could negotiate their terms of entry onto a gaming facility premises in order to protect their own interests, while ordinary persons could not. *Id.* ¶ 25.

{19} Three years later, this Court considered whether a casino employee could be a “visitor” within the meaning of the Compact. *Guzman*, 2009-NMCA-116, ¶ 19. In *Guzman*, the plaintiffs filed a wrongful death lawsuit after their son, Anthony, was killed in a car accident on his way home from work as an employee of a gift shop on the casino premises. *Id.* ¶¶ 1, 3. On the night of his death, Anthony consumed alcohol during his shift that had been purchased by his manager, and after clocking out, stayed to talk with his manager for about half an hour. *Id.* ¶ 3. The defendants filed a motion for judgment on the pleadings, arguing that “as an employee, [Anthony] could not be a ‘visitor’ within the meaning of the Compact” and that his “status was not converted to that of a visitor during the time he remained on the premises after clocking out because he stayed for a business purpose, to discuss a potential promotion.” *Id.* ¶¶ 17, 19.

² Defendants recognize that their interpretation of *Bay Mills* conflicts with decisions from our Supreme Court and ask us to “limit the prior rulings in *Doe* and *Mendoza*.” Even if we agreed that *Bay Mills* was on point, we could not depart from *Doe*, as “[a]ppeals in this Court are governed by the decisions of the New Mexico Supreme Court—including decisions involving federal law, and even when a United States Supreme Court decision seems contra.” *Dalton v. Santander Consumer USA, Inc.*, 2015-NMCA-030, ¶ 30, 345 P.3d 1086, rev’d on other grounds, 2016-NMSC-035, 385 P.3d 619; see also *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 20, 135 N.M. 375, 89 P.3d 47; *State v. Manzanares*, 1983-NMSC-102, ¶ 3, 100 N.M. 621, 674 P.2d 511 (citing *Alexander v. Delgado*, 1973-NMSC-030, 84 N.M. 717, 507 P.2d 778); *State v. Darkis*, 2000-NMCA-085, ¶ 10, 129 N.M. 547, 10 P.3d 871.

The district court agreed and dismissed the case. *Id.* ¶¶ 1, 17. This Court reversed, holding that to the extent Anthony “[w] as a person lawfully on the premises with the permission of the casino, the wrongful death claim was well pleaded and should have withstood [the d]efendants’ motion for dismissal.” *Id.* ¶ 23.

{20} In this case, Defendants’ arguments as to why Sipp does not qualify as a visitor largely consist of points we considered and rejected in *Guzman*. Defendants emphasize that Sipp was only on the premises to do business as an employee of Dial Electric and contend he cannot be a visitor under the Compact given the business nature of his visit. As in *Guzman*, Defendants’ argument is essentially that, as a matter of law, Sipp “was not like a regular patron or guest to whom the waiver applies.” *Id.* ¶ 19. The *Guzman* Court “disagree[d] that the matter can be determined as a matter of law” for purposes of a motion to dismiss and expressly distinguished *R & R Deli, Inc.*, explaining that the rationale for excluding claims by business entities as a matter of law did not apply to individual plaintiffs who suffer physical injuries to their person or property. *Guzman*, 2009-NMCA-116, ¶¶ 19, 21. Instead, the Court considered whether the plaintiffs had sufficiently alleged Anthony’s status as a visitor and held—using language that mirrored UJI 13-1302—that to the extent Anthony was “on the premises with the permission of the casino,” the wrongful death claim was well-pleaded. *Guzman*, 2009-NMCA-116, ¶ 23; accord UJI 13-1302.

{21} Defendants, citing to the policy rationale in *R & R Deli, Inc.*, argue that businesses like Dial Electric can negotiate the terms under which they enter the gaming facility and suggest that employees of the business should be treated in the same manner as the business itself for purposes of the waiver. However, this Court rejected that argument as applied to individual employees, writing in *Guzman* that “we disagree that the bargaining position of [an employee] . . . is analogous to that of a business entity, such that he or she is similarly capable of protecting his or her own interests[.]” 2009-NMCA-116, ¶ 20. Likewise, *Guzman* noted that “the holding in *R & R Deli, Inc.* was based on more than [the] mere bargaining positions of the parties. We also based our decision on the unremarkable fact that business entities cannot suffer the type of ‘bodily injury’ contemplated in the waiver.” *Guzman*, 2009-NMCA-116, ¶ 21. The *Guzman* Court thus concluded that a person capable of suffering a physical injury “is simply not analogous to that of a business entity for purposes of the waiver.” *Id.* For the same reasons, we decline to treat Sipp—an individual who suffered physical harm—as a business entity here.

{22} Plaintiffs’ amended complaint alleged that Sipp was on the premises with the permission of Defendants. In light of *Guzman*, we hold that Sipp’s status as a visitor was well-pleaded and should have withstood Defendants’ motion for dismissal. *See id.* ¶ 17 (holding that whether the decedent was a “visitor” under the Compact was “a question of fact that was sufficiently pleaded and that dismissal was not proper”).

B. Defendants Have Not Negated Plaintiffs’ Allegations That Sipp Was a Visitor to a Gaming Facility

{23} Defendants also argue that the Compact’s waiver of sovereign immunity is inapplicable because Sipp was not injured while a visitor to a “gaming facility.” Defendants note that the Compact defines “gaming facility” as “the buildings or structures in which Class III Gaming is conducted on Indian Lands[.]” and asserted in their motion to dismiss that “Sipp was injured at a [Buffalo Thunder] receiving area with a garage door (essentially, a loading dock), which is not a Gaming Facility[.]” Plaintiffs counter that the Compact does not require that the injury occur within a gaming facility, and in any event, the loading dock was part of a gaming facility.

{24} We turn first to Defendants’ argument that there is no waiver for Sipp’s injuries because he was not at gaming facility when he was injured. To the extent Defendants argue that there is no waiver of sovereign immunity for injuries that occur outside of the gaming facility, we observe that they have not provided any authority for that interpretation, and both the plain language of the Compact and New Mexico precedent are to the contrary. Foremost, the Compact does not limit the waiver to claims for injuries occurring “in” or “at” a gaming facility. Rather, Section 8 provides a waiver for “visitors to the gaming facility” that suffer an injury caused by the Gaming Enterprise. (Emphasis added.) Moreover, this Court and our Supreme Court have allowed claims for physical injuries occurring outside the gaming facility to proceed in state court when the injured party was a visitor to the gaming facility and the party’s injury was caused by the Gaming Enterprise. *See Doe*, 2007-NMSC-008, ¶ 2 (holding that the Compact validly conferred jurisdiction over a claim involving a fifteen-year-old girl who was abducted from a casino parking lot); *see also Mendoza*, 2011-NMSC-030, ¶¶ 2-3 (concluding that the district court had jurisdiction under Section 8 when three patrons who had been served alcohol at the casino were involved in a car crash after leaving the casino); *Guzman*, 2009-NMCA-116, ¶ 1 (holding that the plaintiffs had sufficiently pleaded that an employee who died on his way home from work was

a “visitor” to the casino within the terms of the Compact). We cannot adopt Defendants’ interpretation while remaining consistent with these precedents.

{25} Defendants also contend their motion to dismiss raised a factual challenge to subject matter jurisdiction that countered Plaintiffs’ jurisdictional allegations with evidence that the receiving area was not part of the gaming facility. *See South v. Lujan*, 2014-NMCA-109, ¶¶ 7-9, 336 P.3d 1000 (discussing the standard of review for motions to dismiss that raise factual challenges to subject matter jurisdiction). Defendants point to an affidavit by Angela Padilla, the director of the Pueblo of Pojoaque Gaming Commission, which stated:

[The Pueblo of Pojoaque Gaming Commission (PPGC)] has issued to Buffalo Thunder Inc. (“BTI”) a license as a Gaming Enterprise with authority to conduct gaming at Buffalo Thunder Resort and Casino (“BRTC”). BRTC is a trade name that is not a legal entity which encompasses both (1) Buffalo Thunder Resort (“BTR”), another trade name that is not a legal entity, which refers to various hotel and resort facilities that do not include any gaming, and (2) a physically distinct casino. BTI is only authorized by its license from PPGC to operate gaming at that casino, which does not include any receiving area with a garage-type door. (Emphasis added.)

Defendants assert that Padilla’s affidavit is sufficient to negate Plaintiffs’ allegations that Sipp was a visitor to a gaming facility. We disagree. While the affidavit states that the casino does not have a receiving area, it is silent about whether the receiving area was otherwise a part of “the buildings or structures in which Class III Gaming is conducted.” Plaintiffs responded that the receiving area and the casino are all in the same building, under the same roof, but as Defendants noted below, Plaintiffs did not submit evidence on that point. However, during oral argument to this Court, Defendants acknowledged that the receiving area is connected to the casino—specifically, that the receiving area is at the back of the hotel, and access to the casino is through the hotel lobby. Under the narrow circumstances presented here, neither party has produced evidence either establishing or negating Plaintiffs’ jurisdictional allegations. In the absence of evidence in the record, we are left only with the allegations in Plaintiffs’ complaint. Accepting those allegations as true, we conclude Plaintiffs sufficiently pleaded that Sipp was a visitor to Buffalo Thunder Resort and Casino who suffered a bodily injury proximately caused by the conduct of the Gaming Enterprise.

{26} As a final matter, Defendants have argued on appeal that particular entities are not properly joined and that Hella Rader's derivative claims fail as a matter of law under *Guzman*, 2009-NMCA-116, ¶¶ 24-26. These issues were not raised or litigated below and the district court has not had the opportunity to resolve

them. To the extent these issues are jurisdictional, we decline to exercise our discretion to rule on them in the first instance. *See Morris v. Brandenburg*, 2015-NMCA-100, ¶ 51, 356 P.3d 564 (noting that appellate courts have the district to consider unpreserved questions involving jurisdiction).

CONCLUSION

{27} For the foregoing reasons, we reverse the district court's dismissal of Plaintiffs' lawsuit and remand for further proceedings consistent with this opinion.

{28} IT IS SO ORDERED.

MEGAN P. DUFFY, Judge

WE CONCUR:

JACQUELINE R. MEDINA, Judge

SHAMMARA H. HENDERSON, Judge

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-016

No: A-1-CA-38763 (filed December 20, 2021)

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

DONALD WING a/k/a
DONALD WING III,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY

Daylene A. Marsh, District Judge

Certiorari Denied, February 15, 2022, No. S-1-SC-39182.

Released for Publication March 22, 2022.

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OPINION

ATTREP, Judge.

{1} Defendant Donald Wing III appeals his conviction and sentence for possession of a controlled substance (methamphetamine), in violation of NMSA 1978, Section 30-31-23(A) (2011, amended 2021), following entry of a guilty plea conditioned on his right to appeal the denial of his motion to suppress. Because we conclude Defendant's proximity to the scene of a recent crime, in conjunction with all the surrounding circumstances, gave rise to reasonable suspicion in this case, we affirm the district court's denial of Defendant's suppression motion. In this appeal, Defendant also contends that we must remand for resentencing because the district court did not afford him the opportunity to allocute prior to sentencing. The State counters that, by entering into a plea and disposition agreement, Defendant waived his right to raise the allocution violation on appeal. We do not agree with the State on this point. We hold that the entry of a valid guilty plea and appellate waiver does not operate to waive the right to appeal an allocution violation that occurred at sentencing.

Because the district court did not afford Defendant the right of allocution, we reverse Defendant's sentence and remand for resentencing.

MOTION TO SUPPRESS

{2} As for the district court's suppression ruling, Defendant argues the court erred in concluding that his encounter with law enforcement was consensual and in alternatively concluding that the encounter, if nonconsensual, was supported by reasonable suspicion. Assuming for purposes of this opinion that Defendant indeed was seized at the inception of the encounter, we conclude that reasonable suspicion supported the stop of Defendant, and we affirm the district court's denial of his suppression motion on this basis. *Cf. State v. Ortiz*, 2009-NMCA-092, ¶¶ 21, 49, 146 N.M. 873, 215 P.3d 811 (observing that this Court may uphold a district court's decision to dismiss charges on any of the grounds underlying its decision).

I. Background

{3} While on patrol in his marked vehicle, at around 1:15 a.m. on a cold January day, Farmington Police Officer Matthew Burns observed at least two individuals in an empty lot appearing to dump a large piece of trash from the back of a truck. Officer Burns testified that there were numerous issues with this lot, including unwanted subjects

and people dumping trash there. Upon seeing the truck in the lot, Officer Burns turned his vehicle around and drove in the direction of the street where he believed he saw the truck traveling. By the time Officer Burns got to the street, the truck was gone, but Defendant was there walking a bicycle. Without activating his patrol lights or telling Defendant to stop, Officer Burns approached Defendant and asked him about the activity in the lot. Defendant immediately admitted to dumping trash there. {4} Officer Burns estimated that between when he saw the truck on the lot and when he came in contact with Defendant, only a minute or two had passed; he also estimated that the distance between Defendant and the lot was "pretty close," roughly 100 yards. Defendant was the only person around at that time, and Officer Burns testified that it was unusual for anyone to be out, given it was a cold, January morning. When asked if he specifically saw Defendant or his bicycle, which had distinctive lights through the spokes, on the lot, Officer Burns answered that it was dark and he could see a couple subjects but he did not provide any description of the subjects and could not say whether Defendant was one of them. Officer Burns further stated that he did not recall seeing the bicycle on the lot because he was focused on the truck at the time.

{5} After obtaining Defendant's name and date of birth, Officer Burns learned of an outstanding warrant for Defendant's arrest, and he placed Defendant under arrest. Prior to being booked at the local detention center, Defendant was searched and methamphetamine and drug paraphernalia were found on Defendant's person; this discovery led to the charges in this case. Defendant moved to suppress both the evidence found on his person and a statement he made when officers discovered the methamphetamine. Defendant's motion alleged that he "was seized . . . when Officer . . . Burns saw [Defendant] walking his bicycle and began to question him about what he was doing in the dirt lot" and that this seizure was unconstitutional because Officer Burns lacked reasonable suspicion. The State's written response to the motion, as well as the parties' presentations to the district court at the suppression hearing, focused on whether reasonable suspicion existed to link Defendant to the trash dumping.

{6} After taking the matter under advisement, the district court entered a written order denying Defendant's motion on alternative grounds. The court first ruled that Defendant's constitutional rights were not implicated because Officer Burns had not seized Defendant prior to his admission that he dumped trash in the lot. Alterna-

tively, acknowledging the State effectively conceded that a seizure occurred, the district court ruled that the seizure of Defendant, prior to his admission, was supported by reasonable suspicion. Defendant appeals the district court's denial of his suppression motion, pursuant to his conditional plea.

II. Because Reasonable Suspicion Supported the Stop of Defendant, We Affirm the Denial of Defendant's Suppression Motion

{7} Defendant makes numerous contentions directed at explaining why the district court erred in concluding that Defendant's initial encounter with Officer Burns was consensual and therefore not a seizure. Because we agree with the district court's alternative ruling—i.e., that the stop of Defendant was supported by reasonable suspicion—we need not and do not address Defendant's arguments about the encounter being nonconsensual.

A. Standard of Review

{8} Defendant argues that under both the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution, his seizure was unreasonable.¹ See *Yazzie*, 2016-NMSC-026, ¶ 17 (“The United States and the New Mexico Constitutions provide overlapping protections against unreasonable searches and seizures.” (alteration, internal quotation marks, and citation omitted)). It is well established that “a police officer may detain an individual in investigating potential criminal activity where the officer has formed a reasonable suspicion the individual is breaking, or has broken, the law”—such detention is not constitutionally unreasonable. *State v. Salazar*, 2019-NMCA-021, ¶ 12, 458 P.3d 546 (internal quotation marks and citation omitted).

{9} “A reasonable suspicion is a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law.” *State v. Hubble*, 2009-NMSC-014, ¶ 8, 146 N.M. 70, 206 P.3d 579 (internal quotation marks and citation omitted). “We will find reasonable suspicion if the officer is aware of specific articulable facts, together with rational inferences from those facts, that, when judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring.” *Id.* (internal quotation marks and citation omitted).

“The level of suspicion required for an investigatory stop is considerably less than proof of wrongdoing by a preponderance of the evidence.” *State v. Urioste*, 2002-NMSC-023, ¶ 10, 132 N.M. 592, 52 P.3d 964 (internal quotation marks and citation omitted).

{10} Because Defendant does not challenge the district court's factual findings, whether reasonable suspicion supported the stop is a legal question we review de novo. See *Yazzie*, 2016-NMSC-026, ¶ 15. “On appeal, we must review the totality of the circumstances and must avoid reweighing individual factors in isolation.” *State v. Martinez*, 2018-NMSC-007, ¶ 12, 410 P.3d 186. In doing this, we view the facts “in a manner most favorable to the prevailing party,” indulge “all reasonable inferences in support of the court's decision,” and disregard “all inferences or evidence to the contrary[.]” *State v. Werner*, 1994-NMSC-025, ¶ 10, 117 N.M. 315, 871 P.2d 971 (internal quotation marks and citation omitted).

B. Defendant's Proximity to the Scene of a Recent Crime, in Conjunction With All the Surrounding Circumstances, Gave Rise to Reasonable Suspicion

{11} Defendant does not contend Officer Burns lacked reasonable suspicion that trash had been illegally dumped in the lot. Instead, Defendant contends the officer lacked reasonable suspicion that Defendant, in particular, was involved in this offense. Thus, our inquiry is limited to whether, based on the totality of the circumstances, Officer Burns' suspicion that Defendant was involved in the illegal dumping was reasonable. The district court ruled that it was. Defendant on appeal makes several arguments why this was error, chief among them that Officer Burns relied exclusively on Defendant's proximity to the scene of the crime, which Defendant contends was insufficient to form a reasonable suspicion.

{12} In advancing this argument, Defendant does not contend proximity to the scene of a recent crime is irrelevant when assessing the reasonableness of a stop. Any such contention would be contrary to precedent. When viewed in conjunction with all the circumstances known to an officer, proximity to the scene of a recent crime may prove significant in determining the reasonableness of a suspicion. *State v. Watley*, 1989-NMCA-112, 109 N.M. 619, 788 P.2d 375, illustrates this point. In *Wat-*

ley, the officer received a report in the early morning hours of a rape in the immediate area he was patrolling. *Id.* ¶ 15. The only additional facts known to the officer were that the suspect was Hispanic and there was a person wearing a ski mask running north on a nearby street. *Id.* The officer then stopped the defendant, who was traveling north in a truck on the nearby street and was the only one around. *Id.* Even though the defendant did not match the minimal description known to the officer (i.e., the defendant was not Hispanic, was not wearing a ski mask, and was not on foot), this Court concluded the circumstances supported the stop. *Id.* ¶¶ 17-18. *Watley* considered it significant that “[the] defendant was stopped in the early morning hours a short distance from the area where an alleged crime had been committed and where a man had been seen running toward the vicinity where [the] defendant was stopped” and that the defendant was the only person in the area. *Id.* ¶¶ 17-18. Based on these facts, this Court held the officer “could reasonably have concluded that [the] defendant may have been involved in the commission of the reported offense.”² *Id.* ¶ 17.

{13} In other cases, this Court likewise has concluded that proximity to the scene of a recent crime—in conjunction with appropriate circumstances—may support reasonable suspicion. See, e.g., *State v. Lovato*, 1991-NMCA-083, ¶¶ 2-4, 11-14, 112 N.M. 517, 817 P.2d 251 (concluding there was reasonable suspicion supporting a vehicular stop to investigate a reported drive-by shooting where “the incident . . . occurred around midnight, the car . . . met the general description radioed by the police dispatcher, and there was no other vehicular traffic in the area”); *State v. Jimmy R.*, 1997-NMCA-107, ¶¶ 2-3, 124 N.M. 45, 946 P.2d 648 (concluding the officer had reasonable suspicion for an investigative stop because the subjects, who alone were in the vicinity of reported criminal activity, began walking away when the officer drove up); *State v. Ortiz*, 2017-NMCA-006, ¶¶ 14-15, 387 P.3d 323 (concluding the officer had reasonable suspicion to stop the defendant where, notwithstanding the lack of suspect's description, the defendant was the only person in the vicinity of a recent report of suspicious activity, at an hour “when it [was] objectively reasonable to infer there were no other individuals present and that the business was

¹ Defendant, however, does not assert that the New Mexico Constitution affords him greater protection than the United States Constitution. In light of this and because our courts “have never interpreted the New Mexico Constitution to require more than a reasonable suspicion that the law is being or has been broken to conduct a temporary, investigatory traffic stop,” we apply the same reasonable suspicion standard under both the state and federal constitutions. *State v. Yazzie*, 2016-NMSC-026, ¶ 38, 376 P.3d 858.

² After reaching this conclusion, the Court in *Watley* went on to discuss facts the officer observed after the stop. See 1989-NMCA-112, ¶ 19. Such facts, however, cannot be used to support the lawfulness of a stop, so we give them no consideration. See *State v. Jason L.*, 2000-NMSC-018, ¶ 20, 129 N.M. 119, 2 P.3d 856 (“Reasonable suspicion must exist at the inception of the seizure. The officer cannot rely on facts which arise as a result of the encounter.” (citation omitted)).

not open[.]” and the defendant’s behavior was suspicious given the time of day and location).³

{14} In contrast to *Watley*, and similar cases cited above, *State v. Garcia*, 2009-NMSC-046, 147 N.M. 134, 217 P.3d 1032, upon which Defendant principally relies,⁴ illustrates the type of situation in which proximity to the scene of a recent crime proves insufficient in light of the totality of the circumstances. In *Garcia*, our Supreme Court determined that “seizing [the d]efendant because he was near the address where the yet-uninvestigated ‘possible domestic’ had occurred was unreasonable because the officer had no articulable, particularized suspicion that [the d]efendant was breaking or had broken the law.” 2009-NMSC-046, ¶ 44. The Court reached this conclusion for two reasons. First, “the officer had no information that a crime had been or was being committed[.]” *id.* ¶ 45—a situation not at issue in this case, given Officer Burns’ direct observation of illegal dumping. Second, “even had the officer known that a crime had been committed,” the Court in *Garcia* observed, “the fact that [the d]efendant was not merely walking in the vicinity was not necessarily sufficient to support a reasonable suspicion that [the d]efendant was the responsible party.” *Id.* ¶ 46 (emphasis added).

The facts—or more aptly the absence thereof—that made the defendant’s proximity to the scene of a crime insufficient in *Garcia* included that the officer had no description of the suspect and the defendant was merely on the same block as the supposed crime at 7:00 p.m., a time when it is not unusual for people to be walking in the streets. *Id.* Given these circumstances, the Court concluded, “[t]he connection between [the d]efendant and any crime that may have been in progress was too attenuated to constitute reasonable suspicion.” *Id.*

{15} With the foregoing precedents in mind, we turn to the totality of the circumstances here. The specific articulable facts and rational inferences place this case closer to the circumstances in *Watley* than those in *Garcia*, and we similarly conclude that they gave rise to reasonable suspicion. In this case, around 1:15 a.m. on a January day, Officer Burns witnessed at least two individuals appearing to dump trash from the back of a truck in an empty lot that is known for exactly this type of criminal activity. See *State v. Martinez*, 2020-NMSC-005, ¶ 36, 457 P.3d 254 (“[W] here an officer is patrolling an area known as a site where a particular type of crime is prevalent and stops an individual on suspicion that he or she has potentially

committed the very crime that occurs with frequency in that area, then the assertion that the area in question is a high-crime area is quite acceptable if not essential to understanding and judging the merits of the officer’s suspicion.”). Although Officer Burns drove in the direction he believed he saw the truck travel, by the time he arrived there, only about one to two minutes later, the truck was gone, and Defendant was the only individual in the vicinity.⁵ The stop occurred in “pretty close proximity” to the illegal dumping, about 100 yards from the lot. It was unusual for anyone to be out given the time of day and the conditions. Considering all these circumstances together—that Defendant was in close temporal and physical proximity to the scene of a crime, known for exactly the same type of crime suspected, that Defendant was found in the area where the truck involved in the crime was seen leaving, that Defendant was the only individual in the vicinity, and that it was late at night and unusual for anyone to be out—Officer Burns reasonably could have concluded that Defendant, in particular, was involved in the illegal dumping he had just witnessed. See, e.g., *Watley*, 1989-NMCA-112, ¶¶ 17-18 (concluding that similar circumstances gave rise to reasonable suspicion); *Goodrich*, 450 F.3d at 561-63 (same).

³ Commentators and numerous other courts have reached similar conclusions. See, e.g., 4 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.5(h) (6th ed. 2021) (discussing, in the context of a stop related to recent criminal activity in the area, what combination of facts and circumstances will suffice to establish a “reasonable possibility” that the person stopped committed the offense, and identifying as considerations “(1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender’s flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation”); *United States v. Goodrich*, 450 F.3d 552, 561-63 (3d Cir. 2006) (upholding the validity of the stop, notwithstanding imprecise description of the suspect, because other relevant factors, including (1) the reputation of the area for criminal activity of the type suspected; (2) the time of day; (3) the geographical and temporal proximity of the stop to the scene of the alleged crime; and (4) the number of persons in the area, “tend[ed] to more narrowly define the universe of potential suspects and thereby constrain police discretion”); *People v. Brown*, 353 P.3d 305, 316-19 (Cal. 2015) (concluding, notwithstanding lack of suspect description, that reasonable suspicion existed where the deputy arrived at the scene of a fight within three minutes of dispatch; it was 10:30 p.m.; the defendant was the only person, and in the only vehicle, near the scene; and the defendant first drove away from, then drove back toward, the scene); *State v. Johnson*, 2011 SD 10, ¶¶ 2, 11, 13-14, 795 N.W.2d 924 (per curiam) (concluding that reasonable suspicion existed where it was early morning; the officer knew that a casino had been robbed seconds beforehand; the defendant was stopped four blocks from the casino; there were no other vehicles moving away from the casino; and the location of the vehicle was on a logical escape route).

⁴ On appeal, Defendant additionally relies on *State v. Eric K.*, 2010-NMCA-040, 148 N.M. 469, 237 P.3d 771. *Eric K.* appears to be another example of a situation where proximity to the scene of a recent crime proves insufficient in light of the totality of the circumstances. Unfortunately, the opinion contains little explanation why the circumstances of that case proved insufficient, so it is difficult to glean much on this point from *Eric K.* We do, however, observe that *Eric K.* involved numerous circumstances not at play in this case—e.g., the report was from a 911 caller (the identity of whom was unknown); the specific location of the alleged crime was unknown; it was mid-afternoon; and other people were in the vicinity at the time of the stop. *Id.* ¶¶ 2-5. Given these circumstances, we can appreciate why this Court concluded that reasonable suspicion did not exist. See *id.* ¶¶ 23-24.

⁵ The fact that Defendant, when stopped, was traveling on foot and not in the truck, does not make Officer Burns’ suspicion unreasonable. See *Watley*, 1989-NMCA-112, ¶¶ 17-18 (upholding stop of vehicle when suspect seen fleeing on foot); *Brown*, 353 P.3d at 309, 318-19 (upholding stop of vehicle even though the officer did not know if suspect was on foot or in vehicle). Officer Burns observed multiple people engaged in illegal dumping; and while it was possible that all involved departed together in the truck, as Defendant surmises, it also was possible that the suspects departed separately or parted ways before Officer Burns reached the street where the truck was seen traveling since, as the district court observed, “it would only take one person to drive the truck away.” See *Yazzie*, 2016-NMSC-026, ¶ 33 (“The requirement of reasonable suspicion is not a requirement of absolute certainty[.]” (alteration, internal quotation marks, and citation omitted)); *Werner*, 1994-NMSC-025, ¶ 10 (recognizing that all reasonable inferences in support of the district court’s decision should be indulged).

Given the circumstances in their totality, this is not the type of situation, as Defendant suggests, where proximity to the scene of a recent crime proves insufficient.

{16} Nor are Defendant's remaining arguments in support of a contrary conclusion persuasive. Defendant contends that Officer Burns did not see him or his distinctive-looking bicycle on the lot and that there otherwise was nothing directly linking Defendant to the illegal dumping. Relatedly, Defendant contends that it was entirely possible that he just happened to be walking in the area at the time the illegal dumping occurred. These arguments misapprehend the level of certainty necessary to support an investigative detention. While "particularized suspicion," based on all the circumstances known to the officer, that the individual detained is breaking or has broken the law is necessary to render the stop reasonable, officers "need not limit themselves to their direct observations in developing suspicions, and they need not exclude all possible innocent explanations of the facts and circumstances they observe." *Salazar*, 2019-NMCA-021, ¶ 16 (internal quotation marks and citation omitted); see also *Martinez*, 2020-NMSC-005, ¶ 31 ("The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct." (internal quotation marks and citation omitted)). Indeed, "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *Yazzie*, 2016-NMSC-026, ¶ 33 (internal quotation marks and citation omitted); see also *id.* ¶ 22 (providing that "where conduct justifying the stop was ambiguous and susceptible of an innocent explanation, officers could detain the individuals to resolve the ambiguity" (alteration, omission, internal quotation marks, and citation omitted)); *Salazar*, 2019-NMCA-021, ¶¶ 3, 5-6, 19 (concluding that a stop was reasonable notwithstanding that the officer lost sight of the vehicle observed evading a DWI checkpoint and was uncertain whether the vehicle stopped was the target vehicle). {17} As we have discussed, there was a sufficient probability that Defendant was involved in the illegal dumping, thereby making the stop of Defendant, if any, reasonable. The district court's denial of Defendant's suppression motion is affirmed.

ALLOCATION

{18} Defendant's second claim of error is that he was denied the right to allocution at his sentencing hearing and, as a result, is entitled to resentencing. The State does not disagree that Defendant's right to allocution was violated. Instead, the State contends that Defendant's entry into a plea and disposition agreement bars all but claims of jurisdictional defects, which, the State contends, allocution errors are not. In response,

Defendant argues first that the scope of the appellate waiver in the plea and disposition agreement did not encompass allocution errors and second that the allocution violation is indeed a jurisdictional defect. Because we agree with Defendant's second argument, we address this point only. We conclude that the denial of the right to allocution renders the ensuing sentence unauthorized by statute—a jurisdictional defect that may be appealed notwithstanding the entry of a valid guilty plea and appellate waiver. Because Defendant was denied the right to allocution, we remand for resentencing in this case.

I. Background

{19} Defendant and the State entered into a plea and disposition agreement in which Defendant agreed to plead guilty to possession of a controlled substance in this case and another case. The State in turn agreed to dismiss the remaining charges in both cases. The plea and disposition agreement contained "[n]o agreement as to sentencing[.]" but the State did not oppose the sentences in the two cases being suspended and run concurrently. In relevant part, the plea and disposition agreement read:

[D]efendant gives up any and all motions, defenses, objections or requests which [he] has made or raised, or could assert hereafter, to the court's entry of judgment and imposition of a sentence consistent with this agreement. [D]efendant waives the right to appeal the conviction that results from the entry of this plea agreement.

Excepted from this waiver was Defendant's right to appeal the district court's suppression ruling in this case.

{20} The district court held a sentencing hearing in the two cases governed by the plea and disposition agreement, as well as in a third case in which Defendant also pleaded guilty to possession of a controlled substance. Only the State, defense counsel, and an individual from treatment court were invited to speak at the hearing. As the individual from treatment court was speaking, Defendant interjected, expressing disagreement with one of the stated assertions. Aside from this, Defendant neither spoke, nor was he ever invited to address the court prior to imposition of the sentence. At the conclusion of the hearing, the district court sentenced Defendant within the statutory maximum punishment. Defendant appealed the judgment and sentence as to this case only; he did not appeal the judgment and sentence as to the other two cases.

II. An Allocution Violation Can Be Raised on Appeal Notwithstanding the Entry of a Valid Guilty Plea and Appellate Waiver

{21} The question we resolve today is one we consider de novo: whether the denial of the right to allocution is a jurisdictional

defect that may be raised on appeal, notwithstanding the entry of a valid guilty plea and appellate waiver. See *State v. Chavarria*, 2009-NMSC-020, ¶ 11, 146 N.M. 251, 208 P.3d 896 (providing that "[q]uestions regarding subject matter jurisdiction are questions of law which are subject to de novo review" (internal quotation marks and citation omitted)). We begin by briefly reviewing the contours of the right to allocution in New Mexico. We then discuss the usual effect of the waiver made in a valid guilty plea and appellate waiver. Recognizing that our Supreme Court has deemed jurisdictional defects—i.e., sentences not authorized by statute—as the only types of sentencing claims that may be raised on appeal in this context, we examine whether allocution violations constitute such defects, and ultimately determine that they do. Our conclusion rests on longstanding principles that a court's sentencing authority derives exclusively from statute; that the Criminal Sentencing Act (the Act), NMSA 1978, §§ 31-18-12 to -26 (1977, as amended through 2020), plainly mandates that the opportunity for allocution be provided at every felony sentencing proceeding; and that a court's failure to afford this right renders the sentence invalid.

A. The Right to Allocution in New Mexico

{22} The right to allocution in New Mexico has been expansively applied and guardedly protected. "Allocution is defined as the formal inquiry or demand made by the court or clerk to [the] accused at the time for pronouncing sentence as to whether [the] accused has anything to say why sentence should not be pronounced on him." *State v. Setser*, 1997-NMSC-004, ¶ 20, 122 N.M. 794, 932 P.2d 484 (internal quotation marks and citation omitted). The common law doctrine of allocution, also known as allocutus, is codified in the Act and applies to all felony offenses.⁶ See *Tomlinson v. State*, 1982-NMSC-074, ¶¶ 9-12, 98 N.M. 213, 647 P.2d 415 (holding that "Section 31-18-15.1 extends the common law doctrine of allocutus to non-capital felonies as enumerated in Section 31-18-15 and that the trial judge must give the defendant an opportunity to speak before he pronounces sentence"). In modern-day sentencing, allocution serves many important functions. Predominantly, allocution "provid[es] an avenue through which a defendant may ask for mercy based on factors that might not otherwise be brought to the court's attention, and promot[es] safety, certainty and equity in sentencing and the judicial process overall." *Williams*, 2021-NMCA-021, ¶ 9 (internal quotation marks and citation omitted).

Even where a defendant's statements can have little or no practical impact on the sentencer—such as where the court must apply habitual offender enhancements—allocution still is required and serves a meaningful purpose. See *Leyba*, 2009-NMCA-030, ¶ 27 (providing that “the opportunity to personally address the sentencer retains both symbolic and practical significance . . . [and] may increase for some defendants the perceived equity of the process” (internal quotation marks and citation omitted)). An allocution violation in New Mexico renders the sentence invalid, resulting in the remedy of reversal and resentencing without inquiry into the harm the violation may have caused. See *Tomlinson*, 1982-NMSC-074, ¶¶ 11-12 (rejecting the argument that an allocution violation is “harmless error” and reasoning that “[t]here is no substitute for the impact on sentencing which a defendant's own words might have if he chooses to make a statement” (internal quotation marks and citation omitted)).

B. A Valid Guilty Plea and Appellate Waiver Waives a Defendant's Right to Appeal All Non-Jurisdictional Defects and Errors Not Otherwise Reserved

{23} We turn next to the effect of a valid guilty plea and appellate waiver on a defendant's right to appeal. As an initial matter, we note that our discussion here applies only when the defendant does not explicitly reserve the matter he or she seeks to raise on appeal. While the New Mexico Constitution confers to an aggrieved party an absolute right to one appeal, see N.M. Const. art. VI, § 2, our Supreme Court has determined this right may be waived. In particular, “a plea of guilty or nolo contendere, when voluntarily made after advice of counsel and with full understanding of the consequences, waives objections to prior defects in the proceedings” and, according to the Court, “also operates as a waiver of statutory or constitutional rights, including the right to appeal” a conviction and sentence.⁷ *Cha-*

varria, 2009-NMSC-020, ¶¶ 9, 16 (quoting *Hodge*, 1994-NMSC-087, ¶ 14). However, “a plea agreement may not waive the right to challenge on appeal whether a sentence was imposed without jurisdiction.” *State v. Tafoya*, 2010-NMSC-019, ¶ 6, 148 N.M. 391, 237 P.3d 693; see also *Chavarria*, 2009-NMSC-020, ¶ 9 (providing that a voluntary guilty plea ordinarily waives a defendant's right to appeal on “other than jurisdictional grounds” (internal quotation marks and citation omitted)); *State v. Trujillo*, 2007-NMSC-017, ¶ 8, 141 N.M. 451, 157 P.3d 16 (“[A] plea of guilty does not waive jurisdictional errors.”); Rule 12-321(B)(1) NMRA (providing that the “[s]ubject matter jurisdiction of the trial or appellate court may be raised at any time”). {24} In this case, Defendant does not challenge the validity of his plea and only specifically reserved the right to appeal the district court's suppression ruling. Accordingly, whether Defendant may raise the allocution violation on appeal turns on whether that claim is jurisdictional. See *Chavarria*, 2009-NMSC-020, ¶¶ 9-10. We must therefore examine the meaning of “jurisdictional” in this context, a subject our Supreme Court addressed in *Chavarria*. The Court there explained that “[t]he only relevant inquiry in determining whether the court has subject matter jurisdiction is to ask whether the matter before the court falls within the general scope of authority conferred upon such court by the constitution or statute.” *Id.* ¶ 11 (alteration, internal quotation marks, and citation omitted). Further, “a court's sentencing power properly is considered part of its subject matter jurisdiction[.]” *Tafoya*, 2010-NMSC-019, ¶ 7, and “is derived exclusively from statute[.]” *Chavarria*, 2009-NMSC-020, ¶ 12 (internal quotation marks and citation omitted). See also *State v. Frawley*, 2007-NMSC-057, ¶ 6, 143 N.M. 7, 172 P.3d 144 (“No point of law has longer been established in New Mexico than the rule that the prescription of the mode of punishment is preeminently a rightful subject of legislation.”

(alterations, internal quotation marks, and citation omitted)), *superseded by statute on other grounds as recognized by State v. Quintana*, 2021-NMSC-013, ¶ 34, 485 P.3d 215. In particular, the Act “confers authority on the trial court to impose a criminal sentence in accordance with its provisions.” *Chavarria*, 2009-NMSC-020, ¶ 12 (emphasis added); accord § 31-18-13(A) (“[A]ll persons convicted of a crime under the laws of New Mexico shall be sentenced in accordance with the provisions of the [Act.]”). Thus, our Supreme Court explained, whether a sentencing court acts within its jurisdiction in this context hinges on whether the defendant's sentence was authorized by the Act. *Chavarria*, 2009-NMSC-020, ¶¶ 11-12; see also *State v. Sinyard*, 1983-NMCA-150, ¶ 1, 100 N.M. 694, 675 P.2d 426 (providing that the defendant's “claim that the sentence is unauthorized by statute is jurisdictional”); cf. *State v. Wyman*, 2008-NMCA-113, ¶ 2, 144 N.M. 701, 191 P.3d 559 (“A claim that a sentence is illegal and unauthorized by statute is jurisdictional and may be raised for the first time on appeal.”).

{25} Applying these principles in *Chavarria*, the Court determined that the defendant's claim of unconstitutional cruel and unusual punishment did not implicate the sentencing court's jurisdiction. 2009-NMSC-020, ¶¶ 13-14. Observing that the defendant's life sentence was explicitly authorized by certain provisions of the Act, the Court concluded that the trial court did not exceed its sentencing jurisdiction and that the defendant's claim could not be raised on appeal in light of his guilty plea and appellate waiver. *Id.* ¶¶ 10, 13-14. In contrast, the Court observed, a claim that a sentence was not authorized by the Act—such as, for example, a claim that probation could not be imposed after a sentence was partially suspended, see *Sinyard*, 1983-NMCA-150, ¶ 1—was jurisdictional and accordingly could be raised on appeal, notwithstanding the entry of a guilty plea and appellate waiver.

⁶ This Court has extended the right to allocution to a variety of other types of proceedings. See *State v. Williams*, 2021-NMCA-021, ¶ 12, 489 P.3d 949 (probation revocation proceedings), cert. denied, 2021-NMCERT-___ (No. S-1-SC-38732, Mar. 31, 2021); *State v. Leyba*, 2009-NMCA-030, ¶ 27, 145 N.M. 712, 204 P.3d 37 (habitual offender proceedings); *State v. Ricky G.*, 1990-NMCA-101, ¶ 13, 110 N.M. 646, 798 P.2d 596 (children's court proceedings). But see *State v. Stenz*, 1990-NMCA-005, ¶¶ 15-21, 109 N.M. 536, 787 P.2d 455 (declining to extend the right to allocution to misdemeanor sentencing proceedings in the absence of a statute or rule establishing the same).

⁷ This language in *Chavarria* could be read as stating that a defendant's plea of guilty or nolo contendere in and of itself, in the absence of an appellate waiver, has the effect of waiving a defendant's right to appeal the deprivation of all statutory and constitutional rights, even those occurring after entry of the defendant's plea. See 2009-NMSC-020, ¶ 9. If such were the case, we might question its accuracy. See, e.g., *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (“When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” (emphasis added)), cited with approval in *State v. Hodge*, 1994-NMSC-087, ¶ 14, 118 N.M. 410, 882 P.2d 1. We, however, have no occasion to consider this matter today. Like *Chavarria*, Defendant's plea and disposition agreement contained an appellate waiver, see 2009-NMSC-020, ¶ 3, and we assume for purposes of our analysis that this waiver would have been effective in waiving all non-jurisdictional defects at Defendant's sentencing hearing.

See *Chavarria*, 2009-NMSC-020, ¶ 14; see also, e.g., *Tafuya*, 2010-NMSC-019, ¶¶ 1, 3, 6-8 (affirming that the defendant, by pleading no contest, did not waive the right to appeal a claim that the district court erroneously applied the Earned Meritorious Deductions Act in fashioning his sentence); *Trujillo*, 2007-NMSC-017, ¶¶ 7-9 (treating as a jurisdictional matter the issue of whether a district court could adjudicate habitual offender proceedings, where the original plea and disposition agreement was silent on the question); *State v. Shay*, 2004-NMCA-077, ¶¶ 1, 5-6, 136 N.M. 8, 94 P.3d 8 (reversing imposition of habitual offender enhancements, notwithstanding that the defendant agreed in his plea to the enhancement, because the issue involved “an illegal sentence, which is a jurisdictional issue”).

C. The Violation of a Defendant’s Right to Allocution Renders the Ensuing Sentence Unauthorized by the Act

{26} To determine whether a sentence rendered without affording a defendant the right to allocution is unauthorized by the Act—and thus presents a jurisdictional defect that may be raised on appeal notwithstanding the entry of a valid guilty plea and appellate waiver—we examine the source and nature of the right in New Mexico.⁸ Because the common law doctrine of allocution was extended to all felonies as part of the Act’s mandatory sentencing procedures for felony offenses, see *Tomlinson*, 1982-NMSC-074, ¶ 12, we turn first to the Act. Again, the Act provides that “all persons convicted of a crime under the laws of New Mexico shall be sentenced in accordance with the provisions of the [Act.]” Section 31-18-13(A) (emphasis added). Beyond dictating the terms of imprisonment and maximum fines for given offenses, see § 31-18-15(A), (E), the Act also mandates certain procedures a judge must follow at sentencing. As relevant here, under Section 31-18-15.1(A), “[a] district court must hold a sentencing hearing to determine the existence of mitigating or aggravating circumstances that justify a departure of up to one-third from the basic sentence applicable to the crime.” *State v. Ayala*, 2006-NMCA-088, ¶ 6, 140 N.M. 126, 140 P.3d 547 (internal quotation marks and citation omitted).⁹ This Court has construed Section 31-18-15.1(A) as imposing a mandatory duty on the district

court to hold such a sentencing hearing, regardless of whether the defendant sought to present mitigating evidence at the hearing or even affirmatively waived the issue below. See *State v. Sotelo*, 2013-NMCA-028, ¶¶ 39, 41, 296 P.3d 1232 (“The plain language of the statute imposes a duty on the court. . . . The statute does not prescribe any prerequisites to the district court’s exercise of this duty.”).

{27} Allocution in turn is a form of mitigation, *id.* ¶ 42, and likewise is mandated by the Act. Nearly forty years ago, our Supreme Court in *Tomlinson* addressed the source and scope of the right to allocution in New Mexico. The Court observed that allocution is a common law doctrine, originally limited to capital offenses. See *Tomlinson*, 1982-NMSC-074, ¶ 5. It further observed that other jurisdictions had both explicitly codified the doctrine in statute or rule and expanded the right to non-capital offenses. *Id.* ¶ 7. And despite the fact that “the right is not specifically set forth by the plain language of Section 31-18-15.1[.]” *Williams*, 2021-NMCA-021, ¶ 10, our Supreme Court similarly concluded that the Legislature intended to incorporate and expand on the right to allocution with its adoption of Section 31-18-15.1. *Tomlinson*, 1982-NMSC-074, ¶ 12. To this end, the Court determined that Section 31-18-15.1(A) “extends the common law doctrine of allocutus to non-capital felonies as enumerated in Section 31-18-15.1[.]” *Tomlinson*, 1982-NMSC-074, ¶ 12. As a result, Section 31-18-15.1(A), which, as discussed, requires “a sentencing hearing to determine whether aggravating or mitigating circumstances exist, also require[s] the trial court to give a defendant an opportunity to speak before the trial court pronounces sentence.” *Ricky G.*, 1990-NMCA-101, ¶ 7 (emphasis added). {28} Just as the district court judge has a duty to hold a sentencing hearing to determine the existence of mitigating or aggravating circumstances, see *Sotelo*, 2013-NMCA-028, ¶ 45; § 31-18-15.1(A), so too does the judge have a duty to afford the defendant the right to allocution prior to sentencing, see *Williams*, 2021-NMCA-021, ¶ 14 (“It is the duty of the court to inform a defendant of his or her right to allocution, and when . . . the district court does not fulfill this duty, the sentence is invalid.”). See also *Ricky G.*, 1990-NMCA-101, ¶ 7 (same). Failure of the district court to fulfill this duty renders the sentence invalid

and mandates reversal and resentencing without any inquiry into harm or the like. See *id.*; see also *Tomlinson*, 1982-NMSC-074, ¶¶ 11-12; cf. *State v. Jones*, 2010-NMSC-012, ¶ 48, 148 N.M. 1, 229 P.3d 474 (providing that since “the trial court lacks the statutory authority to impose an adult sentence on any youthful offender without complying with [NMSA 1978.] Section 32A-2-20 [(2009)]” of the Delinquency Act, “[i]t follows that the parties lack the ability to bargain away the court’s own responsibility” (emphasis omitted)). {29} In sum, in prescribing a trial court’s sentencing authority under the Act, the Legislature requires courts to afford defendants the right of allocution. See *Tomlinson*, 1982-NMSC-074, ¶ 12. The district court has an affirmative duty to adhere to the Act’s prescriptions in this regard. See *Williams*, 2021-NMCA-021, ¶ 14; *Ricky G.*, 1990-NMCA-101, ¶ 7. And failure of the district court to afford a defendant the right of allocution under Section 31-18-15.1 renders the ensuing sentence invalid. See *Tomlinson*, 1982-NMSC-074, ¶¶ 11-12. From all this, we conclude that a sentence imposed without affording the defendant the right of allocution renders the sentence unauthorized by statute—a jurisdictional defect that may be raised on appeal notwithstanding the entry of a valid guilty plea and appellate waiver. See *Chavarria*, 2009-NMSC-020, ¶ 9.

{30} Defendant thus is not precluded from raising the allocution violation on appeal. As stated, the parties do not dispute that Defendant’s right to allocution was violated, and our review of the record confirms this. Defendant’s sentence in this case is therefore invalid. We accordingly reverse that sentence and remand for a new sentencing hearing, at which Defendant is to be advised of his right to address the district court and given the opportunity to do so. See *Tomlinson*, 1982-NMSC-074, ¶¶ 12-13.

CONCLUSION

{31} For the foregoing reasons, we affirm the district court’s denial of Defendant’s motion to suppress but reverse Defendant’s sentence and remand for resentencing.

{32} IT IS SO ORDERED.

JENNIFER L. ATTREP, Judge

WE CONCUR:

MEGAN P. DUFFY, Judge

ZACHARY A. IVES, Judge

⁸ Relying on an opinion from the United States Supreme Court, the State contends that the denial of the right to allocution does not represent a jurisdictional defect. The State’s reliance on United States Supreme Court precedent in this context is not persuasive, given that the right to allocution and the jurisdictional question we examine here are matters of state law.

⁹ Since *Ayala*, Section 31-18-15.1 has been amended to conform with the conclusion that a sentencing enhancement based on a judicial finding of aggravating circumstances violates the constitutional right to trial by jury. See *Frawley*, 2007-NMSC-057, ¶¶ 1, 22; compare § 31-18-15.1 (1993, amended 2009), with § 31-18-15.1. The existence of mitigating circumstances, however, continues to be a matter for the judge. See § 31-18-15.1(A)(1).

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-017

No: A-1-CA-38179 (filed August 24, 2021)

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

MATTHEW ROBERT STEVENS

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Stanley Whitaker, District Judge

Certiorari Denied, March 24, 2022, No. S-1-SC-38990.

Released for Publication May 10, 2022.

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OPINION

YOHALEM, Judge.

{1} The memorandum opinion filed on August 10, 2021, is hereby withdrawn and replaced with this opinion. Defendant Matthew Robert Stevens was charged in the Second Judicial District Court with aggravated assault against a household member (deadly weapon), pursuant to NMSA 1978, Section 30-3-13(A)(1) (1995); false imprisonment, pursuant to NMSA 1978, Section 30-4-3 (1963); and aggravated assault (deadly weapon), pursuant to NMSA 1978, Section 30-3-2(A) (1963). All but the last charge, aggravated assault (deadly weapon), were dismissed by the State prior to the scheduled trial date following the exclusion of State witnesses as a sanction for failing to make them available for interviews. The State appeals from the district court's dismissal with prejudice of Defendant's last remaining charge on the grounds that the district court lacked jurisdiction because the State failed to bring the case to trial within the deadline set by LR2-308 NMRA.

{2} Relying on the provisions of LR2-308, the State contends that the district court erred in dismissing this criminal case with prejudice for four reasons: (1) the district court erred in concluding that the rule

was jurisdictional and that dismissal with prejudice was required if a case was not timely tried; (2) the district court erred in concluding dismissal with prejudice was required by the terms of LR2-308; (3) the State was not responsible for the failure to comply with the deadline to commence trial; and (4) dismissal was precluded by the exception set forth in LR2-308(H) (6). We agree with the State both that the district court erred in dismissing for lack of jurisdiction and that the rule, by its terms, did not require dismissal. We reverse and remand on these bases, without reaching the two additional issues raised by the State.

BACKGROUND

{3} Defendant was charged on May 2, 2018, in the metropolitan court with aggravated assault against a household member (deadly weapon); false imprisonment; and aggravated assault (deadly weapon). The metropolitan court found probable cause on May 3, 2018. The State requested pretrial preventive detention, based on interviews with the victim and witnesses and Defendant's criminal history. The metropolitan court granted the motion, finding that reliable evidence showed that Defendant posed a danger to the community, and that no release conditions would reasonably protect the safety of the community from future criminal activity.

{4} Defendant was indicted by a grand jury on May 16, 2018, and the case proceeded in the Second Judicial District Court. Shortly thereafter, Defendant asked the district court to reconsider the order requiring pretrial detention. The motion to reconsider was denied and Defendant remained in pre-trial detention throughout the proceedings. {5} Defendant was arraigned on May 25, 2018. The timelines set by the rules for criminal proceedings in the Second Judicial District Court run either from the date of arraignment or from some other triggering event. LR2-308(F)(5)(a) (stating that deadlines for commencement of trial and other events run from arraignment or other applicable triggering event identified in LR2-308(G)). In this case, the parties agree that the timelines ran from May 25, 2018, the date of Defendant's arraignment.

{6} At the time of arraignment, the State is required by LR2-308(B)(2) to file a certification. This certification requires the State to acknowledge that it has done sufficient investigation to be "reasonably certain that . . . the case will reach a timely disposition by plea or trial within the case processing time limits set forth in this rule[.]" LR2-308(B)(2)(a). The certification also requires the State to acknowledge that it understands that, "absent extraordinary circumstances," its "failure to comply with the case processing time lines set forth in [LR2-308] will result in sanctions as set forth in [LR2-308(H)]." LR2-308(B)(2)(d). The State timely filed this certification.

{7} LR2-308(F)(3) requires the district court to assign a case to one of three tracks. The deadlines for a case to progress depend on the track selected by the district court. LR2-308(F)(5). At a status hearing on July 12, 2018, the district court assigned the case to Track 1, the track with the shortest time limits, intended for the least complex criminal cases. LR2-308(F)(3). Both parties agree that, as a Track 1 case, the rule required the district court's scheduling order to provide a date for commencement of trial within "within two hundred ten (210) days of arraignment." LR2-308(F)(5) (a). The district court adopted a scheduling order setting a November 26, 2018, deadline for pretrial motions, and a trial date on a trailing docket for January 28, 2019. Although the scheduling order provided that the trial date was within the 210-day period for commencing trial set by LR2-308(F)(5)(a), the date set was actually more than a month past the deadline to commence trial under the rule. The 210 days expired on December 21, 2018. The State did not alert the district court to its error during the scheduling conference or after receipt of the scheduling order.

{8} On November 26, 2018, the deadline set by the district court for filing pretrial motions, Defendant filed a pretrial motion to exclude four of the State's witnesses, based on the State's failure to timely make them available for interview by defense counsel. Defendant noted in his motion that his trial was scheduled to commence after the deadline set by the rule, without requesting any relief on this basis. The State did not respond to Defendant's motion.

{9} At a December 17, 2018 hearing, on Defendant's motion to exclude witnesses, the district court reprimanded the State for failing to file a response, and granted Defendant's motion, excluding four prosecution witnesses. Once again, the fact that the scheduled trial date violated LR2-308's deadline for commencing trial was not brought to the district court's attention.

{10} December 21, 2018, was the last day under the rule to timely commence trial. Three days after the deadline passed, Defendant filed an addendum to his November 26, 2018, motion to exclude witness testimony. In the addendum to his motion, Defendant informed the district court that the deadline set by LR2-308(F)(5) for commencing trial had expired, and asked the court to dismiss the case as a sanction.

{11} The State responded by claiming that Defendant's addendum was a pretrial motion, that the deadline for pretrial motions was November 26, 2018, and, therefore, Defendant's December 24, 2018, motion to dismiss should be denied as untimely. The district court agreed with the State, ruling orally at a January 8, 2019 hearing, that Defendant's motion to dismiss for failing to comply with the rule's time for commencement of trial was an untimely-filed pretrial motion, and, therefore, holding that it could not be filed without the prior permission of the court. The district court orally denied Defendant's motion to dismiss on this basis and set trial for January 30, 2019. Only one count remained to be tried—aggravated assault (deadly weapon)—the others having been dismissed by the State after four prosecution witnesses were excluded.

{12} On January 28, 2019, the case was assigned to another judge for trial. On the day of trial, Defendant moved for reconsideration of the district court's oral ruling denying his motion to dismiss. The district court granted Defendant's motion, announcing on January 30, 2019, the morning of trial, that the case was dismissed with prejudice.

{13} The State filed a motion to reconsider. Following a hearing on the State's motion to reconsider, the district court entered a written order granting, in a single document, Defendant's motion to dismiss and denying the State's motion to reconsider.

The district court concluded, in relevant part, that because the time limits set by LR2-308 for commencing trial had expired more than a month earlier without an extension having been sought, the court had no jurisdiction, and was required as well by the terms of the rule to dismiss with prejudice.

{14} The State appealed to this Court.

DISCUSSION

{15} The State contends, in relevant part, that the district court erred in concluding that the time limits for trial set forth in LR2-308 are jurisdictional and that, because the time for commencing trial set by the rule had already expired, the district court was required to dismiss with prejudice. We agree with the State's claims of error, both because the rule is not jurisdictional and it does not require dismissal with prejudice when the deadline for trial has passed.

I. Standard of Review

{16} "The determination of whether jurisdiction exists is a question of law which [we] review[] de novo." *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207, 46 P.3d 668. We review de novo as well the district court's construction of the provisions of LR2-308, "because the interpretation of rules is a question of law." *H-B-S P'ship v. Aircoa Hosp. Servs., Inc.*, 2008-NMCA-013, ¶ 5, 143 N.M. 404, 176 P.3d 1136.

II. The District Court Had Subject-Matter Jurisdiction

{17} Although the district court did not specify in its order, we assume that the court was referring to its subject matter jurisdiction when it held that "the time limits imposed by . . . LR2-308 are jurisdictional." "Subject matter jurisdiction is the power to adjudicate the general questions involved in the claim[.]" *Williams v. Rio Rancho Pub. Schs.*, 2008-NMCA-150, ¶ 10, 145 N.M. 214, 195 P.3d 879.

{18} The source of the district court's jurisdiction is Article VI, Section 13 of the New Mexico Constitution, which provides: "The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as provided by law[.]" As our Supreme Court has held, jurisdiction cannot be created through the Court's rulemaking authority; rules regulate the procedure in our district courts. Jurisdiction is controlled by the constitution and our Legislature. See *State v. Smallwood*, 2007-NMSC-005, ¶ 6, 141 N.M. 178, 152 P.3d 821; *State v. Guzman*, 2004-NMCA-097, ¶ 9, 136 N.M. 253, 96 P.3d 1173 (holding that the former Rule 5-604(B) NMRA (2004), which set a six-month deadline for trial of a simple criminal case "is not jurisdictional").

{19} The only question relevant to determine whether the district court has subject matter jurisdiction is "whether this kind of claim . . . falls within the general scope of authority conferred upon such court by the constitution or statute." *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶ 12, 120 N.M. 133, 899 P.2d 576. Criminal cases plainly fall within the general scope of authority conferred upon our district courts, see *State ex rel. Foy v. Austin Cap. Mgmt., Ltd.*, 2015-NMSC-025, ¶ 7, 355 P.3d 1, and, therefore, we conclude that the district court had jurisdiction.

III. The District Court Erred in Construing LR2-308 to Require Dismissal With Prejudice When the Deadline for Commencing Trial Has Passed

{20} Having concluded that the provisions of LR2-308 are not jurisdictional, the remaining question before us is whether the district court correctly concluded that the provisions of the rule removed all discretion from the court, making dismissal with prejudice mandatory.

{21} The State contends that the failure to timely commence trial is no different than any other violation of the rule; it is a "failure to comply" addressed in LR2-308(H) by the imposition of a sanction chosen by the district court, in the exercise of its discretion, on the responsible party. LR2-308(H) (1) provides:

If a party fails to comply with any provision of this rule or the time limits imposed by a scheduling order entered under this rule, the court shall impose sanctions as the court may deem appropriate in the circumstances and taking into consideration the reasons for the failure to comply.

{22} Instead of focusing on LR2-308(H), Defendant turns to LR2-308(J), the rule's provision addressing extensions of time for trial. Defendant contends that the State's failure to timely request an extension of time to commence trial should be treated identically to the pretrial denial of an extension request, pursuant to LR2-308(J)(4). LR2-308(J)(4) provides that if a timely request for an extension of time is denied before the date for trial to commence by the chief judge, and the state then fails to commence trial on the date set, dismissal with prejudice is required. Defendant contends that dismissal with prejudice is therefore mandatory in this case as well.

{23} We are not persuaded by Defendant's analogy to LR2-308(J)(4). LR2-308(J)(4) applies solely when a timely request for a second extension of time, requiring a showing of extraordinary circumstances, is sought, and is denied upon review by the chief judge *before the date set for trial*. Contrary to Defendant's construction of this provision, LR2-308(J)(4) does not impose mandatory dismissal; Subparagraph (J)(4) gives the State

the option of proceeding to trial on the date set. The case is dismissed only if the State opts not to proceed to trial.

{24} In this case, there was no request for an extension of time and no pretrial denial of that request. The predicate for application of LR2-308(J)(4), therefore, was not satisfied. Most importantly, the State was not given the option of avoiding dismissal by proceeding to trial because the deadline for trial had already expired. This was arguably a violation of the rule requiring the State to commence trial within 210 days of arraignment. As the State contends, a failure to comply with *any provision* of the rule is specifically addressed by LR2-308(H)(1), which states that “[i]f a party fails to comply with *any provision* of this rule[,]” the district court “shall impose sanctions *as the court may deem appropriate in the circumstances* and taking into consideration the reasons for the failure to comply.” (Emphases added.)

{25} This Court, most recently in *State v. Lewis*, 2018-NMCA-019, 413 P.3d 484, construed LR2-308(H)(1) to mandate that the district court apply some sanction if a party has failed to comply with a provision of the rule, but to leave the type of sanction to the discretion of the district court. See *Lewis*, 2018-NMCA-019, ¶ 8 (construing the identical language of LR2-400.1(A) (2015) NMRA, the predecessor of LR2-308).

{26} We note that LR2-308(H)(1) requires the district court to exercise its discretion in light of the circumstances and, in particular, in light of the reasons for the failure to comply in deciding what sanction is appropriate. Here the State contends that the failure to timely bring Defendant to trial was attributable to the error made by the district court in its scheduling order, or to the Defendant relieving the State of all responsibility for the violation, and

making any sanction, let alone dismissal with prejudice, inappropriate. We leave both the appropriateness of a sanction and the type of sanction to be imposed, if one is appropriate, to the district court’s discretion on remand.

CONCLUSION

{27} We reverse and remand to allow the district court to determine, in the exercise of its discretion, whether the State is the party responsible for the delay, and if so, what sanction is appropriate under LR2-308(H)(1).

{28} IT IS SO ORDERED.

JANE B. YOHALEM, Judge

WE CONCUR:

KRISTINA BOGARDUS, Judge

MEGAN P. DUFFY, Judge

Advance Opinions

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From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-018

No: A-1-CA-39149 (filed December 14, 2021)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
FELICIA J. PERU,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY

Tom F. Stewart, District Judge

Certiorari Denied, March 24, 2022, No. S-1-SC-39205.

Released for Publication May 10, 2022.

Hector H. Balderas, Attorney General
Benjamin L. Lammons, Assistant
Attorney General
Santa Fe, NM

for Appellee

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

for Appellant

OPINION

HANISEE, Chief Judge.

{1} Defendant appeals the district court order continuing her probation, arguing that the district court violated her right to due process by denying her motion to appear in person at an adjudicatory hearing on the State's motion to revoke her probation. In denying Defendant's motion, the district court relied on New Mexico Supreme Court Order No. 20-8500-013 (the Supreme Court Order), in which the Court set forth procedures related to the function of judicial proceedings in light of the burgeoning COVID-19 pandemic. See Supreme Court Order No. 20-8500-013 (April 16, 2020), https://www.nmcourts.gov/wp-content/uploads/2020/12/Order-No_-20-8500-013-Updating-and-Consolidating-Precautionary-Measures-for-Court-Operations-in-NM-Judiciary-4-16-20.pdf. For the reasons that follow, we affirm.

BACKGROUND

{2} Between May 2019 and January 2020, the State filed three different petitions to

revoke Defendant's probation, alleging Defendant's various failures to comply with her probation requirements. On March 11, 2020, following the State's third petition to revoke probation, the COVID-19 pandemic was declared a public health emergency in New Mexico.¹ On April 16, 2020, our Supreme Court announced the Supreme Court Order, updating precautionary measures for court operation in the New Mexico Judiciary during the COVID-19 public health emergency, which is at issue in this case. In pertinent part, the Supreme Court Order provides that "[a]ll judges shall use telephonic or audio-visual attendance for court appearances by attorneys, litigants, witnesses, and the press unless there is an emergency need for an in-person appearance upon motion of a party." Supreme Court Order No. 20-8500-013 at 4.

{3} In May 2020, Defendant filed a motion requesting to appear in person at an upcoming adjudicatory hearing on the State's motion to revoke her probation. The district court denied Defendant's motion and stated within its findings

that no emergency need existed in the case. Following the adjudicatory hearing, at which Defendant appeared via audio-visual connection, the district court filed its order continuing Defendant's probation and Defendant subsequently filed her notice of appeal. The State filed a fourth petition to revoke Defendant's probation, alleging continued violations. Following a hearing on the State's motion, the district court filed an order in which it unsatisfactorily discharged Defendant from probation and released Defendant from the Grant County Detention Center.

DISCUSSION

{4} We observe at the outset that because Defendant was unsatisfactorily discharged from probation and subsequently released on the district court's order, this case presents no actual controversy, and we are unable to grant any actual relief. Indeed, Defendant states that "[s]he does not ask this Court to reinstate her to probation. She asks simply for this Court to hold that she had a right to appear in person at her [adjudicatory] hearing, and that that right was violated." Thus, this case appears to be moot. See *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008 ("A case is moot when no actual controversy exists, and the court cannot grant actual relief." (internal quotation marks and citations omitted)). Even if a case is moot, we have discretion to "review moot cases that present issues of substantial public interest or which are capable of repetition yet evade review." *Id.* ¶ 10. Recognizing the likelihood that this Court will be asked to resolve future cases that are similarly related to the district court's application of the Supreme Court Order—or other similar orders from our Supreme Court related to COVID-19—we address below the merits of Defendant's appeal.

{5} Here, Defendant's primary argument is that the district court misinterpreted the Supreme Court Order and, in so doing, violated Defendant's rights to due process by denying her motion to appear in person at an adjudicatory hearing. Defendant does not argue that the Supreme Court Order itself is erroneous or unconstitutional, but rather that the district court erred in its interpretation and application of the Supreme Court Order. Defendant asserts that because she filed motions requesting in-person proceedings, the district court was required under the Supreme Court Order to grant such motions and hold in-person proceedings.

¹ See State of N.M., Executive Order 2020-004 (March 11, 2020) <https://cv.nmhealth.org/wp-content/uploads/2020/03/Executive-Order-2020-004.pdf>.

Indeed, Defendant contends that “[w]hen [she] insisted on appearing in person, the district court needed to conduct the hearing in person, with appropriate safeguards to protect everyone from [the C]oronavirus.” Defendant misapprehends the Supreme Court Order.

{6} The Supreme Court Order states that “[a]ll judges shall use telephonic or audio-visual attendance for court appearances by attorneys, litigants, witnesses, and the press *unless there is an emergency need* for an in-person appearance upon motion of a party.” Supreme Court Order No. 20-8500-013 at 4 (emphasis added). The Supreme Court Order further provides that the district court has discretion to order in-person appearances “on the judge’s own initiative, without a motion by a party, provided that the judge shall confer with the parties and the chief judge of the district before proceeding with an in-person appearance.” Supreme Court Order No. 20-8500-013 at 4. Specifically related to criminal proceedings, the Supreme Court Order provides that “[a]ny criminal procedure rules requiring the presence of the defendant may be accomplished through remote, audio-visual appearance in the

discretion of the judge, provided that confidential communication between the defendant and defense counsel is made available[.]” Supreme Court Order No. 20-8500-013 at 4.

{7} Under these provisions, the district court has discretion to require in-person appearances within certain parameters or when moved to do so by a party asserting an emergency need to appear in person. The Supreme Court Order does not require the district court to grant a defendant’s motion for in-person proceedings where such motion fails to present an emergency need. Defendant’s motion did not assert an emergency need for Defendant to appear in person; rather it merely asserted a general constitutional right to appear in person for probation revocation proceedings. Moreover, Defendant fails to articulate on appeal that her motion was supported by an emergency need and provides no authority to support her implicit assertion that her desire to exercise her right to appear in person at proceedings constituted an emergency. Because Defendant fails to establish that her motions were supported by emergency need, contrary to the district court’s findings, we can assign no error to

the district court’s compliance with the Supreme Court Order. *See State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (explaining that “[t]here is a presumption of correctness in the district court’s rulings” and that it is a defendant’s “burden on appeal to demonstrate any claimed error below” (alterations, internal quotation marks, and citation omitted)); *see also Martinez v. Sw. Landfills, Inc.*, 1993-NMCA-020, ¶ 18, 115 N.M. 181, 848 P.2d 1108 (“[A]n appellant is bound by the findings of fact made below unless the appellant properly attacks the findings, and that the appellant remains bound if he or she fails to properly set forth all the evidence bearing upon the findings.”). We therefore hold that the district court did not err in its interpretation of the Supreme Court Order.

CONCLUSION

{8} For the reasons stated above, we affirm.

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

J. MILES HANISEE, Chief Judge

WE CONCUR:

JACQUELINE R. MEDINA, Judge

GERALD E. BACA, Judge

² Defendant argues as well that there was insufficient evidence of a violation to support the district court’s revocation of her probation. Defendant fails to develop this argument with any explanation or analysis, citation to the record, or citation to relevant authority, and we therefore consider the argument to be undeveloped and decline to address it further. *See Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 (“This Court has no duty to review an argument that is not adequately developed.”); *see In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (“We have long held that to present an issue on appeal for review, an appellant must submit argument and authority as required by rule. We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority. [T]herefore[, we] will not do this research for counsel. Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal.” (citations omitted)).

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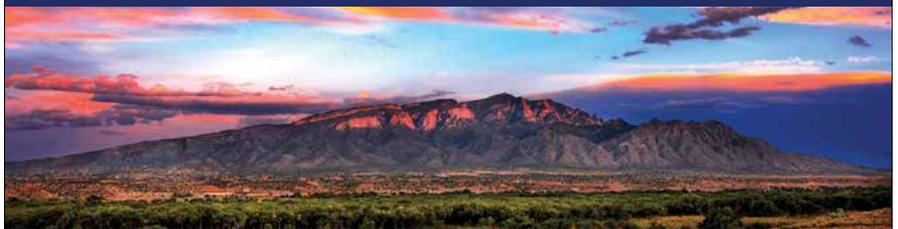
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Rio Rancho Attorney seeks motivated senior with experience, common sense, and thick skin. Please contact Daniel at (505) 247-1110.

Assistant City Attorney for the Municipal Affairs Division— Aviation Department

The City of Albuquerque Legal Department is hiring an Assistant City Attorney for the Municipal Affairs Division—Aviation Department. The Legal Department's team of attorneys provides a broad range of general counsel legal services to the City. This specific position will focus on representation of the City's interests with respect to Aviation Department legal issues and regulatory compliance. The position will be responsible for interaction with Aviation Department administration, the Albuquerque Police Department, various other City departments, boards, commissions, and agencies, and various state and federal agencies, including the Federal Aviation Administration and the Transportation Security Administration. The legal services provided will include, but will not be limited to, legal research, drafting legal opinions, reviewing and drafting policies, ordinances, and executive/administrative instructions, reviewing and drafting permits, easements, real estate contracts and procurement contracts and negotiating same, serving as records custodian for the Aviation Department, providing counsel on Inspection of Public Records Act requests and other open government issues, providing advice on City ordinances and State/Federal statutes and regulations, litigating matters as needed, 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. Aviation background is not essential, but any experience with aviation/airports will be considered. Candidates must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Please apply on line at www.cabq.gov/jobs and include a resume and writing sample with your application.

Associate Attorney

Budagher & Tann, LLC, an Albuquerque law firm specializing in estate planning, probate, taxation, business, and real estate matters has an immediate opening for an associate attorney with 0-5 years of experience. We offer a collegial balanced work / life environment and do not track billable hours, vacation, or sick leave. Friendly working environment with opportunity to grow with the firm. Competitive salary and benefits. Please send letter of interest and resume to adminassistant@budagherlaw.com.

Associate Attorney

Atkinson, Baker & Rodriguez, P.C. is a successful and established Albuquerque-based complex civil commercial and tort litigation firm seeking motivated and talented associate attorney candidates with great academic credentials. Join our small but growing focused Firm and participate in litigating cases from beginning to end with the support of our nationally recognized, experienced attorneys! Come work for a team that fosters development and growth to become a stand-out civil litigator. Highly competitive compensation and benefits. Send resumes, references, writing samples, and law school transcripts to Atkinson, Baker & Rodriguez, P.C., 201 Third Street NW, Suite 1850, Albuquerque, NM 87102 or Careers@abrfirm.com. Please reference Attorney Recruiting.

Senior Assistant City Attorney (REVISED)

Two (2) fulltime professional positions, involving primarily civil law practice. Under the administrative direction of the City Attorney, represents and advises the City on legal matters pertaining to municipal government and other related duties, including misdemeanor prosecution, civil litigation and self-insurance matters. This position will focus primarily on land use, water issues, public utilities, nuisances and other City interests. Represents the city in acquisition of property through negotiated purchase or condemnation proceedings. Reviews and/or drafts responses or position statements regarding EEOC claims asserted against the City. Pursues bankruptcy claims and represents the City's interest in bankruptcy court. Assists with revenue recovery. Juris Doctor Degree AND three year's experience in a civil law practice; at least one year of public law experience preferred. Must be a member of the New Mexico State Bar Association, licensed to practice law in the state of New Mexico, and remain active with all New Mexico Bar annual requirements. Valid driver's license may be required or preferred. If applicable, position requires an acceptable driving record in accordance with City of Las Cruces policy. Individuals should apply online through the Employment Opportunities link on the City of Las Cruces website at www.las-cruces.org. Resumes and paper applications will not be accepted in lieu of an application submitted via this online process. There are two current vacancies for this position. One position will be on a remote work assignment for up to one (1) year. This will be a continuous posting until filled. Applications may be reviewed every two weeks or as needed. SALARY: \$82,278.14 - \$119,257.01 / Annually CLOSING DATE: Continuous

Part to Full-Time Associate Attorney

Macke Law & Policy, LLC, a civil defense and consulting firm, specializing in the defense of governmental entities and officials, seeks a part to full-time associate attorney. Quality work environment with work-from-home opportunities and a casual atmosphere otherwise. If interested, please send cover letter, resume and references to Dan at dan@mackelaw.com.

Economic Equity Attorney

New Mexico Center on Law and Poverty seeks a dynamic and creative attorney to work with community leaders and lawmakers on policy changes that increase housing stability and address predatory lending and unfair debt collection practices. Required: 1 year or more litigation or direct representation experience; strong leadership and advocacy skills; commitment to economic, racial, and gender justice. Preferred: Spanish, Indigenous language, or other language fluency; experience with lobbying and legislative processes, budget analysis, media strategies, and coalition building. Apply in confidence by emailing a resume and cover letter to con-tact@nmpovertylaw.org. We are an equal opportunity employer committed to a healthy, collaborative, and inclusive work environment for a diverse staff. We strongly encourage applications from Black, Native, and indigenous people, people of color, immigrants, LGBTQ+, and New Mexicans and individuals of multiple backgrounds and identities.

Attorney

Description: Hartline Barger LLP, a nationally recognized trial law firm specializing in civil litigation, is seeking two attorneys with litigation experience (preferably at a 3-10 year experience level) to join its New Mexico team in either its Santa Fe or Albuquerque office. The ideal candidate will have significant experience handling tort and commercial litigation matters and the following attributes: 1. Strong academic and litigation background; 2. Exceptional writing and oral advocacy skills; 3. Ability to independently manage a caseload from answer to verdict; 4. Skills to work closely with other attorneys on various legal projects; 5. Experience in handling court appearances, depositions and mediations; 6. Facility for effectively communicating with clients, including the preparation of substantive updates; We offer an above-market salary and collaborative firm culture with exceptional benefits. Please email Lanika Doyle for more information. Ldoyle@hartlinebarger.com.

Civil Assistant U.S. Attorney(s) (AUSA) in the Albuquerque office

The U.S. Attorney's Office for the District of New Mexico is recruiting one or more Civil Assistant U.S. Attorney(s) (AUSA) in the Albuquerque office. Civil AUSAs enforce federal civil rights, environmental statutes, combat fraud in the government, and defend agencies and employees in the federal government in civil litigation. The Civil Division seeks to be a force for that which is right, uphold the rule of law, and make fairness, equality, and impartiality the hallmarks of its work. Applicants must be able to independently manage all aspects of their assigned cases, including overall strategy, preparing pleadings and motions, taking depositions, preparing and answering discovery, negotiating settlements, and trying cases. If you are interested in serving the public and representing the people of the United States in a manner that will instill confidence in the fairness and integrity of the USAO and the judicial system, and have the experience necessary to do so, please apply before the vacancy closes on October 4, 2022. Qualification: Applicants must possess a J.D. Degree, be an active member in good standing of a bar (any jurisdiction) and have at least three (3) years of post-J.D. legal or other relevant experience. Salary: AUSA pay is administratively determined based, in part, on the number of years of professional attorney experience. The pay for this position is \$71,718 - \$174,590 including locality pay. The complete vacancy announcement may be viewed at <https://www.justice.gov/usao-nm/job/assistant-united-states-attorney> or at <https://www.usajobs.gov/job/676259300> (USAJobs). All applicants must apply through USAJobs.

Business Attorney

Rodey, Dickason, Sloan, Akin & Robb, P.A. is accepting resumes for attorneys with 2-5 years' experience in corporate, real estate, and finance transactional matters for our Albuquerque and/or Santa Fe offices. Experience in corporate and municipal finance, business law, and real estate law is a plus. This position provides the opportunity to work on important and interesting transactions for A Level clients. Prefer practitioner with strong academic credentials, and law firm or government experience. Firm offers excellent benefit package. Salary commensurate with experience. Please send indication of interest and resume to Adrian Salazar, via email to jobs@rodey.com with "Business Attorney" in the subject line, or P.O. Box 1888, Albuquerque, NM 87103. All inquiries kept confidential.

Civil Litigation Attorney

Rodey, Dickason, Sloan, Akin & Robb, P.A. is accepting resumes for attorneys with 2 to 8 years of Civil Litigation experience to work in our Albuquerque office. Qualifications: Ideal candidate must have strong academic credentials, excellent references, solid writing skills, and must be licensed in New Mexico. Rodey offers comprehensive benefits package, including health, dental and vision; professional development and multi-faceted mentoring program; FSA and HSA plan option(s); 401K plan/employer match; group life and long-term disability insurance; employee assistance program; wireless phone/services stipend. We are excited about our opportunity to partner with qualified candidates looking to advance their legal career. Please send cover letter, resume, law school transcript and writing sample and submit to Adrian Salazar, Human Resources Director, via email to jobs@rodey.com with "Litigation Attorney" in the subject line, or PO Box 1888 Albuquerque, NM 87103. All inquiries will be kept confidential. Rodey is an Equal Opportunity Employer.

Eleventh Judicial District Attorney's Office, Div II

The McKinley County District Attorney's Office is seeking applicants for an Assistant Trial Attorney, Trial Attorney and Senior Trial Prosecutor. Senior Trial Attorney position and Trial Attorney position requires substantial knowledge and experience in criminal prosecution, rules of evidence and rules of criminal procedure; trial skills; computer skills; audio visual and office systems; ability to work effectively with other criminal justice agencies; ability to communicate effectively; ability to re-search/analyze information and situations. Assistant Trial Attorney position is an entry level position and requires basic knowledge and skills in the areas of criminal prosecution, rules of evidence and rules of criminal procedure; public relations, ability to draft legal documents; ability to work effectively with other criminal justice agencies. These positions are open to all persons who have knowledge in criminal law and who are in good standing with the New Mexico Bar or any other State bar. The McKinley County District Attorney's Office provides regular court-room practice and a supportive and collegial work environment. Salaries are negotiable based on experience. Submit letter of interest and resume to District Attorney Bernadine Martin, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter to Bmartin@da.state.nm.us. Position to commence immediately and will remain opened until filled.

Legal Assistant Santa Fe/Albuquerque, NM

Description: The Santa Fe/Albuquerque offices of Hartline Barger LLP are seeking an energetic and reliable Legal Assistant to join our busy litigation defense team. The ideal candidate is reliable, energetic, and personable, with experience in one or more of the following areas of law: commercial litigation, product liability and personal injury defense. Responsibilities: Drafting and typing various types of documents, including correspondence, pleadings, memoranda and other such documents specific to the litigation practice area; Proofreading and redlining work for accuracy, format, grammar, and punctuation; Preparing e-filings and court submissions in federal and local courts. Must know court rules, procedures and calendaring requirements; Scheduling/calendaring appointments such as depositions, document productions, client meetings, trials, court hearings and appearances; coordinates travel arrangements as necessary; Handling incoming and outgoing mail; Performing secretarial functions associated with firm administrative tasks, including processing new client/matter requests, client bills, time reports and expense reports; Inputting attorney and other timekeeper's time; reviews for accuracy and corrects errors; Performing any other administrative tasks as may be assigned. Essential Knowledge, Skills and Abilities: Ability to type at least 75 words per minute with accuracy; Thorough knowledge of MS Office applications including Word, PowerPoint, Excel and Outlook; Excellent written and oral communication skills, including grammar, spelling and punctuation; Ability to read, comprehend and follow instructions; Thorough familiarity with legal terminology pertinent to general legal concepts and specific area(s) of assignment; Strong organizational skills; Ability to perform clerical tasks with a high degree of accuracy; Ability to work independently and as a member of a team, take initiative, set priorities and see projects through completion; Ability to work effectively in a fast-paced environment, meet deadlines, handle multiple tasks, and respond to changing priorities; Ability to work irregular hours as needed is a must. Requirements: Educational/Job Experience Requirements: High School Diploma or equivalent; Minimum of 5 years of legal secretarial experience required; Specialized secretarial degree, associate and/or bachelor's degree desirable but not required. We offer above-market compensation and a comprehensive benefits package including medical, dental, vision, life/AD&D Insurance, 401(k) savings plan and generous paid time off. Hartline Barger LLP is a law firm founded in 1994, serving clients throughout the state and across the country, with offices in Dallas, Corpus Christi, Houston, Waco, Lubbock, Texas and Albuquerque and Santa Fe New Mexico. Nationally recognized for our work in product liability litigation and a broad spectrum of practice areas—from personal

injury defense, commercial litigation and toxic torts to warranty and deceptive trade practice litigation—we have built our firm with lawyers who, simply stated, like to try cases. Please email Lanika Doyle for more information. Ldoyle@hartlinebarger.com.

Regulatory Attorney Req. ID: 6087702 Albuquerque, NM

PNM Resources has an opening for a Regulatory Attorney. Handles complex legal matters and projects. Conducts legal research, drafts corporate legal documents, and conducts transactions, and represents the corporation in complex litigation or proceedings. Juris doctorate degree from an accredited law school, with five+ years related experience in the actual practice of law. Must be licensed to practice law in the State of New Mexico within one year of the hiring date. Regulatory compliance, utility law, ESG issues, transactional law, and litigation experience strongly preferred. To apply go to www.pnm.com/careers. PNM Resources and affiliates are Equal Opportunity/Affirmative Action employers. Women, minorities, disabled individuals, and veterans are encouraged to apply.

Legal Assistant

Established civil trial litigation firm in Albuquerque seeks full-time legal assistant with 3-5 years' experience. Position requires a team player with strong word processing, organizational skills, excellent clerical, computer, and word processing skills. Knowledge of State and Federal District Court Rules and filing procedures, document and case management, ability to monitor, organize and distribute large volumes of information. Proficient in MS Word, Adobe Pro, and PowerPoint. Multitasking, stress management skills and a willingness to learn are essential for this position. Send resume and salary requirements to GUEBERT GENTILE & PIAZZA P.C., Attn: Cassandra A. Marquez, P.O. Box 93880, Albuquerque, NM 87199-3880. No Phone calls please.

Legal Services Intake Coordinator

The New Mexico State Bar Foundation seeks a full-time Intake Coordinator to answer Bar Foundation Legal Service Programs incoming calls, conduct/complete intakes and establish case files in the Legal Services Programs electronic case management systems. The successful applicant must have excellent communication, customer service, and organizational skills. Minimum high school diploma required. Fluency in Spanish is a plus. Generous benefits package. \$16-\$18 per hour, depending on experience and qualifications. Qualified applicants should submit a cover letter and resume to HR@sbnm.org. Visit <https://www.sbnm.org/About-Us/Career-Center/State-Bar-Jobs> for full details and application instructions.

Legal Assistant Supervisor – 13th Judicial District Attorney

The Sandoval County Office of the 13th Judicial District Attorney in Bernalillo, New Mexico has an opening for a Supervising Legal Assistant. This position requires extensive knowledge of the criminal justice system and office organization and tasks such as trial preparation, maintenance of calendars, customer service and general office administrative functions. The position requires the supervision and training of a staff of 10-13 legal assistants. Preferred qualifications include at least 3 years working in a District Attorney's Office or related Criminal Justice organization. Advanced knowledge of the Case Management System (CMS) and supervisory experience. Salary commensurate with experience within the FY2023 New Mexico District Attorney Classification Salary Schedule. Please apply @ <https://www.13th.nmdas.com/> where you will have access to our application. Email applications to kfajardo@da.state.nm.us

Legal Assistant

Legal Assistant with minimum of 3- 5 years' experience for established commercial civil litigation firm. Requirements include current working knowledge of State and Federal District Court rules and filing procedures, calendaring, trial preparation, document and case management; ability to monitor, organize and distribute large volumes of information; proficient in MS Office, AdobePro, Powerpoint and adept at learning and use of electronic databases and legal-use software; has excellent clerical, computer, and word processing skills. Competitive Benefits. If you are highly skilled, pay attention to detail & enjoy working with a team, email resume to e_info@abrfirm.com or Fax to 505-764-8374.

Paralegal

Personal Injury/Civil litigation firm in the Journal Center area is seeking a Paralegal with minimum of 5+ years' experience, including current working knowledge of State and Federal District Court rules and filing procedures, trial preparation, document and case management, calendaring, and online research, is technologically adept and familiar with use of electronic databases and legal-use software. Qualified candidates must be organized and detail-oriented, with excellent computer and word processing skills and the ability to multi-task and work independently. Experience in summarizing medical records is a plus. Salary commensurate with experience. Please send resume with references and a writing sample to paralegal3.bleuslaw@gmail.com

Legal Secretary

AV rated insurance defense firm seeks full-time legal assistant with five plus years' experience in insurance defense and civil litigation. Position requires a team player with strong word processing and organizational skills. Proficiency with Word, knowledge of court systems and superior clerical skills are required. Should be skilled, attentive to detail and accurate with a Minimum typing speed of 75 wpm. Excellent work environment, salary, private pension, and full benefits. Please submit resume to mvelasquez@rileymlaw.com or mail to 3880 Osuna Rd. NE, Albuquerque, NM 87109

Contract Paralegal

Contract paralegal specializing in litigation, probates, wills, and trusts. I can draft various documents including various pleadings, demand letters, wills, trusts, contracts, etc. Contact: paralegalnewmexico@gmail.com.

Paralegal

Stiff, Garcia & Associates, LLC, a successful downtown insurance defense firm, seeks sharp, energetic paralegal. Must be a self-starter, detail-oriented, organized, and have excellent communication skills. A four-year degree or paralegal degree, and insurance defense and/or personal injury experience required. Bilingual in Spanish a plus. Please e-mail your resume and list of references to agarcia@stiffllaw.com

Paralegal

AV Rated insurance defense firm needs full-time paralegal. Seeking individual with minimum of five years' experience as a paralegal in insurance defense. Excellent work environment, salary private pension, and full benefits. Please submit resume and references to Office Manager, 3880 Osuna Rd., NE, Albuquerque, NM 87109 or email to mvelasquez@rileymlaw.com.

Billing Specialist

Modrall Sperling is seeking a Billing Specialist to join our team in Albuquerque, NM. The ideal candidate will have 3-5 years of law firm billing experience and have a concrete understanding of standard and e-billing procedures. Must be comfortable with working in a fast-paced environment, proficient with standard MS Office applications, and able to prioritize tasks effectively and efficiently. Familiarity with e-billing sites (eBillingHub, Serengeti, Collaborati, Counsel Link, etc.), LEDES files and previous experience with Aderant billing software is a plus. Must be very detail oriented, a team player, and have excellent organizational and communication skills. The Billing Specialist is responsible for the following: Manage the monthly billing cycle, which includes distribution of prebills, corrections to cost and fee billing entries, finalization and distribution of client bills by both traditional and electronic submission. Work closely with the firms' electronic billing coordinator in all aspects of electronic billing. Work closely with attorneys and legal assistants regarding billing rates, client billing detail, and invoice submission. Appeal and manage rejected or reduced time entries on e-billing sites within specified timeframe. Other tasks as assigned. Modrall Sperling offers competitive salaries and a comprehensive benefits package that includes medical, dental, life insurance, long-term disability, short-term disability, 4-01(k), and PTO/ Modrall Sperling is an Equal Opportunity Employer. Please forward your resume to Susan Harris: susanh@modrall.com

Office Space

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Locally owned and operated. Move-in ready suite ideal for a solo attorney. Conveniently located in the North Valley with easy access to I-25, Paseo Del Norte, and Montano. Visit our web-site www.sunvalleyabq.com for more details or call Jaclyn Armijo at 505-343-2016.

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virtual mail, virtual telephone reception service, hourly offices and conference rooms available. Witness and notary services. Office Alternatives provides the infrastructure for attorney practices so you can lower your overhead and appear more professional. 505-796-9600/officealternatives.com.

Services

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Expert Witness, Engineering Forensics and Investigation Services: I can get to the bottom of your engineering investigation and explain it, so everyone can understand. Call/v-mail/text/email today, Prof. Anthony Menicucci PhD-Engr., forensics engineer with experience testifying in Federal & State court. anthony@armatech.us, 505-249-2075 for more info.

Miscellaneous

For Sale – Law Books

For sale: collection of 1600's and 1700's law books, including works of Edward Coke and second American edition of Blackstone's commentaries. 505-870-2112 or robertwionta@centurylink.net

Search For Will

Albuquerque / Rio Rancho Area

Searching for the will of GEORGE "CURTIS" CROSS. Please contact Erica Herold at 209-570-7862.

2022 Bar Bulletin Publishing and Submission Schedule

The Bar Bulletin publishes twice a month on the second and fourth Wednesday. Advertising submission deadlines are also on Wednesdays, three weeks prior to publishing by 4 pm.

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

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



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