BAR BULLETIN
Official Publication of the State Bar of New Mexico
November 30, 2016 • Volume 55, No. 48

State Bar of New Mexico
2017 Licensing Notification

Your 2017 State Bar licensing fees and certifications are due Dec. 31, 2016, and must be completed by Feb. 1, 2017, to avoid non-compliance and related late fees.

Complete your annual licensing requirements at www.nmbar.org/licensing.

Payment by credit card* available.
If you have any questions, please call
505-797-6083 or email license@nmbar.org
For more details, refer to page 5.

*Online payment by credit card will incur a service charge.

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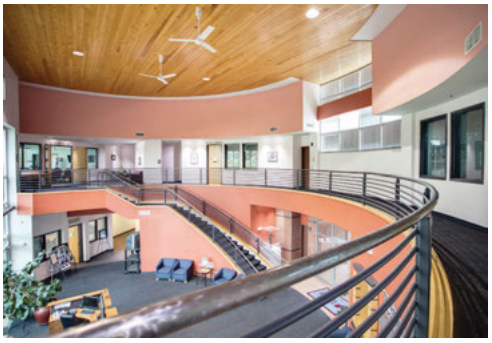
State Bar Center

Your Meeting Destination



Hold your conference, seminar, training, mediation, reception, networking social or meeting at the State Bar Center.

- Multi-media auditorium
- Board room
- Small to medium conference rooms
- Classrooms
- Reception area
- Ample parking
- Free Wi-Fi

For more information, site visits and reservations, call 505-797-6000.

STATE BAR of NEW MEXICO

www.nmbar.org

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Conveniently located in Journal Center

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email: address@nmbar.org • www.nmbar.org

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Notices

Court News

New Mexico Supreme Court Board of Legal Specialization

Comments Solicited

The following attorneys are applying for certification as a specialist in the areas of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, attorneys and others are encouraged to comment upon any of the applicant's qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Natural Resources Law
Susan C. Kery

Family Law
Roxanne R. Lara

New Mexico Court of Appeals

Announcement Judicial Vacancy

A vacancy will occur on Dec. 1 due to the retirement of Judge Roderick T. Kennedy. The deadline for application is 5 p.m., Dec. 8. The Appellant Nominating Commission will meet Dec. 22 in Santa Fe to interview applicants for this vacancy. Alfred Mathewson, chair of the Appellate Court Judicial Nominating Commission, invites applications for these positions from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications can be found at lawschool.unm.edu/judsel/application.php.

Applicants for Vacancy

Nine applications were received in the Judicial Selection Office as of 5 p.m., Nov. 17, for the Judicial Vacancy in the New Mexico Court of Appeals due to the retirement of Hon. Michael D. Bustamante effective Oct. 31. The New Mexico Court of Appeals Judicial Nominating Commission will meet at 9 a.m. on Dec. 1 at the Supreme Court Building in Santa Fe to evaluate the applicants for this position. The Commission meeting is open to the public. Those who want to comment will have the opportunity to be heard. The names of the applicants in alphabetical order: **Henry M. Bohnhoff**, **Kristina Bogardus**, **Stephen French**, **Paul William Grace**, **Emil Kiehne**, **Kerry Kiernan**, **William M. Mast**, **Jacqueline Medina** and **Briana Zamora**.

Professionalism Tip

With respect to parties, lawyers, jurors, and witnesses:

I will do my best to ensure that court personnel act civilly and professionally.

Second Judicial District Court

Hours Change

Effective Nov. 21, the Second Judicial District Children's Court Clerk's Office, located at 5100 2nd Street, Albuquerque, hours will be 8 a.m. to 4 p.m. The office will remain open through the lunch hour.

Sixth Judicial District Court

Notice of Right to Excuse Judge

Gov. Susana Martinez appointed Jarod K. Hofacket to fill the vacant judicial position and to take office on Nov. 4 in Division IV of the Sixth Judicial District Court. Judge Hofacket will be assigned all pending and reopened cases previously assigned to Judge Daniel Viramontes, District Judge, Division IV. All pending and reopened cases involving Amy DeLaney-Hernandez shall be assigned to Judge Hofacket. All pending and reopened cases involving Tyler Benting shall be assigned to Judge Jennifer E. DeLaney, District Judge, Division II. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days to excuse Judge Hofacket.

Bernalillo County Metropolitan Court

Court Closure

The Bernalillo County Metropolitan Court will be closed from 11 a.m.–2 p.m. on Dec. 9 for the Court's Annual Staff Appreciation Holiday Lunch.

U.S. District Court, District of New Mexico

Announcement of Judicial Vacancy

The Judicial Conference of the U.S. has authorized the appointment of a full-time U.S. magistrate judge for the District of New Mexico at Albuquerque. The current annual salary of the position is $186,852. The term of office is eight years. A full public notice and application forms for the U.S. magistrate judge position are posted in the Clerk's Office of the U.S. District Court at all federal courthouses in New Mexico, and on the Court's website at www.nmd.uscourts.gov. Application forms may also be obtained from the Intake Counter at all federal courthouses in New Mexico, or by calling 575-528-1439. Applications must be received by Dec. 23. All applications will be kept confidential unless the applicant consents to disclose.

U.S. Courts Library

Holiday Open House

Join the staff of the U.S. Courts Library for an open house. Enjoy some cookies and punch from 10 a.m.–5 p.m., Dec. 14. Stop by and meet staff, peruse the collection and discover how the Library can become an integral part of your legal research team. The Library is located on the third floor of the Pete V. Domenici U.S. Courthouse at the northeast corner of Fourth St. and Lomas Blvd. in downtown Albuquerque. Normal hours of operation are 8 a.m.–noon and 1–5 p.m., Monday through Friday. For more information, call 505-348-2135.

State Bar News

Attorney Support Groups

- Dec. 5, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the first Monday of the month.)
- Dec. 12, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- Dec. 19, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

2017 Licensing Notification

Due by Dec. 31

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Appellate Practice Section

Brown Bag Lunch with Judge James J. Wechsler

Join the Appellate Practice Section and the Young Lawyers Division for a brown bag lunch at noon, Dec. 2, at the State Bar Center with guest Judge James J. Wechsler of the New Mexico Court of Appeals. The lunch is informal and is intended to create an opportunity for appellate judges and practitioners who appear before them to exchange ideas and get to know each other better. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. with Tim Atler, tja@atlerfirm.com. Space is limited.

Board of Bar Commissioners

Appointments to Boards and Commissions

The Board of Bar Commissioners will make appointments to the following boards and commissions: Client Protection Commission (one appointment, three-year term); Commission on Professionalism (one lawyer position, one non-lawyer position, two year terms); and the New Mexico Legal Aid Board (one appointment, three year term). Members who want to serve should send a letter of interest and brief résumé by Dec. 1 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to 505-828-3765; or email to jconte@nmbar.org.

Commissioner Vacancies

Two vacancies exist on the Board of Bar Commissioners. Applicants should plan to attend the 2017 Board meetings scheduled for April 21, July 27 (Ruidoso, in conjunction with the annual meeting), Sept. 15 and Dec. 13, 2017 (Santa Fe). Members interested in serving on the Board should submit a letter of interest and résumé to Executive Director Joe Conte (jconte@nmbar.org) by Jan. 16, 2017.

A vacancy was created in the First Bar Commissioner District, representing Bernalillo County, due to Julie Vargas' appointment to the bench. The Board will make the appointment at the Jan. 27, 2017, meeting to fill the vacancy until the next regular election of Commissioners. The term will run through Dec. 31, 2017.

A vacancy exists in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. The Board will make the appointment at its Jan. 27, 2017, meeting to fill the vacancy until the next regular election of Commissioners, and the term will run through Dec. 31, 2017. Active status members with a principal place of practice located in the Third Bar Commissioner District are eligible to apply.

Board of Editors

Seeking Applications for Open Positions

The State Bar Board of Editors has open positions beginning Jan. 1, 2017. Both lawyer and non-lawyer positions are open. The Board of Editors meet at least four times a year (in person and by teleconference), reviewing articles submitted to the *Bar Bulletin* and the quarterly *New Mexico Lawyer*. This volunteer board reviews submissions for suitability, edits for legal content and works with authors as needed to develop the topics or address other concerns. The Board's primary responsibility is for the *New Mexico Lawyer*, which is generally written by members of a State Bar committee, section or division about a specific area of the law. The Board of Editors should represent a diversity of backgrounds, ages, geographic regions of the state, ethnicity, gender, and areas of legal practice, and preferably have some experience in journalism or legal publications. Applicants outside of Albuquerque are especially needed. The State Bar president, with the approval of the Board of Bar Commissioners, appoints members of the Board of Editors, often on the recommendation of the current Board. Those interested in being considered for a two-year term should send a letter of interest and résumé to Communications and Member Services Program Manager Evann Kleinschmidt at ekleinschmidt@nmbar.org. Apply by Dec. 1.

Featured
Member Benefit

New Mexico Lawyers and Judges Assistance Program

Confidential help is available to lawyers, judges, and law students troubled by substance abuse, depression, stress, and other issues. Contact Jill Ann Yeagley, 505-797-6003 or visit http://www.nmbar.org/JLAP/JLAP.html. Free helpline services are available during non-business hours at 505-228-1948 or 1-800-860-4914 and through the Judges Helpline at 1-888-502-1289.

Accelerated *Bar Bulletin* Holiday Deadlines

Due to upcoming holiday closures, the *Bar Bulletin* has accelerated printing schedules.

Submit notices by Dec. 16 for the **Dec. 28 issue** and by Dec. 21 for the **Jan. 4, 2017, issue**. Submit content to notices@nmbar.org.

Intellectual Property Law Section

AIPLA Moot Court Judges Needed

Two UNM School of Law teams will participate in the American Intellectual Property Law Association Moot Court Competition in the spring, partially sponsored by the State Bar Intellectual Property Law Section. The teams seek volunteer attorneys beginning in January to judge their training and mock trials prior to the formal competition. Contact Professor Marsha Baum at Baum@law.unm.edu or any board member of the Intellectual Property Law

Section to volunteer. A board roster can be found at www.nmbar.org/IPLaw.

UNM

Law Library

Hours Through Dec. 18

Building & Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10a.m.–6p.m.
Sunday	noon–6 p.m.

Reference

Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed

Women's Law Caucus

Award Nominations

The Women's Law Caucus at the UNM School of Law seeks nominations for an outstanding woman in the New Mexico legal community to honor in the name of former Justice Mary Walters, who was the first woman appointed to the New Mexico Supreme Court. Those who want to make a nomination should submit the following information to Lindsey Goodwin at goodwili@law.unm.edu by Nov. 30: 1) nominee's name, 2) nominee's firm organization/title, 3) why the nominee should receive the award, 4) if the nominator is willing to introduce the nominee should she be chosen, and 5) any other relevant information.

Other Bars

Albuquerque Lawyers Club

December Luncheon and CLE

Join the Albuquerque Lawyers Club for "Are There 13th Century Ethical Pointers for Dealing with 21st Century Problems?" (2.0 EP) at 11:30 a.m., Dec. 7, at Seasons Rotisserie and Grill in Albuquerque. Jack Clark Robinson, OFM, the Minister Provincial of Our Lady of Guadalupe Province of the Franciscans, will present insights from his more than 30 years as a Franciscan friar and ministering across the Southwest. Judge James O. Browning of the U.S. District Court will introduce Father Robinson. For more information and to R.S.V.P., visit www.albuquerquelawyersclub.com.

New Mexico Criminal Defense Lawyers Association

Two CLEs to Fulfill Ethics Requirements

The New Mexico Criminal Defense Lawyers Association presents two CLEs to help attorneys fill their ethics credits requirements. On Dec. 2, attend "Clients First: Understanding Your Role as an Advocate" in Albuquerque (4.0 G, 2.5 EP) and and "Latest Techniques in Trial Skills & Sentencing" on Dec. 16 in Las Cruces (3.5 G, 2.0 EP). Civil attorneys are welcome. Visit www.nmcdla.org to register and renew membership dues for 2017 today.

New Mexico Defense Lawyers Association

Basic Skills CLE

The New Mexico Defense Lawyers Association presents a half-day "Basic Skills Academy" CLE for young lawyers (3.0 G) in the morning and a half-day CLE devoted to ethics/professionalism topics (3.0 EP) in the afternoon on Dec. 16, at the Greater Albuquerque Jewish Community Center. Morning topics include case intake, analysis and evaluation, depositions, and expert witnesses. Afternoon topics include lawyer incivility and enforcement, ethics jeopardy and JLAP. This is an excellent opportunity for all lawyers to top off their ethics professionalism CLE requirements by year-end. Registration and full program details for both seminars are available at www.nmdla.org or by calling 505-797-6021.

Other News

Santa Fe Neighborhood Law Center

Annual CLE

Join the Santa Fe Neighborhood Law Center for it's annual CLE "Law and Policy for Neighborhoods" (10.0 G, 2.0 EP), Dec. 8–9 at the Santa Fe Convention Center. Featured speakers include Chief Justice Charles W. Daniels and recently retired Justice Richard C. Bosson. A free continental breakfast and box lunch will be provided both days on site for CLE attendees and faculty. For more information or to register, visit www.sfnlc.com/.

Board of Bar Commissioners Election 2016

Voting in the 2016 election for the State Bar of New Mexico Board of Bar Commissioners began Nov. 10 and closes at noon on Nov. 30. There are two open positions in the **Seventh Bar Commissioner District** (Catron, Dona Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties). Four candidates submitted nomination petitions for the two positions, so there will be a contested election in that district. View the candidate biographies and statements in the Nov. 9 *Bar Bulletin* (Vol. 55, No. 45).

Voting will be conducted electronically. A link to the electronic ballot and instructions was emailed to all members in the Seventh Bar Commissioner District using email addresses on file with the State Bar. To provide an email address if one is not currently on file or to request a mailed ballot, contact Pam Zimmer at pzimmer@nmbar.org.

Legal Education

November

30 **Navigating the Amenability Process in Youthful Offender Cases (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Environmental Regulations of the Oil and Gas Industry (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Building Your Civil Litigation Skills**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

December

1 **Drugs in the Workplace**
2.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

1 **Piercing the Entity Veil: Individual Liability for Business Acts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

1 **Wine, Cheese and CLEs**
1.0 G
Live Seminar, Albuquerque
New Mexico Legal Aid
kaseyd@nmlegalaid.org

1 **Celebrate Pro Bono: Ways to Give Back in New Mexico**
1.0 G
Live Seminar, Albuquerque
New Mexico Legal Aid
505-545-8543

1–4 **Case Plus: Focus Groups for Plaintiff Cases**
28.7 G
Live Seminar, Albuquerque
American Association for Justice
www.justice.org

2 **Controversial Issues Facing the Legal Profession**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

2 **As Judges See It: Best (and Worst) Practices in Civil Litigation**
6.0 G
Live Seminar, Las Cruces
NBI Inc.
www.nbi-sems.com

2 **Personal Injury Evidence: Social Media, Smartphones, Experts and Medical Records**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

2 **Clients First: Understanding Your Role as an Advocate**
4.0 G, 2.5 EP
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmdla.org

2 **2016 Annual Civil Rights Seminar**
6.0 G
Live Seminar, Albuquerque
New Mexico Defense Lawyers Association
www.nmdla.org

2 **Civility and Professional Identity**
2.0 EP
Live Seminar, Albuquerque
New Mexico Workers Compensation Administration
www.workerscomp.state.nm.us

2 **Third Annual Wage Theft CLE**
3.0 G, 1.0 EP
Live Seminar, Gallup
New Mexico Hispanic Bar Association
www.nmhba.net

5 **Justice with Compassion—Courthouse Facility Dogs Improving the Legal System**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Lawyers' Duties of Fairness and Honesty (Fair or Foul: 2016)**
2.0 E
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Keynote Address with Justice Ruth Bader Ginsburg (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Avoiding Retirement Pitfalls**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Boundaries and Easements**
6.5 G, 1.0 EP
Live Seminar, Albuquerque
Halfmoon Education
www.halfmoonseminars.com

5–9 **Forensic Evidence**
24.9 G, 1.2 EP
Live Seminar, Santa Fe
National District Attorneys Association
www.ndaa.org

6 **Transgender Law and Advocacy**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Medical Marijuana Law in New Mexico**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

December

7 **13th Century Ethical Pointers for Dealing with 21st Century Problems**
2.0 EP
Live Seminar, Albuquerque
Albuquerque Lawyers Club
575-921-1597

7 **Deposition Practice in Federal Cases**
2.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **EEOC Update, Whistleblowers and Wages (2015 Employment and Labor Law Institute)**
3.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **Gender and Justice (2016 Annual Meeting)**
1.0 E
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **The Rise of 3-D Technology: What Happened to IP? (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **HR Legal Compliance: Advanced Practice**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

8 **2016 Real Property Institute**
4.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Structuring Minority Interests in Businesses**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8–9 **Law and Policy for Neighborhoods Conference**
10.0 G, 2.0 EP
Live Program, Santa Fe
Santa Fe Neighborhood Law Center
www.sfnlc.com

9 **Immigrant Youth in the System: The Intersection of Immigration, Family Law and Juvenile Justice**
6.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **The Ethics of Bad Facts: The Duty to Disclose to the Tribunal**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Government Procurement and Municipal Lawsuits**
7.0 G
Live Seminar, Albuquerque
City of Albuquerque Legal Department
505-768-4500

9 **Water Rights in New Mexico**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

9 **As Judges See It: Top Mistakes Attorneys Make in Civil Litigation**
6.0 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com

9 **Medical Marijuana Law in New Mexico**
6.0 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com

9 **Essentials of Employment Law**
6.6 G
Live Seminar, Santa Fe
Sterling Education Services
www.sterlingeducation.com

12 **Ethicspalooza: The Ethics of Managing and Operating an Attorney Trust Account**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Ethicspalooza: Ethically Managing Your Law Practice**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Ethicspalooza: Ethical Issues of Using Social Media and Technology in the Practice of Law**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Ethicspalooza: The Disciplinary Process**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **Trials of the Century II**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **How to Get Your Social Media, Email and Text Evidence Admitted (and Keep Theirs Out)**
6.0 G
Live Seminar, Santa Fe
NBI Inc.
www.nbi-sems.com

13 **Collection Law from Start to Finish**
6.0 G
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

14 **2016 Intellectual Property Law Institute—Copy That! Copyright Topics Across Diverse Fields**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

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

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

Effective November 18, 2016

Unpublished Opinions

No. 34254	3rd Jud Dist Dona Ana CV-14-5710, R WALSH v A MONTES (reverse and remand)	11/14/2016
No. 32241	10th Jud Dist Quay CV-11-118, R CIOLLI v MCFARLAND LAND (affirm in part and remand)	11/14/2016

Unpublished Opinions

No. 35646	11th Jud Dist San Juan CR-14-547, STATE v R IRONWING (reverse)	11/14/2016
No. 35282	AD AD 15-40, IN RE J KURIYAN (affirm)	11/15/2016
No. 35410	11th Jud Dist San Juan CR-14-165, STATE v D GARRISON (affirm)	11/15/2016
No. 35719	12th Jud Dist Otero CV-16-402, STATE v J DELATORRE (reverse)	11/15/2016
No. 35383	2nd Jud Dist Bernalillo CR-08-2056, STATE v P GARCIA-QUINTERO (reverse)	11/16/2016

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

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective November 30, 2016

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2016 NMRA:

Effective Date (except where noted differently: 12/31/2016)

Rules of Civil Procedure for the District Courts

1 007.2	Time limit for filing motion to compel arbitration	
1 009	Pleading special matters	07/01/2017
1 017	Parties plaintiff and defendant; capacity	07/01/2017
1 023	Class actions	
1 054	Judgments; costs	
1 055	Default	07/01/2017
1 060	Relief from judgment or order	07/01/2017
1 079	Public inspection and sealing of court records	05/18/2016
1 083	Local rules	
1 093	Criminal contempt	
1 096	Challenge of nominating petition	
1 104	Courtroom closure	
1 120	Domestic relations actions; scope; mandatory use of court-approved forms by self-represented litigants	
1 128	Uniform collaborative law rules; short title; definitions; applicability	
1 131	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
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1 128.2	Initiation of collaborative law process; voluntary participation; conclusion; termination; notice of discharge or withdrawal of collaborative lawyer; continuation with successor collaborative lawyer	
1 128.3	Proceedings pending before tribunal; status report; dismissal	
1 128.4	Emergency order	
1 128.5	Adoption of agreement by tribunal	
1 128.6	Disqualification of collaborative lawyer and lawyers in associated law firm	
1 128.7	Disclosure of information	
1 128.8	Standards of professional responsibility and mandatory reporting not affected	
1 128.9	Appropriateness of collaborative law process	
1 128.10	Coercive or violent relationship	
1 128.11	Confidentiality of collaborative law communication	
1 128.12	Privilege against disclosure for collaborative law communication; admissibility; discovery	
1 128.13	Authority of tribunal in case of noncompliance	

Rules of Civil Procedure for the Magistrate Courts

2 110	Criminal contempt	
2 114	Courtroom closure	
2 305	Dismissal of actions	
2 702	Default	
2 705	Appeal	

Rules of Civil Procedure for the Metropolitan Courts

3 110	Criminal contempt	
3 114	Courtroom closure	
3 204	Service and filing of pleadings and other papers by facsimile	
3 205	Electronic service and filing of pleadings and other papers	
3 702	Default	

Civil Forms

4 204	Civil summons	
4 226	Civil complaint provisions; consumer debt claims	07/01/2017
4 306	Order dismissing action for failure to prosecute	
4 309	Thirty (30) day notice of intent to dismiss for failure to prosecute	
4 310	Order of dismissal for failure to prosecute	
4 702	Motion for default judgment	
4 702A	Affirmation in support of default judgment	
4 703	Default judgment; judgment on the pleadings	
4 909	Judgment for restitution	
4 909A	Judgment for restitution	
4 940	Notice of federal restriction on right to possess or receive a	05/18/2016
4 982	Withdrawn	
4 986	Withdrawn	
4 989	Withdrawn	
4 990	Withdrawn	

Rules of Criminal Procedure for the District Courts

5 102	Rules and forms	
5 104	Time	
5 112	Criminal contempt	
5 123	Public inspection and sealing of court records	05/18/2016
5 124	Courtroom closure	
5 304	Pleas	
5 511	Subpoena	
5 511.1	Service of subpoenas and notices of statement	
5 614	Motion for new trial	
5 615	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/2016
5 801	Reduction of sentence	

Rules of Criminal Procedure for the Magistrate Courts

6 102	Conduct of court proceedings	
6 109	Presence of the defendant	
6 111	Criminal contempt	
6 116	Courtroom closure	
6 201	Commencement of action	
6 209	Service and filing of pleadings and other papers	
6 506	Time of commencement of trial	05/24/2016
6 601	Conduct of trials	

Rules of Criminal Procedure for the Metropolitan Courts

7 109	Presence of the defendant	
7 111	Criminal contempt	
7 115	Courtroom closure	
7 201	Commencement of action	
7 209	Service and filing of pleadings and other papers	
7 304	Motions	
7 506	Time of commencement of trial	05/24/2016
7 606	Subpoena	

Rules of Procedure for the Municipal Courts

8 102	Conduct of court proceedings	
8 108	Presence of the defendant	
8 110	Criminal contempt	
8 114	Courtroom closure	
8 201	Commencement of action	
8 208	Service and filing of pleadings and other papers	
8 506	Time of commencement of trial	05/24/2016
8 601	Conduct of trials	

Criminal Forms

9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
9 611	Withdrawn	
9 612	Order on direct criminal contempt	
9 613	Withdrawn	

Children's Court Rules and Forms

10 103	Service of process	
10 163	Special masters	
10 166	Public inspection and sealing of court records	05/18/2016
10 168	Rules and forms	
10 171	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/2016
10 322	Defenses and objections; when and how presented; by pleading or motion	
10 325	Notice of child's advisement of right to attend hearing	
10 340	Testimony of a child in an abuse or neglect proceeding	
10 408A	Withdrawn	
10 413	Withdrawn	
10 414	Withdrawn	
10 417	Withdrawn	
10 502	Summons	
10 560	Subpoena	
10 570	Notice of child's advisement of right to attend hearing	
10 571	Motion to permit testimony by alternative method	
10 604	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
10 701	Statement of probable cause	
10 702	Probable cause determination	
10 703	Petition	
10 704	Summons to child Delinquency Proceeding	
10 705	Summons to parent or custodian or guardian – Delinquency Proceeding	
10 706	Order of appointment of attorney for child and notice and order to parent(s), guardian(s), or custodian(s)	
10 707	Eligibility determination for indigent defense services	
10 711	Waiver of arraignment and denial of delinquent act	
10 712	Plea and disposition agreement	
10 713	Advice of rights by judge	
10 714	Consent decree	
10 715	Motion for extension of consent decree	
10 716	Judgment and Disposition	
10 717	Petition to revoke probation	
10 718	Sealing order	
10 721	Subpoena	
10 722	Affidavit for arrest warrant	
10 723	Arrest warrant	
10 724	Affidavit for search warrant	
10 725	Search warrant	
10 726	Bench warrant	
10 727	Waiver of right to have a children's court judge preside over hearing	
10 731	Waiver of arraignment in youthful offender proceedings	
10 732	Waiver of preliminary examination and grand jury proceeding	
10 741	Order for evaluation of competency to stand trial	
10 742	Ex parte order for forensic evaluation	
10 743	Order for diagnostic evaluation	
10 744	Order for pre dispositional diagnostic evaluation	
10 745	Order for evaluation of amenability to treatment for youthful offender (requested by defense counsel)	
Rule Set 10	Table of Corresponding Forms	

Rules of Evidence

11-803	Exceptions to the rule against hearsay – regardless of whether the declarant is available as a witness	

Rules of Appellate Procedure

12 101	Scope and title of rules	
12 201	Appeal as of right; when taken	
12 202	Appeal as of right; how taken	
12 203	Interlocutory appeals	
12 203.1	Appeals to the Court of Appeals from orders granting or denying class action certification	
12 204	Appeals from orders regarding release entered prior to a judgment of conviction	
12 206	Stay pending appeal in children's court matters	
12 206.1	Expedited appeals from children's court custody hearings	
12 208	Docketing the appeal	
12 209	The record proper (the court file)	

12 302	Appearance, withdrawal, or substitution of attorneys; changes of address or telephone number
12 305	Form of papers prepared by parties.
12 309	Motions
12 310	Duties of clerks
12 317	Joint or consolidated appeals
12 318	Briefs
12 319	Oral argument
12 320	Amicus curiae
12 321	Scope of review; preservation
12 322	Courtroom closure
12 402	Issuance and stay of mandate
12 403	Costs and attorney fees
12 404	Rehearings
12 501	Certiorari from the Supreme Court to the district court regarding denial of habeas corpus
12 503	Writs of error
12 504	Other extraordinary writs from the Supreme Court
12 505	Certiorari from the Court of Appeals regarding district court review of administrative decisions
12 601	Direct appeals from administrative decisions where the right to appeal is provided by statute
12 602	Appeals from a judgment of criminal contempt of the Court of Appeals
12 604	Proceedings for removal of public officials within the jurisdiction of the Supreme Court
12 606	Certification and transfer from the Court of Appeals to the Supreme Court
12 607	Certification from other courts to the Supreme Court
12 608	Certification from the district court to the Court of Appeals

Uniform Jury Instructions – Civil

13-1830	Measure of damages; wrongful death (including loss of consortium)

Uniform Jury Instructions – Criminal

14 301	Assault; attempted battery; essential elements
14 303	Assault; attempted battery; threat or menacing conduct; essential elements
14 304	Aggravated assault; attempted battery with a deadly weapon; essential elements
14 306	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; essential elements
14 308	Aggravated assault; attempted battery with intent to commit a felony; essential elements
14 310	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
14 311	Aggravated assault; attempted battery with intent to commit a violent felony; essential elements
14 313	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14 351	Assault upon a [school employee] [health care worker]; attempted battery; essential elements
14 353	Assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct; essential elements
14 354	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery with a deadly weapon; essential elements
14 356	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct with a deadly weapon; essential elements
14 358	Aggravated assault on a [school employee] [health care worker]; attempted battery with intent to commit a felony; essential elements
14 360	Aggravated assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
14 361	Assault on a [school employee] [health care worker]; attempted battery with intent to commit a violent felony; essential elements
14 363	Assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14 371	Assault; attempted battery; "household member"; essential elements
14 373	Assault; attempted battery; threat or menacing conduct; "household member"; essential elements
14 374	Aggravated assault; attempted battery with a deadly weapon; "household member"; essential elements
14 376	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; "household member"; essential elements
14 378	Aggravated assault; attempted battery with intent to commit a felony; "household member"; essential elements
14 380	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; "household member"; essential elements
14 381	Assault; attempted battery with intent to commit a violent felony; "household member"; essential elements
14 383	Assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; "household member"; essential elements
14 990	Chart
14 991	Failure to register as a sex offender; 1999 and 2000 versions of SORNA; essential elements
14 992	Failure to register as a sex offender; 2005, 2007, and 2013 versions of SORNA; essential elements
14 993	Providing false information when registering as a sex offender; essential elements
14 994	Failure to notify county sheriff of intent to move from New Mexico to another state, essential elements
14 2200	Assault on a peace officer; attempted battery; essential elements
14 2200A	Assault on a peace officer; threat or menacing conduct; essential elements
14 2200B	Assault on a peace officer; attempted battery; threat or menacing conduct; essential elements
14 2201	Aggravated assault on a peace officer; attempted battery with a deadly weapon; essential elements
14 2203	Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with a deadly

weapon; essential elements
14 2204 Aggravated assault on a peace officer; attempted battery with intent to commit a felony; essential elements
14 2206 Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with intent to commit a felony; essential elements
14 2207 Aggravated assault on a peace officer; attempted battery with intent to commit a violent felony; essential elements
14 2209 Aggravated assault on a peace officer; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14 3106 Possession of a dangerous drug
14 4503 Driving with a blood or breath alcohol concentration of eight one hundredths (.08) or more; essential elements
14 4506 Aggravated driving with alcohol concentration of (.16) or more; essential elements
14 5120 Ignorance or mistake of fact

Rules Governing Admission to the Bar

15 104 Application
15 205 Grading and Scoring
15 302 Admission to practice

Rules of Professional Conduct

16-108 Conflict of interest; current clients; specific rules

Rules Governing Discipline

17 202 Registration of attorneys
17 204 Trust accounting
17 208 Incompetency or incapacity
17 214 Reinstatement

Rules Governing the Client Protection Fund

17A-005 Composition and officers of the commission

Rules Governing the Unauthorized Practice of Law

17B 005 Civil injunction proceedings
17B 006 Determination by the Supreme Court

Rules Governing the Recording of Judicial Proceedings

22 101 Scope; definitions; title
22 204.1 Temporary Certification for Court Reporters

Supreme Court General Rules

23 107 Broadcasting, televising, photographing, and recording of court proceedings; guidelines

Rules Governing the New Mexico Bar

24 101 Board of Bar Commissioners
24 102 Annual license fee
24 110 "Bridge the Gap: Transitioning into the Profession" program
24 111 Emeritus attorney

Local Rules for the First Judicial District Court

I. Rules Applicable to All Cases

LR1-101 Title and citation
LR1-102 Locations of principle offices
LR1-103 Failure to comply
LR1-104 Return check charge
LR1-105 Control of court files
LR1-106 Mode of attire
LR1-107 Assigned judge
LR1-108 Assignment of consolidated cases
LR1-109 Certificates of service
LR1-110 Informing the court of contact information
LR1-111 Appearances and withdrawals by self-represented parties (pro se parties)
LR1-112 Corporations and other business entities as parties
LR1-113 Exhibits
LR1-114 Submission of orders, decrees and judgments
LR1-115 Filing of orders, judgments, and other instruments

II. Rules Applicable to Civil Cases

LR1-201 Motion practice
LR1-202 Interrogatories, requests for production, and requests for admission
LR1-203 Judgments based on written instruments
LR1-204 Review of administrative decisions and orders
LR1-205 Electronic filing authorized

III. Rules Applicable to Criminal Cases

LR1-301 Search warrants
LR1-302 Transport of persons in custody
LR1-303 Grand jury
LR1-304 Indictment and summons
LR1-305 Motion practice
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IV. Rules Applicable to Domestic Relations Cases

LR1-401 Modification of Rule 1-016 scheduling dates
LR1-402 Tolling of procedural deadlines
LR1-403 Contempt

V. Rules Applicable to Children's Court Cases

[Reserved]

VI. Rules Applicable to Court Alternative Dispute Resolution Programs

LR1-601 Alternative dispute resolution

VII. Forms

[Reserved]

Local Rules for the Second Judicial District Court

Rules Applicable To All Cases

LR2-101 Title
LR2-102 Chief judge
LR2-103 Children's, civil, criminal, and domestic relations courts; judge assignments; partner judges; presiding judges
LR2-104 Assignment of cases

LR2-105 Consolidating cases
LR2-106 Priorities for resolving scheduling conflicts
LR2-107 Court hours; holidays; weather delays and closings
LR2-108 Court security
LR2-109 Decorum
LR2-110 Official record of court proceedings
LR2-111 Transportation of incarcerated and in-custody persons for hearings and trial; dress
LR2-112 Tendering money to and disbursing money from the court; insufficient funds checks; refunds; daily jury receipt
LR2-113 Pro se appearance and filings; corporations as parties
LR2-114 Counsel of record; appearance; withdrawal
LR2-115 Attachments
LR2-116 Briefs and statements of supporting points and authorities; approval; page limit
LR2-117 Exhibits at hearings and trial
LR2-118 Interrogatories; counting
LR2-119 Opposed motions and other opposed matters; filing; hearings
LR2-120 Unopposed motions and other unopposed matters; filing
LR2-121 Trial and merits hearings
LR2-122 Vacating settings; notice to court of resolution
LR2-123 Default judgments
LR2-124 Findings of fact and conclusions of law
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LR2-126 Rule 1-099 NMRA filing fee and certificate
LR2-127 Orders to show cause

Rules Applicable To Civil Cases

LR2-201 Rule 1-016 NMRA, pretrial scheduling orders and final pretrial orders
LR2-202 Rule 1-054 NMRA, attorney fees
LR2-203 Electronic filing authorized

Rules Applicable To Criminal Cases

LR2-301 Grand jury proceedings.
LR2-302 Bond procedures
LR2-303 Waivers of arraignment
LR2-304 Furloughs
LR2-305 esignation of proceedings for transcript conference
LR2-306 Appeals from driver's license revocation hearings
LR2-307 Technical violation program
LR2-308 Case management pilot program for criminal cases

Rules Applicable To Domestic Relations Cases

LR2-401 Court clinic mediation program and other services for child-related disputes.
LR2-402 Exemption from Rule 1-016 NMRA

Rules Applicable To Court Cases

LR2-501 Adoption; new birth certificate
LR2-502 Exemption from Rule 1-016 NMRA

Rules Applicable Court Alternative Resolution Programs

LR2-601 Court-annexed alternative resolution generally
LR2-602 Settlement facilitation program
LR2-603 Court-annexed arbitration

Forms

LR2-Form 701 Motion to withdraw
LR2-Form 702 Entry of appearance by substitute counsel or party pro se
LR2-Form 703 Request for hearing
LR2-Form 704 Notice of hearing
LR2-Form 705 Praecipe
LR2-Form 706 Rule 1-099 NMRA, certificate
LR2-Form 707 Final pretrial order
LR2-Form 708 Notice and Order STEPS
LR2-Form 709 Court clinic referral order
LR2-400 Case management pilot program for criminal cases 02/02/2016

Local Rules for the Third Judicial District Court

I. Rules Applicable To All Cases

LR3-101 Citation
LR3-102 Disciplinary action for failure to comply
LR3-103 Court appointments and application for fees
LR3-104 District court trust and litigant accounts
LR3-105 Court security
LR3-106 Pleadings and filed papers
LR3-107 Pro se filings (parties who wish to represent themselves without an attorney)
LR3-108 Appearances, withdrawals, and substitution of counsel
LR3-109 Change of address or telephone number
LR3-110 Service of notices and the mailing of other pleadings
LR3-111 Hearings and scheduling conflicts
LR3-112 Telephone conferences and hearings
LR3-113 Orders and judgments
LR3-114 Depositing of wills

II. Rules Applicable To Civil Cases

LR3-201 Default judgments
LR3-202 Disposition of civil exhibits
LR3-203 Civil case control
LR3-204 Consolidation of cases
LR3-205 Findings of fact and conclusions of law
LR3-206 Jury matters
LR3-207 Reopening cases
LR3-208 Attorney fees
LR3-209 Electronic filing authorized

III. Rules Applicable To Criminal Cases

LR3-301 Transport of persons in custody
LR3-302 Bond procedures

IV. Rules Applicable To Domestic Relations Cases

LR3-401 Domestic relations mediation program
LR3-402 Safe exchange and supervised visitation program
LR3-403 Child support payments
LR3-404 Parenting classes

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

LR3-601 Settlement facilitation program

VII. Forms

[Reserved]

Local Rules for the Fourth Judicial District Court

I. Rules Applicable To All Cases

LR4-101 Title
LR4-102 Failure to comply
LR4-103 Assignment of cases
LR4-104 Mode of attire
LR4-105 Removal of court files
LR4-106 Payments to district court clerk
LR4-107 Prohibition against forum shopping
LR4-108 Telephonic hearings
LR4-109 Submission of orders, judgments, and decrees
LR4-110 Request for hearings
LR4-111 Vacating settings
LR4-112 Jury instructions
LR4-113 Copies of juror questionnaires

II. Rules Applicable To Civil Cases

LR4-201 Filing fees
LR4-202 Electronic filing authorized

III. Rules Applicable To Criminal Cases

LR4-301 Technical violation program for adult probationers

IV. Rules Applicable To Domestic Relations Cases

LR4-401 Domestic relations mediation program

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

[Reserved]

VII. Forms

LR4-Form 701 Notice of hearing
LR4-Form 702 Request for setting

Local Rules for the Fifth Judicial District Court

I. Rules Applicable To All Cases

LR5 101 Divisions of court
LR5 102 Chief judge
LR5 103 Disqualification; designation of judges
LR5 104 Dress requirements
LR5-105 Local rules advisory committee
LR5 106 Orders, decrees and judgments
LR5 107 Motions; settings
LR5-108 Motions to vacate and continue trial settings
LR5-109 Mailing of pleadings
LR5-110 Removal of court files
LR5-111 Duplicating of recorded proceedings
LR5-112 Audio recording free process; civil cases
LR5-113 Interviewing, examining and questioning jurors
LR5-114 Violation of local rules
LR5-115 Death certificates
LR5-116 Notice of unavailability
LR5-117 District court clerk trust account; court registry

II. Rules Applicable To Civil Cases

LR5 201 Local rule exemption to Rule 1 016(B) of the Rules of Civil Procedure for the District Courts; pretrial scheduling
LR5 202 Action by more than one judge
LR5-203 Requested findings of fact and conclusions of law
LR5-204 Judgment based on written instrument
LR5-205 Certificates as to the state of the record
LR5-206 Settlement conference
LR5-207 Motions and exhibits
LR5-208 Written interrogatories
LR5-209 Filing fees and other fees
LR5-210 Motion for default in multiparty cases
LR5-211 Pro se appearances and filings; business organizations as parties
LR5-212 Electronic filing authorized
LR5-213 Consolidating cases

III. Rules Applicable To Criminal Cases

LR5-301 Technical violation program for adult probationers
LR5-302 Transportation of persons in custody

IV. Rules Applicable To Domestic Relations Cases

LR5-401 Domestic relations; mediation

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

[Reserved]

VII. Forms

[Reserved]

Local Rules for the Sixth Judicial District Court

I. Rules Applicable To All Cases

LR6-101 Title
LR6-102 Disciplinary action for failure to comply
LR6-103 Control of court files
LR6-104 Assignment of cases
LR6-105 Court schedules; itinerary; settings
LR6-106 Civil process; issuance
LR6-107 District court clerk's trust and litigant accounts
LR6-108 Court appointments
LR6-109 Court security
LR6-110 Attorney's attire
LR6-111 Legal research materials

II. Rules Applicable To Civil Cases

LR6-201 Withdrawals and substitution of counsel
LR6-202 Service of notices and mailing of other papers
LR6-203 Consolidation of cases
LR6-204 Orders and judgments
LR6-205 Orders to show cause

LR6-206 Default judgments
LR6-207 Attorney fees
LR6-208 Settings
LR6-209 Audio or audio-video conferences and hearings
LR6-210 Scheduling conferences; pretrial conferences
LR6-211 Continuances and conflicts
LR6-212 Excusal of judges
LR6-213 Electronic filing authorized

III. Rules Applicable To Criminal Cases

LR6-301 Orders and judgments in criminal matters
LR6-302 Arrest warrants and affidavits
LR6-303 Docket call
LR6-304 Pretrial conference
LR6-305 Excusal of judges

IV. Rules Applicable To Domestic Relations Cases

LR6-401 Domestic relations mediation and supervised visitation programs; fees
LR6-402 Parent education workshop
LR6-403 Parenting plans
LR6-404 Supervised visitation sliding fee scale

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

[Reserved]

VII. Forms

LR6-Form 701 Request for setting
LR6-Form 702 Local Rule 6 202 consent to service
LR6-Form 703 Certificate as to the state of the record and nonappearance
LR6-Form 704 Pretrial order
LR6-Form 705 Attorney's certificate
LR6-Form 706 Ordered parenting plan for children of separated parents

Local Rules for the Seventh Judicial District Court

I. Rules Applicable To All Cases

LR7 101 Notice of hearing or trial
LR7 102 Delivery of papers to judge
LR7 103 Orders, judgements, and decrees; attorney signature
LR7 104 Orders, judgements, and decrees; no date
LR7 105 Orders, judgements, and decrees; immediate filing
LR7-106 Library
LR7 107 Arrival prior to trial or hearing time
LR7 108 Attire

II. Rules Applicable To Civil Cases

LR7 201 Findings of fact, conclusions of law
LR7 202 Filing fees
LR7-203 Electronic filing authorized

III. Rules Applicable To Criminal Cases

LR7 301 Technical violation program

IV. Rules Applicable To Domestic Relations Cases

[Reserved]

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

[Reserved]

VII. Forms

[Reserved]

Local Rules for the Eighth Judicial District Court

I. Rules Applicable To All Cases

LR8 101 Title
LR8 102 Assignment of cases; consolidation
LR8 103 Page limitations
LR8 104 Forum shopping
LR8 105 Control of court files
LR8-106 Requests for hearing; telephonic appearances
LR8 107 Submission of orders, decrees, and judgments
LR8 108 Exhibits and exhibit lists
LR8-109 Failure to comply

II. Rules Applicable To Civil Cases

LR8 201 Electronic filing authorized

III. Rules Applicable To Criminal Cases

[Reserved]

IV. Rules Applicable To Domestic Relations Cases

[Reserved]

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

LR8-601 Alternative dispute resolution

VII. Forms

[Reserved]

Local Rules for the Ninth Judicial District Court

I. Rules Applicable To All Cases

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LR9-102 Scope
LR9-103 Assignment of judge
LR9-104 Mode of attire
LR9-105 Control of court files
LR9-106 Books belonging to the district court
LR9-107 Appearances and withdrawals
LR9-108 Payment to the clerk of the district court
LR9-109 Conflicts and priorities
LR9-110 Disbursement of trust monies
LR9-111 Case decision deadlines
LR9-112 Form of pleadings
LR9-113 Motion practice
LR9-114 Time-stamped copies of pleadings
LR9-115 Settings

LR9-116 Vacating trials or settings
LR9-117 Disciplinary action

II. Rules Applicable To Civil Cases

LR9-201 Interrogatories, requests for production, and requests for admission
LR9-202 Appointments of counsel
LR9-203 Default judgments; setting aside
LR9-204 Consolidated cases
LR9-205 Orders and judgments
LR9-206 Application of payment for attorney fees
LR9-207 Dismissal of civil cases
LR9-208 Filing fees
LR9-209 Requested instructions
LR9-210 Electronic filing authorized

III. Rules Applicable To Criminal Cases

LR9-301 Transportation of prisoners
LR9-302 Time for presentation of plea and disposition agreements
LR9-303 Order setting defendant's bond
LR9-304 Jointly charged defendants; case caption; effect
LR9-305 Criminal orders; judgments and sentences
LR9-306 Order to release property in custody of court

IV. Rules Applicable To Domestic Relations Cases

LR9-401 Contempt
LR9-402 Presence of parties before court
LR9-403 Telephonic appearance; time for filing and emergency relief
LR9-404 Custody education workshop for child-related proceedings

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

LR9-601 Court ordered mediation in civil cases

VII. Forms

[Reserved]

Local Rules for the Tenth Judicial District Court

I. Rules Applicable To All Cases

LR10 101 Settings
LR10 102 Vacating cases; court approval required
LR10 103 Jury instructions
LR10 104 Orders; judgments; court signature; filing; date
LR10 105 Removal of court files for use in county
LR10-106 Library volumes

II. Rules Applicable To Civil Cases

LR10 201 Dismissals; civil cases
LR10-202 Electronic filing authorized

III. Rules Applicable To Criminal Cases

[Reserved]

IV. Rules Applicable To Domestic Relations Cases

LR10-401 Divorce actions

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

[Reserved]

VII. Forms

[Reserved]

Local Rules for the Eleventh Judicial District Court

I. Rules Applicable To All Cases

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LR11-101 Settings and telephonic appearances
LR11-102 Case assignment
LR11-103 Submission of orders following decision or settlement
LR11-104 Motions; proposed orders; briefs
LR11-105 Continuances
LR11-106 Jury trials; instructions
LR11-107 Voir dire at trial
LR11-108 Withdrawal of court files
LR11-109 Court administration
LR11-110 Place of filing; forum shopping; docket number
LR11-111 Hours; inclement weather
LR11-112 Trust fund
LR11-113 Filing fees and forms of payment
LR11-114 Summonses and subpoenas
LR11-115 Fax filing; copies; return envelopes; changes to documents
LR11-116 Juror questionnaires
LR11-117 Exhibits
LR11-118 Cell phones and other electronic devices
LR11-119 Decorum in the courtroom
LR11-120 Attire in the courtroom
LR11-121 Court appointments

II. Rules Applicable To Civil Cases

LR11-201 Interrogatories
LR11-202 Request for trial setting
LR11-203 Entry of appearance in a civil case; business entities
LR11-204 Exemptions from filing fee
LR11-205 Consolidation of cases
LR11-206 Notice of bankruptcy proceedings in civil cases
LR11-207 Service by electronic transmission; water rights adjudication proceedings
LR11-208 Service of process by publication; notice of pendency of action
LR11-209 Attorney fee awards in default judgment
LR11-210 Electronic filing authorized

III. Rules Applicable To Criminal Cases

LR11-301 Entry of appearance, withdrawal in a criminal case
LR11-302 Automatic sanctions for technical violations by probationers
LR11-303 Quashing bind overs
LR11-304 Post adjudication problem solving courts; ex parte communications

IV. Rules Applicable To Domestic Relations Cases

LR11-401 Domestic relations cases
LR11-402 Domestic relations mediation; safe exchange and supervised visitation

V. Rules Applicable To Children's Court Cases

[Reserved]

VI. Rules Applicable To Court Alternative Dispute Resolution Programs

[Reserved]

VII. FORMS

[Reserved]

Local Rules for the Twelfth Judicial District Court

I. Rules Applicable To All Cases

[Reserved]

II. Rules Applicable To Civil Cases

LR12-201 Electronic filing authorized

III. Rules Applicable To Criminal Cases

[Reserved]

IV. Rules Applicable To Domestic Relations Cases

LR12-401 Domestic relations mediation

V. Rules Applicable To Children's Court Cases

[Reserved]

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LR13 Form 713 Order to mediation (domestic matters only)
LR13 Form 714 Order for advisory consultation (domestic matters only)
LR13 Form 715 Mediation disposition report

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

Certiorari Denied, August 1, 2016, No. S-1-SC-35986

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-074

No. 33,392 (filed June 14, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CHRISTOPHER FRANCO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
KENNETH H. MARTINEZ, District Judge

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico
STEVEN H. JOHNSTON
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

BENNETT J. BAUR
Chief Public Defender
J. K. THEODOSIA JOHNSON
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Michael D. Bustamante, Judge

{1} This case and this Defendant have been before this Court before. This second appeal raises procedural and substantive issues flowing from our double jeopardy jurisprudence. The procedural question boils down to whether Defendant can even pursue a second appeal. The substantive question is whether Defendant can be sentenced under NMSA 1978, Section 31-18-15(A)(4) (2007, amended 2016), following his conviction under NMSA 1978, Section 30-3-8(B) (1993), for shooting at a motor vehicle when the shooting resulted in a death. We conclude that Defendant has a right to appeal, and we affirm the sentence.

BACKGROUND

{2} In July 2007 Christopher Franco (Defendant) shot and killed William Healy during an abortive drug transaction. The shooting occurred outside Defendant's apartment as Healy drove his pickup truck in reverse at a high rate of speed toward Defendant. Defendant was convicted of voluntary manslaughter, shooting at a motor vehicle resulting in great bodily harm (death), aggravated assault, and tampering with evidence. Defendant was sentenced to eleven years of incarceration for the voluntary manslaughter conviction, which included a six-year basic sentence, a one-year firearm enhancement, and a four-year habitual offender enhancement. In addition, he was sentenced to nineteen years of incarceration for the shooting at a motor vehicle conviction, consisting of a fifteen-year basic sentence and a four-year habitual offender enhancement. The nineteen-year sentence was ordered to be served consecutive to the eleven-year manslaughter sentence.

{3} Defendant appealed his convictions and sentences arguing in part that they violated double jeopardy in two respects: (1) the shooting at a motor vehicle and voluntary manslaughter charges should be merged; or (2) the shooting at a motor vehicle sentence should not have been enhanced. Our initial calendar notice proposed to hold that there was no difference between the two theories. The idea that there were two double jeopardy aspects to Defendant's case was never brought up again in his first appeal.

{4} Relying on *State v. Dominguez*, 2005-NMSC-001, ¶¶ 5-16, 137 N.M. 1, 106 P.3d 563, we summarily affirmed Defendant's convictions and sentencing. *State v. Franco* (*Franco I*), No. 30,028, mem. op. (N.M. Ct. App. Sept. 1, 2010) (non-precedential). The Supreme Court granted certiorari in Defendant's case and in a companion case to review whether the ruling in *Dominguez* should be retained. On certiorari the Supreme Court only considered the question whether convicting Defendant of both voluntary manslaughter and shooting at a motor vehicle violated double jeopardy. *State v. Franco* (*Franco II*), No. 32,605, order ¶ 5 (N.M. Sup. Ct. June 10, 2013) (non-precedential). Relying on the companion case of *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, in which *Dominguez* was overruled, the Supreme Court concluded that it did, and vacated Defendant's conviction for voluntary manslaughter. *Franco II*, No. 32,605, order ¶ 5; *Montoya*, 2013-NMSC-020, ¶¶ 54-56 (vacating the voluntary manslaughter conviction because it carried the shorter sentence: six years for a third degree felony resulting in death versus fifteen years for a second degree felony resulting in death).

{5} On remand, the district court held a new sentencing hearing and entered an amended judgment and sentence reflecting another sentence of fifteen years for the shooting at a motor vehicle conviction. At the hearing, Defendant posed no objection to the new sentence. The amended sentence was entered on October 30, 2013. A notice of appeal was filed on December 6, 2013.

{6} Our review of all of the issues presented is de novo. *See State v. Chavarria*, 2009-NMSC-020, ¶ 11, 146 N.M. 251, 208 P.3d 896.

APPEALABILITY

{7} The State questions whether the appeal "is . . . properly before this Court for procedural reasons and because [we] should apply the law of the case doctrine." The State offers a melange of rationales why this appeal is not properly before us. First, the State notes that the notice of appeal was filed late and argues that we should not apply the presumption of ineffective assistance of counsel recognized in *State v. Duran*, 1986-NMCA-125, ¶ 10, 105 N.M. 231, 731 P.2d 374, because Defendant has no right to a second appeal. The State suggests that Defendant is better left to a habeas corpus proceeding. The State also asserts that the law of the case doctrine

counsels that we should decline to accept the appeal. We disagree.

{8} We start our analysis by considering the nature and strength of the right to be free from double jeopardy. First, it is a right of explicit constitutional dimension. New Mexico Constitution Article II, Section 15 provides, in pertinent part, that "any person [shall not] be twice put in jeopardy for the same offense[.]" Second, the Legislature has provided that "[t]he defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment." NMSA 1978, § 30-1-10 (1963). Based on the wording of Section 30-1-10, our Supreme Court has held that a defendant can assert a double jeopardy defense even when he has pled guilty to the challenged offense and has failed to reserve the issue in his plea. *State v. Nunez*, 2000-NMSC-013, ¶ 99, 129 N.M. 63, 2 P.3d 264; *see State v. Handa*, 1995-NMCA-042, ¶¶ 8-9, 17, 120 N.M. 38, 897 P.2d 225.

{9} Perhaps most apropos to the factual scenario we see here is *State v. Breit*, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792. In *Breit*, the Supreme Court held in a second appeal that the defendant could not be retried for murder when the district court had granted a new trial based on extreme prosecutorial misconduct. *Id.* ¶ 1. Before getting to the merits of the claim, however, the Supreme Court had to address the fact that the same issue had been squarely decided against the defendant in a prior appeal. *Id.* ¶¶ 10-12.

{10} After the district court granted the new trial, the defendant moved for dismissal of all charges on double jeopardy grounds. *Id.* ¶¶ 5-6. The district court granted the motion. The state appealed the dismissal of the charges and this Court reversed, concluding that a new trial would not pose a double jeopardy violation. *Id.* The defendant in *Breit* asked the Supreme Court to review the Court of Appeals' decision but the Supreme Court denied certiorari. *Id.* On remand, *Breit* was convicted in a second trial and sentenced to life imprisonment. *Id.* ¶ 7. *Breit* appealed again asserting double jeopardy. *See id.*

{11} Based on this procedural history, the state argued that the law of the case doctrine prevented the Supreme Court from addressing the issue in the second appeal. The Supreme Court disposed of the argument quickly, first by citing to Section 30-1-10 (quoted above) and then by noting that "[t]he right to be protected from double jeopardy is so fundamental, that it cannot be relinquished even if a conviction is affirmed on appeal." *Breit*, 1996-NMSC-067, ¶ 11. The State in the case at hand agrees with this observation.

{12} Furthermore, the Court noted, while the law of the case doctrine is an important prudential policy, it is not inflexible and in the end is a discretionary matter. *Id.* ¶ 12. The State recognizes that as such law of the case is not a procedural bar to our jurisdiction.

{13} This authority counsels against use of the doctrine to preclude the appeal here. While Defendant hinted in his first appeal at the double jeopardy theory he advances now, it was certainly not decided by this Court or the Supreme Court. Even if the issue had been decided previously, *Breit* teaches that a second appeal, with perhaps better arguments, should be allowed. Further, there is nothing in the record that can be used to argue that Defendant intentionally waived or abandoned the argument. The State admits as much.

{14} The State notes that in *State v. Brown*, 2003-NMCA-110, 134 N.M. 356, 76 P.3d 1113, this Court apparently relied on the law of the case doctrine to refuse to consider a challenge to an assertedly improper double enhancement of the defendant's sentence in a drug trafficking case because he had not made the argument in his first appeal. *Id.* ¶¶ 7-8. We refuse to follow *Brown* in this regard, as it includes no discussion of double jeopardy law or the implications of its approach vis à vis double jeopardy. As such, *Brown* is suspect as authority on the proper application of law of the case in cases involving double jeopardy claims.

{15} The strength of double jeopardy protections also leads us to disagree that Defendant should be relegated to habeas corpus proceedings for his remedy. The State's theory is that requiring Defendant to pursue a habeas petition would promote judicial efficiency. While that might be true in the most general sense—in particular when further fact finding is necessary—we disagree that any efficiencies would be gained in this case. There are no facts to be found here. We are presented with a purely legal question. We see nothing to be gained by requiring a district court to consider the case only to be followed by an appeal presenting the exact issues before us now. *Varela v. State*, 1993-NMSC-030, ¶ 5, 115 N.M. 586, 855 P.2d 1050 (stating that a habeas proceeding, while supportable under the facts, was not efficient when the legal question was already before the Court).

{16} The foregoing discussion leads us to conclude that Defendant indeed has a right to this second appeal on an undecided double jeopardy issue. As such there is no reason not to apply the *Duran* presumption in his favor and entertain the appeal despite the late notice of appeal. We so hold.

DOUBLE JEOPARDY

{17} Defendant's double jeopardy argument is straightforward. He asserts that he is being punished twice for a single death: first, when the death was used to satisfy the great bodily harm element of his shooting at a motor vehicle conviction, thus elevating that crime to a second degree felony pursuant to Section 30-3-8(B); and second, when the death was used to impose a fifteen-year sentence pursuant to Section 31-18-15(A)(4). Defendant argues that he should have received a nine-year sentence under Section 31-18-15(A)(6), now codified at Section 31-18-15(A)(7) (2016), the basic sentencing provision for second degree felonies *not* involving a death because the death was already taken into account for punishment purposes when it was used to define the crime as a second degree felony. Analogizing to cases such as *State v. Keith*, 1985-NMCA-012, 102 N.M. 462, 697 P.2d 145, and *State v. Haddenham*, 1990-NMCA-048, 110 N.M. 149, 793 P.2d 279, Defendant asserts that having used the death to "enhance" the crime, the State cannot then also use the death to enhance the sentence imposed.

{18} As we will explain, we disagree with Defendant's assessment of how these statutes were intended to be applied. We conclude that Section 31-18-15(A)(4) was intended to be the basic sentence applicable to all second degree felonies that result in the death of a human being.

{19} In this case, we are concerned with that aspect of double jeopardy that protects against multiple punishments. *See Swafford v. State*, 1991-NMSC-043, ¶¶ 6-7, 112 N.M. 3, 810 P.2d 1223. And, in the context of the claim asserted by Defendant, we are concerned with a particular subset of the multiple punishment construct that addresses the double use of the same facts or circumstances—such as a prior conviction—to prove a predicate offense and thereafter to enhance sentencing. *State v. Lacey*, 2002-NMCA-032, ¶¶ 12, 15, 131 N.M. 684, 41 P.3d 952 (holding that a prior trafficking conviction could

not be used both to prove the offense of conspiracy to commit a first degree felony and to enhance the defendant's conspiracy sentence under the habitual offender statute).

{20} As such, we are not presented with the more typical double description or unit of prosecution theories.[1] This case does not raise the issues common to multiple conviction cases. Here we have one conviction and one sentence. As a consequence, we need not engage in the *Blockburger* analysis common to cases such as *Montoya*. 2013-NMSC-020, ¶¶ 30-34, 46-47; *Swafford*, 1991-NMSC-043, ¶ 10 (describing the *Blockburger* test); *Blockburger v. United States*, 284 U.S. 299, 304 (1932). To do so would be futile; the legal equivalent of trying to fit a square peg in a round hole. Our opinion in *State v. Franklin*, 1993-NMCA-135, 116 N.M. 565, 865 P.2d 1209—on which Defendant heavily relies—is emblematic of the difficulties inherent in such an effort.

{21} Unburdened by the need to undertake a *Blockburger* analysis, we are left with a discrete issue: Is Section 31-18-15(A)(4) the correct sentencing provision for convictions under Section 30-3-8(B) when shooting at a motor vehicle results in a death? We conclude that it is because the Legislature intended Section 31-18-15(A)(4) to be the basic sentence applicable to *all* second degree felonies resulting in deaths.[2]

{22} We start with the language of Section 31-18-15 and its history with the aim of deciphering the objective the Legislature sought to accomplish and give effect to it. Sentencing authority for the category of second degree felonies resulting in death was first enacted in 1994. *Compare* 1994 N.M. Laws, ch. 23, § 3, *with* 1993 N.M. Laws, ch. 182, § 1, *and* § 31-18-15. The amendments had the effect of closing the large gap between life imprisonment for first degree murder, *see* NMSA 1978, § 30-2-1(A) (1994); NMSA 1978, § 31-18-14 (1993, amended 2009) and the then-standard sentence of nine years for second degree murder. *Compare* 1994 N.M. Laws, ch. 23, § 3, *with* 1993 N.M. Laws, ch. 182, § 1; *see* § 30-2-1(B). The same 1994 enactment amended the definition of "second degree murder" to provide that "[w]hoever commits murder in the second degree is guilty of a second degree felony resulting in the death of a human being." 1994 N.M. Laws, ch. 23, § 1; *see* § 30-2-1(B). The criminal definition thus mirrored the sentencing provisions after the amendments to Section 31-18-15(A).

{23} Similar amendments to the voluntary manslaughter provisions were enacted in the same law. 1994 N.M. Laws, ch. 23, § 2; *see* NMSA 1978, § 30-2-3(A) (1994). The amendments defined "voluntary manslaughter" as a "third degree felony resulting in the death of a human being." 1994 N.M. Laws, ch. 23, § 2; *see* § 30-2-3(A). The sentencing provision was amended to increase the penalty for voluntary manslaughter to six years, mirroring the "third degree felony resulting in the death of a human being" language of the crime definition. *Compare* 1994 N.M. Laws, ch. 23, § 3, *and* § 30-2-3(A) *with* 1993 N.M. Laws, ch. 182, § 1.

{24} After the amendments described above, this Court considered a double jeopardy challenge to application of the greater sentence for voluntary manslaughter. *State v. Alvarado*, 1997-NMCA-027, ¶ 4, 123 N.M. 187, 936 P.2d 869. The defendant in *Alvarado* argued that the redundancy of the language in the crime definition and in the sentencing provision violated double jeopardy because it effectively imposed a three-year sentence under the definition and then added an additional three years under the sentencing provision. *Id.* We rejected the argument, concluding that the express legislative goal of increasing sentences for second degree murder and voluntary manslaughter was clear and that the Legislature's choice to "use redundant [language] may have reflected an economy of language, considering all the possibilities" and did not detract from that clear purpose. *Id.* ¶ 10.

{25} We recognize that *Alvarado* by itself does not resolve whether Section 31-18-15(A)(4) applies generally to crimes other than murder and involuntary manslaughter. The broader message of *Alvarado* is that the 1994 amendments were designed to increase the penalty for crimes involving the death of a human being. The question now is whether that message is broad enough to reach crimes not specifically addressed in the 1994 amendments.

{26} That question could have been answered in the negative in 1994. 1994 N.M. Laws, ch. 23, § 3(B) of the amending law provided:

> B. The appropriate basic sentence of imprisonment shall be imposed upon a person convicted of a first, second, third[,] or fourth degree felony or a second or third degree felony resulting in the death of a human being, unless the court alters such sentence[s] pursuant to the provisions of [NMSA 1978, Sections] 31-18-15.1, 31-18-16, 31-18-16.1[,] or 31-18-17.

The specific reference to "second or third degree felony resulting in the death of a human being" could be read to refer to the specific changes made in that enactment.

{27} The argument cannot be made at this point because in 2003 the Legislature amended the section to read as follows:

> B. The appropriate basic sentence of imprisonment shall be imposed upon a person convicted and sentenced pursuant to Subsection A of this section, unless the court alters the sentence pursuant to the provisions of Section[s] 31-18-15.1, 31-18-16, 31-18-16.1[,] or 31-18-17.

2003 N.M. Laws, ch. 1, § 5 (1st Spec. Sess.); *see* § 31-18-15(B).

{28} The much more general language of the 2003 amendment undercuts any argument that Section 31-18-15(A)(4) can only be used in conjunction with the crimes of murder and voluntary manslaughter. Rather, given its clear language, the provision should be applied whenever a second degree felony involves a death. This amendment made clear that Section 31-18-15(A)(4) is the "basic" sentence for all second degree felonies resulting in a death.

{29} Our case law has broadly applied Section 31-18-15(A)(4)—and 15(A)(6), now codified at Section 31-18-15(A)(7)—as basic sentences for crimes involving death of a human being, though we

[1] *Montoya*, 2013-NMSC-020—which resulted in the vacatur of Defendant's conviction for voluntary manslaughter is a typical double description scenario.

[2] In *State v. Varela*, 1999-NMSC-045, ¶ 14, 128 N.M. 454, 993 P.2d 1280, our Supreme Court made clear that a shooting resulting in a death could properly be prosecuted under the language of Section 30-3-8, as amended in 1993. Thus, a conviction under Section 30-3-8 can be a second degree felony involving, or resulting in the death of a human being in the practical, everyday sense of the words.

recognize that the prior cases have not involved double jeopardy claims. In *State v. Shije*, 1998-NMCA-102, ¶¶ 6-7, 125 N.M. 581, 964 P.2d 142, the defendant was convicted of conspiracy to commit first degree murder, a second degree felony, as well as second degree murder. *Id.* ¶ 3. He was sentenced to fifteen years for the murder conviction and for the conspiracy conviction pursuant to Section 31-18-15(A)(4) [then codified as Section 31-18-15(A)(2)]. *See Shije*, 1998-NMCA-102, ¶ 4. He appealed only the fifteen-year sentence for the conspiracy. *Id.* ¶ 1. We rejected his argument that, as an initiatory crime, a conspiracy could not by definition "result" in a death, pointing out that the word "resulting" clearly could reach any crime that in any way led to a death. *Id.* ¶ 6. We also rejected the argument that the 1994 amendments were limited to homicide crimes. *Id.* ¶¶ 8-9.

{30} In *State v. Guerro*, 1999-NMCA-026, ¶¶ 1, 10-11, 126 N.M. 699, 974 P.2d 669, the defendant pled guilty to five counts of homicide by vehicle, NMSA 1978, § 66-8-101(A), (C) (2004), as well as other crimes all flowing from an automobile crash caused by his intoxication. Homicide by vehicle is categorized as a third degree felony. Section 66-8-101(C). After being advised by district court that the potential sentence was six years for each count of homicide by vehicle (thirty years), Defendant entered a no-contest plea and was sentenced to fifteen years of incarceration, the maximum permitted by the plea agreement. *Guerro*, 1999-NMCA-026, ¶¶ 5, 7; *see* § 31-18-15(A)(4) (1994) (now codified as § 31-18-15(A)(8) (2016)). He moved to withdraw his plea asserting that he was misinformed about the maximum sentence he could receive. *Guerro*, 1999-NMCA-026, ¶¶ 8-9. The defendant argued that he should have been sentenced under the generic third degree felony provision—providing for three years per count—because the homicide by vehicle statute did not include the "resulting in death" language. Citing *Shije*, we held that the 1994 amendments—intended as they were to deter "any crimes that result in people's deaths"—were not limited to homicide crimes found in the Criminal Code. *Guerro*, 1999-NMCA-026, ¶ 11; *see State v. McDonald*, 2004-NMSC-033, ¶¶ 7, 18, 136 N.M. 417, 99 P.3d 667 (observing that "the [L]egislature has chosen one basic sentence for generic second and third degree felonies, and a different basic sentence with a greater penalty when an additional fact is found: a crime 'resulting in death' ").

{31} Again, we are fully aware that *Shije*, *Guerro*, and *McDonald* did not involve double jeopardy issues. But that does not make them irrelevant in this context. Double jeopardy protections apply insofar as the Legislature has not acted to impose multiple punishments. *Swafford*, 1991-NMSC-043, ¶ 7. Where the Legislature acts in a clear manner, courts are bound to follow its direction unless its command is unconstitutional. Three cases have now opined that Section 31-18-15(A)(4) is the proper basic sentencing provision for second degree felonies resulting in death. Double jeopardy concerns do not alter that conclusion.

{32} In particular, we conclude that the rule of lenity does not require a different result. Double jeopardy does no more than prevent the sentencing court from imposing greater punishment than the Legislature intended. *Swafford*, 1991-NMSC-043, ¶ 7. The presumption of lenity arises only after the language, structure, and legislative history of the statutes fail to provide a clear answer. *Id.* ¶ 15. Here, we see no lack of clarity. The language of Section 30-3-8(B) applies on its face to this crime. Death is a recognized basis for prosecution under Section 30-3-8(B). A death occurred as a result of Defendant's actions that fit the crime's definition. And, Section 31-18-15(A)(4) fits the crime committed for sentencing purposes because the crime resulted "in the death of a human being." The end result is one crime, punished one time. Double jeopardy principles require no more.

{33} On the surface *Keith*, *Haddenham*, *Franklin*, and *Lacey* seem to support Defendant's position. *Lacey*'s statement that "multiple use of the same facts to prove a predicate offense and to enhance the sentence is precluded by double jeopardy," *Lacey*, 2002-NMCA-032, ¶ 12, echoes Defendant's assertion about the double use of the death here. There is an important distinction, however, between all of these cases and Defendant's situation. Defendant has been given the basic sentence for one crime. In contrast, each of those cases involve true sentence enhancements. That is, in each, the defendant received the basic sentence for his crime and then additional punishment was imposed under separate provisions of the sentencing statutes. In *Keith*, a prior armed robbery conviction was used to elevate his second armed robbery conviction to a first degree felony. 1985-NMCA-012, ¶ 1. He received the basic sentence for a first degree felony and then the State used the same first armed robbery conviction to argue for imposition of an habitual offender sentence. *Id.* In *Haddenham*, a prior felony was used to convict the defendant of being a felon in possession of a firearm. 1990-NMCA-048, ¶ 3. Again, he received the basic sentence for the crime, and then he received a habitual offender enhancement based on the same prior felony. *Id.* In *Franklin*, the defendant was charged with involuntary manslaughter by negligent use of a firearm. 1993-NMCA-135, ¶ 2. The state sought to pursue a firearm enhancement of the basic sentence for the crime charged. *Id.* And in *Lacey*, 2001-NMCA-684, ¶¶ 3-4, the defendant was convicted of a first degree felony based on a prior trafficking conviction. Absent the prior trafficking conviction, he could only have been charged with a second degree felony. *Id.* ¶ 4. The district court then used the same prior conviction (along with two others) to impose the maximum habitual offender sentence. *Id.*

{34} Defendant fails to acknowledge that imposition of an enhanced sentence over and above the basic sentence for a crime is simply different than imposing a basic sentence based on the elements of a crime as defined. Here, Defendant has now received the appropriate basic sentence.

CONCLUSION

{35} Defendant's sentence is affirmed.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:
MICHAEL E. VIGIL, Chief Judge
JONATHAN B. SUTIN, Judge

Certiorari Denied, August 18, 2016, No. S-1-SC-35998

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-075

No. 33,481 (filed June 16, 2016)

W.J. HOLCOMB and SHARON HOLCOMB, Husband and Wife,
Plaintiffs/Counterdefendants and Appellees/Cross-Appellants,
v.
AVEDON RODRIGUEZ a/k/a AVEDON;
ORLANDO RODRIGUEZ, a/k/a ORLANDO;
AVEDON RODRIGUEZ, and THERESA R. MARTINEZ,
Defendants/Counterplaintiffs and Appellants/Cross-Appellees.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
SANDRA A. PRICE, District Judge

ERIC M. SOMMER
SOMMER, UDALL, SUTIN,
HARDWICK & HYATT, P.A.
Santa Fe, New Mexico
for Appellees/Cross-Appellants

CHRIS LUCERO, JR.
Albuquerque, New Mexico
for Appellants/Cross-Appellees

Opinion

J. Miles Hanisee, Judge

{1} A jury found in favor of W.J. and Sharon Holcomb (Plaintiffs) on their trespass claims against Avedon Rodriguez and Theresa Martinez (Defendants). Defendants appeal, raising six claims of error. Plaintiffs cross-appeal the district court's refusal to set Plaintiffs' award of post-judgment interest at a rate of 15 percent per annum. We reject all of Defendants' arguments and agree with Plaintiffs that the district court abused its discretion by refusing to award post-judgment interest in the amount required by statute. We therefore reverse and remand with instructions to modify the rate of post-judgment interest, but leave the district court's judgment undisturbed in all other respects.

BACKGROUND

{2} Plaintiffs own land that lies directly adjacent to Defendants' land to the north. A wash runs southwest across Plaintiffs' western tract, crossing Defendants' land before emptying into the nearby San Juan River. Plaintiffs erected a fence running east to west along their driveway. The fence starts near Plaintiffs' house on the far western end of their property and ends where the wash crosses onto Defendants' property.

{3} In November 2008, Defendant Rodriguez hired Lucas Lucero to channel the wash with earthmoving equipment. Lucero used the equipment to create berms that narrowed and deepened the wash. Without Plaintiffs' permission, Lucero channeled portions of the wash on Plaintiffs' property near their driveway and performed other earthwork on the far eastern boundary of Plaintiffs' land.

{4} On February 5, 2009, Plaintiffs filed a complaint against Defendants seeking injunctive relief and damages arising from claims for common law trespass and violations of criminal trespass under NMSA 1978, Section 30-14-1(D) (1995).[1] Defendants answered and counterclaimed against Plaintiffs for trespass, criminal trespass, and to quiet title against Plaintiffs based on allegations that Plaintiffs had cleared vegetation and constructed a fence on Defendants' property. In June 2009, Plaintiffs hired a civil engineer to evaluate the potential for flooding as a result of Lucero's channel work. The civil engineer concluded that in the event of flooding, Lucero's modifications to the channel would cause the banks of the wash that supported Plaintiffs' driveway to erode. In 2010 flooding from rain storms caused significant erosion of the channel banks supporting a portion of Plaintiffs' driveway. As a result, Plaintiffs hired a professional design firm and a contractor to stabilize the banks of the channel and to install diversion screens to prevent further flood damage.

{5} The district court held a jury trial from April 2 through April 5, 2013. At the close of Defendants' case, Plaintiffs orally moved for a directed verdict on Defendants' counterclaims for trespass, arguing that both entry and damages were necessary elements of a claim for trespass and that Defendants had not offered any evidence that could support a finding in Defendants' favor on either element.

{6} Defendants responded that the jury could find that Plaintiffs had entered Defendants' property based on the testimony of a surveyor and the results of a survey he performed that showed that Plaintiffs' fence was built on Defendants' property. As to damages, Defendants conceded that they had presented no evidence that would allow a jury to fix a dollar amount on the cost of removing and restoring damage to their property caused by the fence, but that photographic evidence showing that Plaintiffs had removed vegetation from Defendants' land while installing the fence was sufficient to submit the trespass claim to the jury for a determination of liability and damages.

{7} The district court granted Plaintiffs' motion for a directed verdict on Defendants' counterclaims for trespass, agreeing with Plaintiffs that Defendants had failed to prove that Plaintiffs' alleged trespass had caused Defendants to suffer any damages. The jury then returned a verdict in Plaintiffs' favor on their common law trespass claim and awarded damages of $33,506.40.[2] The parties submitted post-trial briefs on

[1]Section 30-14-1(D) provides that "[a]ny person who enters upon the lands of another without prior permission and injures, damages or destroys any part of the realty or its improvements, including buildings, structures, trees, shrubs or other natural features, is guilty of a misdemeanor, and he shall be liable to the owner, lessee or person in lawful possession for civil damages in an amount equal to double the value of the damage to the property injured or destroyed."

[2]Plaintiffs voluntarily dismissed their claim for criminal trespass under Section 30-14-1(D).

Defendants' counterclaim to quiet title to the boundary between the parties' properties, after which the district court ruled in Plaintiffs' favor and found that the boundary between the parties' properties was that described in a survey performed by a surveyor hired by Plaintiffs. The district court entered a final judgment against Defendants, awarding Plaintiffs $33,506.40 and quieting title to the boundary line between the parties' properties.

{8} Defendants appeal the district court's judgment, raising the following six claims of error:

1. The jury, not the district court, should have fixed the boundary between Plaintiffs' and Defendants' land;
2. The district court erred in granting a directed verdict on Defendants' counterclaims for trespass against Plaintiffs;
3. The district court should have submitted a jury instruction modeled after NMSA 1978, Section 30-14-6 (1979) on Plaintiffs' trespass claims;
4. There was insufficient evidence of damages to support the jury's verdict against Defendants on Plaintiffs' trespass claims;
5. The district court abused its discretion by awarding prejudgment interest to Plaintiffs; and
6. The district court lacked jurisdiction over Plaintiffs' trespass claims because Defendants enjoyed a prescriptive easement over the area of the alleged trespass.

{9} Plaintiffs cross-appeal the rate at which the district court awarded post-judgment interest, arguing that 15 percent, rather than 8.75 percent, is the required rate under NMSA 1978, Section 56-8-4(A)(2) (2004), which applies to judgments awarding damages caused by tortious conduct.

DISCUSSION

1. The District Court Did Not Err in Adjudicating the North-South Boundary Between the Parties' Properties

{10} Defendants first argue that the district court "erred [in] determining the fact issue concerning the boundary between [the] two properties instead of the jury deciding the boundary issue." Defendants' presentation of the issue is both unclear and confusing; the location of the boundary was common to Defendants' counterclaims for trespass (a cause of action at common law for the jury to decide) and to quiet title (a claim at equity to be decided by the district court, *see* NMSA 1978, § 42-6-9 (1907) (deeming actions to quiet title to be equitable in nature)). *See also Pankey v. Ortiz*, 1921-NMSC-007, ¶¶ 38-43, 26 N.M. 575, 195 P. 906 (Roberts, C.J., specially concurring) (noting that actions for ejectment at common law would only decide the right to possession at a single point in time, while an action to quiet title would conclusively determine the parties' title to the land in question). Since the only occasion for the jury (rather than the district court sitting in equity) to decide the boundary issue was Defendants' trespass counterclaims, the question is not whether the district court erred in determining the boundary, but whether it erred in granting a directed verdict on those claims (Defendants' second issue on appeal). To the extent that Defendants seek to raise a separate issue attacking the manner in which the district court decided their counterclaim to quiet title (Defendants do not appeal or otherwise dispute the district court's decision on the merits of that claim), it is insufficiently developed to warrant our review. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (observing that we do not review unclear or undeveloped arguments that require us to guess at what parties' arguments might be).

2. Defendants Cannot Demonstrate Error as to the District Court's Directed Verdict on Defendants' Counterclaims for Trespass

{11} A directed verdict is proper when, "after considering all evidence in [the] light most favorable to [the] non[-]moving party[,] . . . [the] evidence, as [a] matter of law is insufficient to justify [a] verdict in [the non-moving] party's favor[.]" *Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988-NMSC-012, ¶ 10, 106 N.M. 726, 749 P.2d 1105 (citing J. Walden, Civil Procedure in New Mexico § 9c(2)(a), at 225 (1973)). In this case, the district court entered a directed verdict on Defendants' counterclaim for trespass because it concluded there was no evidence that could support a finding of actual damages in Defendants' favor.

{12} Defendants suggest that even if there was insufficient evidence to put the question of actual damages caused by Plaintiffs' alleged trespass to the jury, Defendants' counterclaim for trespass should have been submitted to the jury for consideration of an award of nominal damages. Thus, Defendants argue that proof of actual damages is not a necessary element of a claim for trespass, and the district court's directed verdict was erroneous because it was based upon a contrary conclusion. Indeed, nominal damages are available in actions for trespass. *See Atchison, T. & S.F. Ry. Co. v. Richter*, 1915-NMSC-008, ¶ 36, 20 N.M. 278, 148 P. 478; *see also* Restatement (Second) of Torts § 163 cmt. d (1965) ("[E]ven a harmless entry or remaining, if intentional, is a trespass."). Put differently, proof of damage is not an element of trespass; all that the plaintiff must show is that the defendant entered the plaintiff's land without authorization, remains on the land, or fails to remove from the land a thing which the defendant has a duty to remove. *See* Restatement (Second) of Torts § 158 (1965). It follows, then, that the district court erred in concluding that Defendants' failure to prove actual damages precluded submission of their counterclaim for trespass to the jury.

{13} But Defendants' trial strategy involved pursuing actual damages for damage they alleged Plaintiffs had caused by installing a fence on their property, not an award of nominal damages. Accordingly, Defendants failed to preserve this issue as a basis for reversal on appeal. "To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required, nor is it necessary to file a motion for a new trial to preserve questions for review." Rule 12-216(A) NMRA. "In analyzing preservation, [the appellate courts] look to the arguments made by [the d]efendant below." *State v. Vandenberg*, 2003-NMSC-030, ¶ 52, 134 N.M. 566, 81 P.3d 19. "To preserve an issue for review on appeal, it must appear that [the] appellants fairly invoked a ruling of the [district] court on the same grounds argued in the appellate court." *Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717.

> The primary purposes for the preservation rule are: (1) to specifically alert the district court to a claim of error so that any mistake can be corrected at that time, (2) to allow the opposing party a fair opportunity to respond to the claim of error and to show why the court should rule against that claim, and (3) to create a record sufficient to allow this Court to make an informed decision regarding the contested issue.

Sandoval v. Baker Hughes Oilfield Operations, Inc., 2009-NMCA-095, ¶ 56, 146 N.M. 853, 215 P.3d 791.

{14} Here, Defendants never sought nominal damages in their answer and counterclaim; instead, Defendants' counterclaim sought "the value of the damage" caused by Plaintiffs' alleged trespass only. At trial, Defendants opposed Plaintiffs' motion for a directed verdict by arguing solely that Defendants had introduced sufficient evidence of actual damages. Defendants did not request a nominal-damages instruction, mention the availability of nominal damages in their response to Plaintiffs' motion for a directed verdict, or otherwise argue to the district court that Defendants were not obliged to prove that they were damaged by Plaintiffs' alleged trespass. In these circumstances, we conclude that Defendants failed to specifically alert the district court to the availability of nominal damages for trespass claims below, a prerequisite to preserving a question of law for review in this Court. Accordingly, we decline to reverse the district court's dismissal of Defendants' counterclaim for trespass on a ground Defendants advance for the first time on appeal. *See Woolwine*, 1987-NMCA-133, ¶ 20.

{15} Next, Defendants argue that their submission into evidence of photographs showing damaged vegetation furnished a basis for the jury to fix an award of damages, rendering the district court's directed verdict on Defendants' counterclaim for trespass erroneous. But the mere fact of damage is not enough to give rise to a question of fact over the extent of actual damages that must be resolved by the jury; Defendants were required to submit additional evidence that would allow the jury to fix the amount of damages Defendants suffered as a result of the alleged trespass with enough certainty to avoid speculation. *See Mascarenas v. Jaramillo*, 1991-NMSC-014, ¶ 22, 111 N.M. 410, 806 P.2d 59 ("Damages based on surmise, conjecture or speculation cannot be sustained. Damages must be proved with reasonable certainty."). Thus Defendants were required to submit evidence that would allow the jury to fix an amount of damage, such as the cost of restoring the vegetation damaged by Plaintiffs' installation of the fence, *see* UJI 13-1813 NMRA, or by producing evidence that Plaintiffs' alleged trespass caused some diminution in the value of Defendants' property, *see* UJI 13-1812 NMRA. Having failed to present any such evidence, it was not error for the district court to conclude that the evidence was insufficient as a matter of law to support a finding that Defendants had suffered damages as a result of Plaintiffs' alleged trespass.

3. The District Court Did Not Err in Refusing Defendants' Requested Jury Instruction on Plaintiffs' Trespass Claim

{16} "We review a district court's refusal to give a proffered instruction de novo to determine whether the instruction correctly stated the law and was supported by the evidence presented at trial." *Silva v. Lovelace Health Sys., Inc.*, 2014-NMCA-086, ¶ 13, 331 P.3d 958. "A party is entitled to have the jury instructed on the party's theory if there is substantial evidence to support it." *Id.* "Failure to submit requested instructions to the jury constitutes reversible error, if the complaining party can show that it was prejudiced by the trial court's refusal to give the requested instruction." *Benavidez v. City of Gallup*, 2007-NMSC-026, ¶ 19, 141 N.M. 808, 161 P.3d 853.

{17} Defendants requested the following jury instruction, apparently modeled on the text of Section 30-14-6:

> The owner of real property in New Mexico shall post notices parallel to and along the exterior boundaries of the property to be posted, at each roadway or other access in conspicuous places, and if the property is not fenced, such notices shall be posted every [500] feet along the exterior boundaries of such land. If property is not fenced or notices posted delineating boundary lines of property, willful trespass cannot be proved.

{18} Defendants argued to the district court that Section 30-14-6 imposed a duty on landowners to post notices on the exterior boundaries of their property in order to subject individuals to trespass liability for any entries thereon. Plaintiffs argued that Defendants' proffered instruction should not be given because Section 30-14-6 set out a defense to charges of criminal trespass under Section 30-14-1, not civil liability for trespass.

{19} The district court agreed with Plaintiffs that Defendants' proffered instruction was not a valid defense to liability for trespass at common law. However, the district court concluded that the instruction was required because Plaintiffs sought double damages against Defendants under Section 30-14-1(D). In response to the district court's interlocutory ruling, Plaintiffs voluntarily dismissed their claim for criminal trespass, at which point the district court refused to submit Defendants' proffered instruction to the jury. Defendants argue on appeal that Section 30-14-6 "imposes a civil duty on the part of landowners seeking criminal prosecution or civil damages for trespass[,]" and as a result, civil liability for trespass may only be found for entries on land that has been posted in compliance with Section 30-14-6.

{20} Whether Section 30-14-6 bars civil liability for trespass unless a landowner complies with its posting requirements (and is thus available as a jury instruction in a civil action for trespass) is a question of statutory construction that we review de novo. *See State v. Marshall*, 2004-NMCA-104, ¶ 6, 136 N.M. 240, 96 P.3d 801. In construing a statute, "[o]ur primary task in construing statutory language is to effect legislative intent." *Benny v. Moberg Welding*, 2007-NMCA-124, ¶ 5, 142 N.M. 501, 167 P.3d 949.

> We start with the language [of the statute] itself, giving effect to its plain meaning where appropriate while being careful not to be misled by simplicity of language when the other portions of a statute call its meaning into question, or the language of a section of an act conflicts with an overall legislative purpose.

Id. (internal quotation marks and citation omitted). We also note that "when determining the meaning of a statute, courts will often construe the language in light of the preexisting common law." *Sims v. Sims*, 1996-NMSC-078, ¶ 23, 122 N.M. 618, 930 P.2d 153. "This rule of construction is a recognition that any law is passed against the background of all the law in effect at the time. If no aspect of the background of law is clearly abrogated, it is presumed to be consistent with, if not incorporated into, new legislation." *Id.* ¶ 24.

{21} Section 30-14-6(A) states:

> The owner, lessee or person lawfully in possession of real property in New Mexico, except property owned by the state or federal government, desiring to prevent trespass or entry onto the real property shall post notices parallel to and along the exterior boundaries of the property to be posted, at each roadway or other way of access

> in conspicuous places, and if the property is not fenced, such notices shall be posted every [500] feet along the exterior boundaries of such land.

The text of Section 30-14-6(A) does not suggest any limitation on an owner, lessee, or other lawful possessor's ability to pursue a common law claim for trespass; rather, it speaks to what the owner, lessee, or other lawful possessor should do in order to "prevent" trespass. We interpret the use of the word "prevent" in Section 30-14-6(A) to indicate the Legislature's intent to establish a standard by which the public may be placed on direct notice that unauthorized entry upon posted land is disallowed and will be subjected to legal consequences, not an intent to exempt from liability all unauthorized entries onto private property that has not been posted.

{22} Considering Section 30-14-6 in light of neighboring provisions in the Criminal Code supports our interpretation. Section 30-14-1 defines differing types of criminal trespass, each of which is a misdemeanor. *See* § 30-14-1(E). For example, Subsection A includes, with certain exceptions, "knowingly entering or remaining upon posted private property without possessing written permission from the owner or person in control of the land" as criminal trespass. Subsections B and C, respectively, prohibit "knowingly entering or remaining upon the unposted lands of another knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof" and "knowingly entering or remaining upon lands owned, operated or controlled by the state or any of its political subdivisions knowing that consent to enter or remain is denied or withdrawn by the custodian thereof" as misdemeanor criminal trespass. Lastly, Subsection D provides that "[a]ny person who enters upon the lands of another without prior permission and injures, damages or destroys any part of the realty or its improvements . . . is guilty of a misdemeanor, and he shall be liable to the owner, lessee or person in lawful possession for civil damages in an amount equal to double the value of the damage to the property injured or destroyed."

{23} Reading these provisions as a whole, it is clear that Section 30-14-6 sets out a standard by which a property may be deemed "posted" for the purposes of determining whether a defendant may be found guilty for knowingly entering property under Section 30-14-1(A) or if the elevated mens rea requirement in Section 30-14-1(B) must be proven. Section 30-14-6 cannot be fairly read to change the common law of trespass, which does not require posting of property in order for an unauthorized entry to constitute a trespass. *See Sims*, 1996-NMSC-078, ¶¶ 23-24. Moreover, Section 30-14-1(D), which imposes double civil liability on any person who "enters upon the lands of another without prior permission and injures, damages or destroys any part of the realty or its improvements," makes no mention of whether the property is posted or unposted. Viewed against these provisions, then, it is clear that Section 30-14-6 does not provide an affirmative defense to common law claims for trespass. Accordingly, the district court correctly rejected Defendants' proffered instruction.

4. Sufficient Evidence Supports the Jury's Damage Award on Plaintiffs' Trespass Claim

{24} "On appeal, a jury award will not be set aside as excessive, unless: [(1)] the evidence, viewed in the light most favorable to the plaintiff, does not substantially support the award; or [(2)] there is an indication that the jury was swayed by passion or prejudice, or employed a mistaken measure of damages." *Wirth v. Commercial Res., Inc.*, 1981-NMCA-057, ¶ 18, 96 N.M. 340, 630 P.2d 292. When we review an award for substantial evidentiary support, "the question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *Muncey v. Eyeglass World, LLC*, 2012-NMCA-120, ¶ 21, 289 P.3d 1255 (alteration, internal quotation marks, and citation omitted). "Additionally, we will not reweigh the evidence nor substitute our judgment for that of the fact[-]finder." *Id.* (alteration, internal quotation marks, and citation omitted).

{25} Defendants argue that the jury's damages award was not supported by substantial evidence because the damage caused by flooding in 2010 occurred upstream of the berms Lucero made on Plaintiffs' property at Defendants' direction. We understand Defendants to be arguing that there was insufficient evidence at trial for the jury to conclude that the flood damage was caused by Defendants' earthwork. But Plaintiffs presented expert testimony that Defendants' earthwork increased the likelihood of flood damage and likely brought about the erosion caused by the 2010 floods. Having failed to object to the admission of this testimony, Defendants' argument boils down to a request that we reweigh the evidence presented to the jury, something we are forbidden from doing under the applicable standard of review. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶ 23, 336 P.3d 436. Nor do Defendants offer any authority in support of their contention that the jury was not permitted to award Plaintiffs damages for the cost of making improvements to prevent future flood damage in addition to the cost of shoring up the foundation of their driveway. "[W]here arguments in briefs are unsupported by cited authority, [we assume that] counsel[,] after diligent search, was unable to find any supporting authority." *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329. After reviewing the evidence in the trial record, we conclude the jury's damages award had a substantial evidentiary basis.

5. The District Court Did Not Abuse Its Discretion in Awarding Prejudgment Interest to Plaintiffs

{26} Section 56-8-4(B) provides that a district court may award prejudgment interest to the prevailing plaintiff in an amount of

> up to [10] percent from the date the complaint is served upon the defendant after considering, among other things:
> (1) if the plaintiff was the cause of unreasonable delay in the adjudication of the plaintiff's claims; and
> (2) if the defendant had previously made a reasonable and timely offer of settlement to the plaintiff.

Prejudgment interest is available in actions in tort. *Southard v. Fox*, 1992-NMCA-045, ¶¶ 1, 8, 113 N.M. 774, 833 P.2d 251. We review a district court's award of prejudgment interest for an abuse of discretion. *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶ 58, 120 N.M. 133, 899 P.2d 576.

{27} The district court awarded Plaintiffs prejudgment interest on the principal amount of the judgment against Defendants at the rate of 8.75 percent per annum from the date of the filing of the complaint to the date of the judgment against Defendants for a total amount of $12,177.05. Defendants argue that the district court abused its discretion in awarding prejudgment interest because Defendants had made reasonable and timely settlement offers prior to trial. Plaintiffs argue that the

district court properly awarded Plaintiffs prejudgment interest because Defendants failed to make a reasonable and timely settlement offer to Plaintiffs.

{28} It is difficult to evaluate Defendants' argument because their brief in chief does not identify the timing and amount of the settlement offers they purportedly made to Plaintiffs, and the district court's oral statement of its reasons for awarding prejudgment interest is not part of the record. However, "where [the] record is unclear, we presume regularity and correctness of the district court's actions." *Murken v. Solv-Ex Corp.*, 2006-NMCA-064, ¶ 27, 139 N.M. 625, 136 P.3d 1035. Defendants argue that because the district court had evidence of a settlement offer by Defendants, it was an abuse of discretion to grant prejudgment interest. But Section 56-8-4(B) makes the existence of a settlement offer but one factor in the totality that is to be considered by the district court in determining whether to award prejudgment interest, and even then, only if the offer is "reasonable." Defendants offer no argument as to why their prejudgment settlement offers were reasonable. A conclusory statement that the district court ought to have credited Defendants' argument that their offers were reasonable is not enough to overcome the presumption that the district court properly found either that Defendants' settlement offers were not reasonable or that other factors counseled in favor of an award of prejudgment interest.

6. Defendants Failed to Preserve Their Argument That They Enjoyed a Prescriptive Easement Over the Wash

{29} Defendants finally argue that they enjoyed an easement by prescription over the portion of the wash that crossed Plaintiffs' property that gave Defendants the right to enter and perform work on the wash. But Defendants never argued the existence of a prescriptive easement either as a counterclaim or a defense to Plaintiffs' trespass claim, and we do not address arguments raised for the first time on appeal. *See Campos Enters., Inc. v. Edwin K. Williams & Co.*, 1998-NMCA-131, ¶ 12, 125 N.M. 691, 964 P.2d 855. We therefore decline to address the merits of Defendants' argument.

7. The District Court Abused Its Discretion in Refusing to Award Post-Judgment Interest at the Mandatory Rate Fixed by Section 56-8-4(A)(2)

{30} In their cross-appeal, Plaintiffs contend that the district court abused its discretion when it fixed its award of post-judgment interest at 8.75 percent per annum because Section 56-8-4(A)(2) requires district courts to impose post-judgment interest at a rate of 15 percent for any judgment based on "tortious conduct," and trespass is a tort. Defendants respond that because there was no evidence that Defendants' trespass was intentional, Section 56-8-4(A)(2) does not apply.

{31} Section 56-8-4(A)(2) provides that "[i]nterest shall be allowed on judgments and decrees for the payment of money from entry and shall be calculated at the rate of [8.75] percent per year, unless . . . the judgment is based on tortious conduct, bad faith or intentional or willful acts, in which case interest shall be computed at the rate of [15] percent." "[A]n award of post[-]judgment interest is mandatory and is to be computed at the statutory rate." *Sunwest Bank of Albuquerque, N.A. v. Colucci*, 1994-NMSC-027, ¶ 25 n.7, 117 N.M. 373, 872 P.2d 346. "We review the award of post-judgment interest for abuse of discretion." *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 74, 146 N.M. 853, 215 P.3d 791. "A court can abuse its discretion by misapprehending or misapplying the law." *Id.*

{32} We agree with Plaintiffs that the district court abused its discretion by refusing to award Plaintiffs post-judgment interest at 15 percent. In *Sandoval*, we considered and rejected Defendants' argument that Section 56-8-4(A)(2)'s 15 percent post-judgment interest rate only applies to judgments based on intentional torts. *See id.* ¶¶ 73-78. There, we held that the plain meaning of Section 56-8-4(A)(2)'s use of the word "tortious" made all judgments based on torts subject to a 15 percent post-judgment interest rate—even negligence, which has no intent or recklessness elements. *Sandoval*, 2009-NMCA-095, ¶ 78. Since trespass is a tort, *see McNeill v. Rice Engineering & Operating, Inc.*, 2010-NMSC-015, ¶ 9, 148 N.M. 16, 229 P.3d 489, it is subject to a 15 percent rate of post-judgment interest. We therefore reverse the district court's award of post-judgment interest and remand with instructions to award Plaintiffs post-judgment interest at a rate of 15 percent per annum.

CONCLUSION

{33} We reverse the district court's award of post-judgment interest to Plaintiffs and remand this case with instructions to the district court that it impose an award of post-judgment interest on the judgment against Defendants at a rate of 15 percent. The district court's judgment is affirmed in all other respects.

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

J. MILES HANISEE, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
M. MONICA ZAMORA, Judge

Certiorari Denied, August 18, 2016, No. S-1-SC-36008

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-076

No. 33,920 (filed June 23, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MARK GALLEGOS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BRETT R. LOVELESS, District Judge

HECTOR H. BALDERAS
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Opinion

Stephen G. French, Judge

{1} A jury convicted Mark Gallegos (Defendant) of shoplifting of property with a value over $500 but not more than $2500, contrary to NMSA 1978, Section 30-16-20(B)(3) (2006); conspiracy to commit shoplifting, contrary to NMSA 1978, Section 30-28-2 (1979); and possession of drug paraphernalia, contrary to NMSA 1978, Section 30-31-25.1 (2001). Defendant appeals his convictions. Defendant argues that (1) his constitutional right to a speedy trial was violated, (2) evidence was improperly admitted in violation of the rules of evidence and the Confrontation Clause of the United States Constitution, (3) a witness was improperly allowed to testify, (4) the district court improperly ruled that Defendant could be questioned about a conditional discharge, and (5) there was insufficient evidence to support Defendant's conviction for felony shoplifting. We are not persuaded by Defendant's arguments and, therefore, affirm his convictions.

BACKGROUND

{2} On January 28, 2011, a security officer in a department store, Christopher Davidson (Davidson), observed Defendant and another person opening videos and concealing the videos in their clothes. Defendant exited the store and was contacted by Albuquerque Police Department officers in the parking lot. Defendant was indicted on April 27, 2011. He was brought to trial on December 16, 2013. In our discussion of the issues, we provide additional facts as necessary.

DISCUSSION

I. SPEEDY TRIAL

{3} The accused in New Mexico have a fundamental right to a speedy trial guaranteed by both the Sixth Amendment of the United States Constitution and Article II, Section 14 of the New Mexico Constitution. *State v. Garza*, 2009-NMSC-038, ¶ 10, 146 N.M. 499, 212 P.3d 387. Our courts have not treated those rights differently, thus we view them as coextensive. *State v. Spearman*, 2012-NMSC-023, ¶ 16 n.1, 283 P.3d 272. Because the specific facts and circumstances of each case determine whether a person's speedy trial right has been violated, the speedy trial analysis is not susceptible to an inflexible, bright-line approach. *Garza*, 2009-NMSC-038, ¶¶ 11, 14.

{4} Our courts have adopted the four-factor balancing test from *Barker v. Wingo*, 407 U.S. 514 (1972). *Garza*, 2009-NMSC-038, ¶ 13. That analysis requires a court to consider "(1) the length of delay, (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) the actual prejudice to the defendant that, on balance, determines whether a defendant's right to a speedy trial has been violated." *Id.* ¶ 13 (internal quotation marks and citation omitted). None of these factors is a "necessary or sufficient condition to the finding of a deprivation of the right of speedy trial[, but, instead,] they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533. The *Barker* analysis requires that "[e]ach of [the four] factors is weighed either in favor of or against the [s]tate or the defendant, and then balanced to determine if a defendant's right to a speedy trial was violated." *Spearman*, 2012-NMSC-023, ¶ 17.

{5} Defendant appeals the district court's denial of his motion to dismiss on speedy trial grounds. We proceed by analyzing the procedural history of this case through the lens of the four-factor *Barker* analysis. We apply a deferential standard of review to the factual findings of the district court and review de novo the weighing and balancing of the *Barker* factors. *Spearman*, 2012-NMSC-023, ¶ 19.

A. The Length of Delay

{6} The length of the delay is both "a triggering mechanism requiring further inquiry into the *Barker* factors" and also one of the four factors in the *Barker* analysis. *Spearman*, 2012-NMSC-023, ¶ 20 (internal quotation marks and citation omitted). Whether or not the threshold for further inquiry is met depends upon whether the delay is considered presumptively prejudicial. *Garza*, 2009-NMSC-038, ¶ 23. The amount of time considered presumptively prejudicial varies with the complexity of the case. *Spearman*, 2012-NMSC-023, ¶ 21. Here, the district court found, and the parties agree, that this case was simple. For a simple case, a delay of longer than one year is considered to be presumptively prejudicial. *Garza*, 2009-NMSC-038, ¶ 47.

{7} Defendant's right to a speedy trial attached when he was indicted in district court on April 27, 2011. *See State v. Taylor*, 2015-NMCA-012, ¶ 7, 343 P.3d 199 (stating that the right to a speedy trial attaches when the defendant becomes an accused, either by arrest, indictment, or criminal information). Defendant's trial commenced on December 16, 2013. The time to trial was nearly thirty-two months, approximately twenty months past the one-year threshold for a simple case. Because the delay was presumptively prejudicial, we continue to a full *Barker* analysis.

{8} This case went to trial more than two-and-one-half years after Defendant's speedy trial right attached. That is a very long time for a simple case, and the length of delay must therefore weigh heavily against the State. *See Taylor*, 2015-NMCA-012, ¶ 9 (holding that a delay of nearly two years in a simple case was to be weighed heavily against the State).

B. Reasons for the Delay

{9} There are four types of delay, each of which is to be weighed differently by the appellate courts. *Garza*, 2009-NMSC-038, ¶ 25. "[O]fficial bad faith in causing delay will be weighed heavily against the government," as will "a deliberate attempt to delay the trial in order to hamper the defense[.]" *Id.* (alteration, internal quotation marks, and citation omitted). Negligent or administrative delay is weighed against the State because, at bottom, the burden rests with the government to bring a defendant to trial. *Id.* ¶ 26. That type of delay is weighed "more lightly." *Id.* (internal quotation marks and citation omitted). The degree of weight tallied against the State for negligent delay "is closely related to the length of delay." *Id.* Appropriate delay justified by "a valid reason, such as a missing witness," is weighed neutrally. *Id.* ¶ 27 (internal quotation marks and citation omitted). Finally, our Supreme Court has acknowledged delay "caused by the defense, which weighs against the defendant." *State v. Serros*, 2016-NMSC-008, ¶ 29, 366 P.3d 1121 (internal quotation marks and citation omitted).

{10} Mindful that the speedy trial analysis depends on the particular facts and circumstances of each case, we review the pertinent facts of this case in order to allocate to each side the reasons for the delay and determine the weight we should assign the reasons for the delay. *See Garza*, 2009-NMSC-038, ¶ 11 (stating that the "substance of the speedy trial right is defined only through an analysis of the peculiar facts and circumstances of each case"); *State v. Tortolito*, 1997-NMCA-128, ¶ 8, 124 N.M. 368, 950 P.2d 811 ("Analysis of the second *Barker* factor involves allocating the reasons for the delay to each side and determining the weight attributable to each reason."). We proceed by dividing the time line of this case into periods for the purpose of our analysis of the reasons for delay.

1. April 27 to November 12, 2011

{11} Defendant's speedy trial right attached when he was indicted on April 27, 2011. On July 29, 2011, the State filed a motion to compel selection of counsel for Defendant and request a speedy trial. The State also filed a demand for notice of intention to claim alibi and/or entrapment, a certificate that all information in the district attorney's file had been disclosed, a request for disclosure, and a notice of intent to call listed witnesses. A pretrial conference was held on October 12, 2011, at which by mutual assent the pretrial conference was postponed. The district court found that this delay was intended to be "about a month." A one-month delay implies that the pretrial conference should have taken place by November 12, 2011. We conclude that during the period of approximately six months and two weeks from April 27 to November 12, 2011, this case was proceeding more or less normally, and, accordingly, we weigh this time period neutrally. *See Taylor*, 2015-NMCA-012, ¶ 11 (weighing neutrally a period of delay when the case "was progressing in a normal fashion"); *see also Garza*, 2009-NMSC-038, ¶ 27 (recognizing that some pretrial delay is inevitable and justifiable).

2. November 13, 2011, to January 6, 2013

{12} This case did not move forward at all after the October 12, 2011 pretrial conference until April 19, 2012, when the State filed a request for a status conference. The status conference was not set timely by the district court. On September 17, 2012, the State filed a motion to review the conditions of Defendant's release on the basis of Defendant's alleged arrest on other charges. That hearing was scheduled for November 20, 2012, and then vacated because Defendant was already in custody or believed to be. The hearing to review Defendant's conditions of release was rescheduled to January 17, 2013. On December 28, 2012, counsel for Defendant filed a notice of unavailability from January 7 through March 15, 2013.

{13} We conclude that the period from November 13, 2011, until January 6, 2013, counts as negligent and/or administrative delay. The hearing on Defendant's conditions of release did not serve to move the case forward. The delay was due to the failure of the State and the district court to move this case towards trial. This period of approximately thirteen months and three weeks weighs against the State.

3. January 7 to March 15, 2013

{14} Although Defendant's notice established counsel's unavailability from January 7 through March 15, 2013, counsel for Defendant was present at the January 17, 2013 hearing, and substitute counsel was present at a pretrial conference on March 6, 2013. Although delay caused by a defendant is weighed against that party, *Serros*, 2016-NMSC-008, ¶ 29, it does not appear from the record that defense counsel's unavailability caused any delay in this case. Thus, we weigh the approximately two month and one week period from January 7 to March 15, 2013, neutrally.

4. March 16 to May 15, 2013

{15} At a pretrial conference on March 6, 2013, the parties requested a plea hearing which the district court scheduled for May 14, 2013. No plea was reached at the May 14, 2013, hearing. On May 15, 2013, the district court issued a scheduling order, pursuant to which the trial was set for September 3, 2013.

{16} We observe that although on March 6, 2013, the parties requested a setting in about one month, it took the district court approximately two months and one week. Had the district court set the hearing timely, it would have taken place by early April. We conclude that the period between March 16 and May 15, 2013 was in part administrative delay caused by the district court and in part ordinary and inevitable delay associated with moving a case towards trial. We weigh one month of the delay between March 16 and May 15, 2013 neutrally, and one month against the State as administrative delay.

5. May 16 to September 3, 2013

{17} Also during spring and summer of 2013, the parties were in the process of scheduling a pretrial interview with Davidson, the State's essential witness. On May 2, 2013, Davidson did not keep a scheduled appointment for a pretrial interview. At that time, the State had inaccurate contact information for Davidson. Pursuant to the hearing on May 14, 2013, the district court, on May 17, 2013, ordered the State to make Davidson available for a pretrial interview no later than June 13, 2013. The district court indicated that Davidson would be excluded as a witness if the June 13, 2013, deadline was not met unless extended for good cause. By May 30, 2013, the State had established contact with the witness and, on that day, made an inquiry to counsel for Defendant with regard to setting up an interview. Counsel for Defendant responded promptly, offering availability on either June 10 or June 11, 2013. The State did not respond to counsel for Defendant until June 13, 2013. The State suggested that the interview be set up sometime in July. On June 24, 2013, Defendant filed a

motion to exclude the witness pursuant to Rules 5-501, 5-503, and 5-505 NMRA. That motion was denied without prejudice by the district court, which, instead, extended the deadline for completion of the interview with Davidson. On August 1, 2013, the interview was conducted.

{18} We conclude that the period from May 15 until June 11, 2013, weighs neutrally because the witness was missing until May 30, 2013, and, subsequently, the parties were in the process of setting up a timely interview. *See Garza*, 2009-NMSC-038, ¶ 27 (stating that a missing witness justifies appropriate delay). However, because the witness was no longer missing as of May 30, 2013, and the State did not timely respond to counsel for Defendant, who proffered reasonable dates of June 10 or June 11, 2013, for the interview, we analyze separately the delay from June 12 to September 3, 2013.

{19} Some reasons for the delay between June 12 and September 3, 2013, favor Defendant, and others, the State. On one hand, the State did not offer an explanation for its failure to respond to Defendant's attempt to schedule an interview. Moreover, the State missed the district court's deadline, receiving an extension only in retrospect. On the other hand, the State offered to set the interview in July. Rather than accept, Defendant chose to file a motion to exclude. Although the attempt to exclude Davidson rather than set up an interview may have been tactically reasonable, that choice colors our analysis of the delay to some degree. Moreover, the district court found that during at least some of this time period, counsel for Defendant "sort of was in and sort of was out" of the case as counsel was preparing to leave the public defender department. On July 26, 2013, new counsel entered an appearance on behalf of Defendant. Finally, and importantly, as of May 15, 2013, the trial had already been set for September 3, 2013. Defendant did not file a motion to continue the trial on the basis of the delay in interviewing Davidson. Thus, it does not appear that the delay in interviewing Davidson from June 12 until August 1, 2013, delayed the case.

{20} We conclude that the reasons for the delay between June 12 and September 3, 2013, do not favor either party. Although the State did not respond to Defendant's proposed dates, and missed the district court's initial deadline, the elapsed time did not ultimately serve to delay the trial. The district court's May 15, 2013, setting of the trial for September 3, 2013, falls just inside the boundary of the case proceeding in a normal fashion, given the circumstances of Defendant's representation. Thus, we weigh neutrally the time period between June 12 and September 3, 2013. In sum, the entire period of three months and three weeks from May 15 to September 3, 2013, is weighed neutrally.

6. September 3 to December 16, 2013

{21} On August 30, 2013, counsel for Defendant filed a motion to continue the trial set for September 3, 2013. As reason, counsel cited the fact that she had only recently taken over the case and received additional discovery, and was not prepared for trial. Defendant argued that he had the right not only to a speedy trial but also to effective assistance of counsel. The court granted the motion and the trial was rescheduled for December 16, 2013. We observe that the delayed pretrial interview took place only six days after counsel entered her appearance on July 26, 2013, so the requested continuance cannot reasonably be ascribed to the delayed interview. Although the delay was requested by Defendant, we conclude that legitimate tension existed between the right of Defendant to effective assistance of counsel and Defendant's right to a speedy trial. We therefore weigh this period of approximately three months and two weeks neutrally, rather than against Defendant. *See Serros*, 2016-NMSC-008, ¶ 47 (stating that it would be intolerable to force a defendant to surrender the right to effective assistance of counsel in order to protect the right to speedy trial and holding that delay attributable to changing counsel due to ineffective assistance of counsel is not to be counted against the defendant); *Garza*, 2009-NMSC-038, ¶ 11 ("Though speed is an important attribute of the right, if either party is forced to trial without a fair opportunity for preparation, justice is sacrificed to speed." (alteration, internal quotation marks, and citation omitted)).

7. Summary of Reasons for Delay

{22} We weigh approximately sixteeen months and three weeks of the delay from indictment to trial neutrally, and fourteen months and three weeks of the delay against the State. Because all of the delay attributable to the State was either negligent or administrative, the weight we assign the delay increases in accordance with the length of the delay. *See Doggett v. United States*, 505 U.S. 647, 657 (1992) ("[The United States Supreme Court's] toleration of [official] negligence varies inversely with its protractedness[.]"). For reasons we explain below, we do not weigh the reasons for delay factor heavily against the State.

C. Assertion of the Right

{23} The failure of a defendant to assert his fundamental right to a speedy trial does not constitute a waiver of that right. *Garza*, 2009-NMSC-038, ¶ 32. However, "the timeliness and vigor with which the right is asserted may be considered as an indication of whether a defendant was denied needed access to speedy trial over [the defendant's] objection or whether the issue was raised on appeal as an afterthought." *Id*.

{24} Defendant asserted in one form or another his right to a speedy trial on four occasions: (1) verbally at the arraignment on July 11, 2011; (2) on August 1, 2011, included in an "Entry of Appearance, Request for Discovery, and Demand for Speedy Trial"; (3) included in Defendant's motion for a continuance of the trial date was an assertion that he was "entitled to speedy and fair trial but he is also entitled to effective assistance of counsel"; and (4) by filing a motion to dismiss on speedy trial grounds on October 31, 2013. Defendant's first two assertions—the verbal assertion at arraignment and the assertion included as part of a multi-purpose motion—were pro forma. Pro forma assertions are weighted towards Defendant, but only slightly. *See State v. Urban*, 2004-NMSC-007, ¶ 16, 135 N.M. 279, 87 P.3d 1061 (stating that pro forma motions are generally afforded relatively little weight in this analysis). We weigh neutrally Defendant's assertion of his speedy trial right that was nestled within his request to continue the trial. Defendant's counsel requested to delay the trial primarily because counsel had only recently substituted for Defendant's former counsel, who was then no longer with the public defender department. Under those circumstances, we cannot weigh that assertion by Defendant of his speedy trial in his favor.

{25} Defendant's final assertion was his motion to dismiss on speedy trial grounds. Defendant's motion to dismiss was filed approximately six weeks prior to the scheduled trial setting. Because that motion was filed relatively close to the scheduled trial, we afford it less weight in Defendant's favor than if it had been filed earlier. *See State v. Moreno*, 2010-NMCA-044, ¶ 33, 148 N.M. 253, 233 P.3d 782 ("[G]enerally, the closer to trial an assertion is made, the less weight it is given.").

{26} In sum, although Defendant's assertion of his right to a speedy trial was not especially vigorous, we conclude that Defendant adequately asserted his right and did not acquiesce to the delay. *See Taylor*, 2015-NMCA-012, ¶¶ 4, 18 (holding that where the defendant asserted the right to a speedy trial in magistrate court, stipulated that the delay caused by the defendant's motion to continue would not count against the state for the purpose of a speedy trial analysis, and filed a motion to dismiss on speedy trial grounds the day prior to trial, the defendant adequately asserted the right to a speedy trial right and did not acquiesce to delay); *Moreno*, 2010-NMCA-044, ¶ 35 (holding that where the defendant made a pro forma assertion of the right to a speedy trial and filed a pro se motion to dismiss two and one-half months before the date of his last scheduled trial date, this factor weighed slightly in favor of the defendant.)

D. Prejudice

{27} Preventing prejudice to those accused is "[t]he heart of the right to a speedy trial[.]" *Garza*, 2009-NMSC-038, ¶ 12. The speedy trial right is intended "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. The prejudice to a defendant is analyzed with reference to these interests. *Garza*, 2009-NMSC-038, ¶ 35. Generally, "a defendant must show particularized prejudice of the kind against which the speedy trial right is intended to protect." *Id*. ¶ 39.

{28} Defendant argues that he was prejudiced because he was subject to conditions of release while awaiting trial, he suffered undue anxiety and concern, photographs were lost that "might have assisted [Defendant's] defense," and police officer witnesses became unavailable. Moreover, argues Defendant, even if this Court does not agree that Defendant suffered particularized prejudice, the prejudice factor should nevertheless be weighed in his favor because the sheer length of the delay allows us to assume prejudice. We examine Defendant's contentions in turn.

{29} Defendant's assertions of prejudice due to the conditions of release and also anxiety and concern were not explained in detail, which limits the latitude of this Court to credit these contentions within the *Barker* analysis. *See Garza*, 2009-NMSC-038, ¶ 35 ("[W]ithout a particularized showing of prejudice, we will not speculate as to the impact of pretrial incarceration on a defendant or the degree of anxiety a defendant suffers."). Moreover, Defendant did not offer affidavits, testimony, or documentation in support of the allegation of prejudice due to the conditions of release or undue anxiety or concern. *See Spearman*, 2012-NMSC-023, ¶ 39 ("Allegations of counsel are not generally considered evidence."). Accordingly, we hold that Defendant did not suffer prejudice based on the conditions of pretrial release or undue anxiety or concern.

{30} With regard to the unavailable officers, Defendant was required to "state with particularity what exculpatory testimony would have been offered" in order to show prejudice. *Garza*, 2009-NMSC-038, ¶ 36 (alteration, internal quotation marks, and citation omitted). Because Defendant has not demonstrated how the testimony of unavailable officers would have been helpful to his defense, Defendant has not suffered prejudice cognizable within the *Barker* framework on the basis of the officers' unavailability. Defendant's contention with regard to the missing photographs is similarly undeveloped. Defendant has not made any argument as to how or why the missing photographs negatively affected Defendant's defense. In the absence of any explanation, we cannot conclude that the loss of the photographs caused prejudice to the defense. The possibility that the defense will be impaired is "the most serious" type of prejudice, but the burden remains on the defendant to substantiate any such claims. *Garza*, 2009-NMSC-038, ¶ 36 (internal quotation marks and citation omitted). Defendant has not done so in this case.

{31} Defendant also argues that even if this Court concludes, as we have, that particularized prejudice has not been demonstrated, this Court should nevertheless conclude, under the circumstances of this case, that prejudice can be presumed and the prejudice factor should, therefore, be weighed at least slightly in Defendant's favor. Defendant cites both New Mexico and federal cases in support of his argument that the prejudice factor can be weighed in his favor despite Defendant's failure to demonstrate particularized prejudice. We do not agree with Defendant's reading of those cases. We recognize the cases cited by Defendant[1] as standing for the entrenched proposition that a particularized showing of prejudice is not required to establish a speedy trial violation when the length and reasons for delay weigh heavily in favor of the defendant and the defendant has adequately asserted his right to a speedy trial and not acquiesced to the delay. *Garza*, 2009-NMSC-038, ¶ 39 ("[I]f the length of delay and the reasons for the delay weigh heavily in the defendant's favor and the defendant has asserted his right and not acquiesced to the delay, then the defendant need not show prejudice for a court to conclude that the defendant's right has been violated."). However, we do not agree with Defendant that the prejudice factor of the speedy trial analysis weighs in his favor in the absence of a particularized showing of prejudice. *See id*. ¶ 37 ("[N]on-particularized prejudice is not the type of prejudice against which the speedy trial right protects." (alteration, internal quotation marks and citation omitted)). Thus, although Defendant's failure to show particularized prejudice is not dispositive to his claim of a speedy trial right violation, the prejudice factor of the speedy trial analysis does not weigh in Defendant's favor.

E. Weighing and Balancing the Four *Barker* Factors

{32} As this case illustrates, the weighing and balancing of the *Barker* factors is a difficult and sensitive process. *Moore v. Arizona*, 414 U.S. 25, 26 (1973); *see also Vermont v. Brillon*, 556 U.S. 81, 89 (2009) ("The speedy-trial right is 'amorphous,' 'slippery,' and 'necessarily relative.' " (citation omitted)). Central to the analysis is whether a defendant suffered prejudice as a consequence of the delay. *See Garza*, 2009-NMSC-038, ¶ 12 ("The heart of the right to a speedy trial is preventing prejudice to the accused."). However, even in the absence of a showing of particularized prejudice, the state violates a defendant's constitutional right to a speedy trial when the defendant demonstrates that "the length of delay and the reasons for the delay weigh heavily in [the] defendant's favor and [the] defendant has asserted his right and not acquiesced to the delay[.]" *Id*. ¶ 39; *see also United States v. Mendoza*, 530 F.3d 758, 764 (9th Cir. 2008) ("[N]o showing of prejudice is required when the delay is great and attributable to the government." (internal quotation marks and citations omitted)). In this case, Defendant did not establish

[1]*Doggett*, 505 U.S. at 654; *Garza*, 2009-NMSC-038, ¶ 39; *Taylor*, 2015-NMCA-012, ¶ 25.

particularized prejudice, but the length of delay weighs heavily in Defendant's favor, and he adequately asserted his right to a speedy trial. The determinative question, then, is whether the reasons for delay weigh heavily in Defendant's favor. As we stated in paragraph twenty-two of this Opinion, they do not. We explain.

{33} Of the total delay in this case from April 27, 2011, to December 16, 2013, we summarize the reasons for delay as follows: we weigh approximately sixteen months and three weeks neutrally and weigh fourteen months and three weeks against the State. For this simple case, the presumptively prejudicial period was one year. The specific question facing this Court is whether fourteen months and three weeks of negligent and administrative delay weigh heavily against the State when the prejudicial period for this simple case is twelve months.

{34} Defendant has not cited to any case to hold that a person's speedy trial right was violated without a particularized showing of prejudice when the delay was strictly administrative and/or negligent and only exceeded the presumptively prejudicial period by a few months, as in this case. Typically, the period of negligent and administrative delay is considerably longer where a court has held that a defendant's speedy trial right has been violated without a showing of prejudice. *See, e.g.*, *Doggett*, 505 U.S. at 657-58 (holding that negligent delay of six times the presumptively prejudicial period was sufficient to support a speedy trial violation without requiring a showing of prejudice); *Mendoza*, 530 F.3d at 765 (holding that eight years of negligent delay where the presumptively prejudicial period was one year was sufficient to support a speedy trial violation without requiring a showing of prejudice). Although there are recent New Mexico cases holding that an amount of good-faith governmental delay close to that found in this case supports a speedy trial violation without a particularized showing of prejudice, even those holdings are supported by more delay than occurred in this case. *See Taylor*, 2015-NMCA-012, ¶¶ 11-12, 16-17 (holding that approximately nineteen months of negligent and administrative delay weighed heavily against the government in a simple case and supported a speedy trial violation in the absence of particularized prejudice); *State v. Flores*, 2015-NMCA-081, ¶ 37, 355 P.3d 81, *cert. denied*, 2015-NMCERT-008, 369 P.3d 368 (holding that thirty-six months of negligent and administrative delay attributable to the State in a case with a presumptively prejudicial period of eighteen months supported a speedy trial violation without a particularized showing of prejudice). While we remain mindful that the State bore the burden of bringing Defendant to trial and, moreover, that the right at issue is a fundamental constitutional right, we do not weigh fourteen months and three weeks of negligent and administrative delay heavily against the State. Therefore, given that Defendant did not demonstrate particularized prejudice, we affirm the finding of the district court and hold that Defendant's right to a speedy trial was not violated. *See Garza*, 2009-NMSC-038, ¶ 39 (stating that only when the length of and reasons for delay weigh heavily against the state and the defendant adequately asserts the right to a speedy trial and does not acquiesce to delay, is a defendant able to successfully assert a speedy trial violation without a showing of particularized prejudice).

II. ADMISSION OF THE EXHIBIT

{35} The district court admitted two training mode receipts into evidence as an exhibit. Each training mode receipt was created on a register belonging to the store and consisted of a list of prices for merchandise summed to a total amount. Defendant argues that the district court's admission of the exhibit violated both the rules of evidence and the Confrontation Clause of the Sixth Amendment of the United States Constitution. We examine Defendant's arguments in turn.

A. Hearsay

{36} We review the admission of evidence under the evidentiary rules for an abuse of discretion. *State v. Branch*, 2010-NMSC-042, ¶ 9, 148 N.M. 601, 241 P.3d 602, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110. The district court abuses its discretion when a ruling "is clearly against the logic and effect of the facts and circumstances of the case." *State v. Largo*, 2012-NMSC-015, ¶ 22, 278 P.3d 532 (internal quotation marks and citation omitted). "When there exist reasons both supporting and detracting from a [district] court decision, there is no abuse of discretion." *State v. Moreland*, 2008-NMSC-031, ¶ 9, 144 N.M. 192, 185 P.3d 363 (internal quotation marks and citation omitted).

{37} Defendant contends that the exhibit was inadmissible hearsay and therefore, its admission was an abuse of discretion. The district court ruled that the exhibit was admissible under the hearsay exception for records of regularly conducted activity.

{38} "Hearsay is an out-of-court statement offered to prove the truth of the matter asserted." *State v. King*, 2015-NMSC-030, ¶ 24, 357 P.3d 949 (internal quotation marks and citation omitted); *see also* Rule 11-801(C) NMRA. Hearsay is inadmissible unless it falls within an exception. Rule 11-802 NMRA. One such exception is the admission of records of regularly conducted activity, Rule 11-803(6) NMRA, also known as the "business records exception." *State v. Cofer*, 2011-NMCA-085, ¶ 9, 261 P.3d 1115 (noting that the exception for records of regularly conducted activity is also known as the "business records exception"). Pursuant to Rule 11-803(6), evidence is admissible if it is

> [a] record of an act, event, condition, opinion, or diagnosis if
>
> (a) the record was made at or near the time by—or from information transmitted by—someone with knowledge,
>
> (b) the record was kept in the course of a regularly conducted activity of a business, institution, organization, occupation, or calling, whether or not for profit,
>
> (c) making the record was a regular practice of that activity, and
>
> (d) all these conditions are shown by the testimony of the custodian or another qualified witness, . . . [unless] the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

{39} The State laid the following foundation for admission of the exhibit through Davidson's testimony. Police officers retrieved merchandise from Defendant's partner and Defendant's car. The police officers gave the recovered merchandise to Davidson. Because Davidson was not trained to use the store register, he enlisted the help of a customer service manager to scan the merchandise. Under Davidson's supervision, the customer service manager scanned the items provided by Davidson into the store's computer system using one of the store's sales registers. In order to scan the merchandise without affecting the store's inventory count, the customer service manager operated the sales register in training mode. The sales register training mode was used by the store both to train cashiers and also to create price lists of merchandise in response

to a shoplifting event, as in this case. Davidson stated that in training mode, the register uses the same pricing database used by the store to scan and price merchandise for purchase. Over two sessions, two lists of prices were generated and each list was automatically summed to a total. The purpose of creating the price lists was not only preparation for prosecution, but also for the internal use of the store in the store's case management system, in which the store keeps track not only of shoplifting incidents, but also incidents unrelated to crime.

{40} Over the objection of Defendant, the district court admitted the exhibit consisting of the two price lists. On appeal, Defendant contends that the price lists should have been excluded because they failed to meet the requirement under Rule 11-803(6) that a record be kept in the course of regularly conducted activity and that the State did not provide evidence that the computer system was reliable. Defendant argues that the lists were made in response to the shoplifting event and were made primarily for the purpose of prosecution. The State argues that whether the price lists were made for the purpose of prosecution is not dispositive and that, instead, the crux of the issue is whether the underlying data was kept in the course of regularly conducted activity.

{41} We agree with the State that the focus of our analysis is the relevant data—here, the pricing information—not the fact that the printout of the pricing data was made for trial. The price lists established store prices for the scanned merchandise. The price data was kept in the store's computerized database for the purpose of pricing their merchandise. Evidence was not presented that the database itself was not reliable to generate the store's prices for the scanned merchandise. *See Roark v. Farmer's Group, Inc.*, 2007-NMCA-074, ¶ 32, 142 N.M. 59, 162 P.3d 896 (noting that "the burden of establishing lack of trustworthiness is on the party opposing admission"). The fact that the documents that comprised the exhibit, composed of data kept in the ordinary course of business, were created with an eye toward prosecution does not render the exhibit inadmissible. *See United States v. Yeley-Davis*, 632 F.3d 673, 680-81 (10th Cir. 2011) (holding that an exhibit composed of authenticated cell phone records, created solely at the request of law enforcement for use in a prosecution, qualified as a business record under the federal business records exception); *United States v. Burgos-Montes*, 786 F.3d 92, 119 (1st Cir. 2015) ("[E]xhibits showing selected data pulled from records that a company keeps in the ordinary course of business fall under the business records exception, even if the physical exhibits themselves were made to comply with a request from law enforcement.").

{42} Defendant argues additionally that Davidson was "not . . . familiar with the workings of th[e] computer[,]" and "did not testify that he knew how the computer records (records of price in this case) are created and maintained." Although we suppose this argument is directed at Rule 11-803(6)(d), which, in relevant part, predicates qualification as a record of regularly conducted activity on testimony by "the custodian or other qualified witness," Defendant's argument is significantly underdeveloped. For the purpose of review, we will not guess at what Defendant's argument might be as to how the district court abused its discretion. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("[Appellate courts] will not review unclear arguments, or guess at what a party's arguments might be." (alteration, internal quotation marks, and citation omitted)). To fully review Defendant's argument, we would have to develop it ourselves, which creates substantial risk of error, *see id.*, and "would also be unfair to the opposing party—in this case, the [s]tate—that is not afforded an opportunity to fully develop an opposing argument." *State v. Murillo*, 2015-NMCA-046, ¶ 17, 347 P.3d 284. However, with regard to Davidson's knowledge of the store's computerized pricing system, we note that he testified that he participated in the creation of approximately 650 similar documents over approximately seven years, the register used was also used to price merchandise for sale, scanning merchandise in the training mode gave the true price of an item, and merchandise from other stores would not have scanned into the store's database. We decline to hold that the district court abused its discretion on the basis of Defendant's fragment of an argument on this point.

{43} We conclude that the admission of the price lists as a record of the store prices of the scanned merchandise pursuant to Rule 11-803(6) was not contrary to the logic and effect of the facts and circumstances of the case. We therefore hold that the district court did not abuse its discretion in admitting the exhibit. *See Largo*, 2012-NMSC-015, ¶ 22 (stating that the district court abuses its discretion when a ruling "is clearly against the logic and effect of the facts and circumstances of the case" (internal quotation marks and citation omitted)).

B. Confrontation Clause

{44} Defendant also makes a Confrontation Clause argument. Defendant argues that it was not sufficient to confront Davidson about the creation of the price lists and that Defendant had an unmet right to confront the customer service manager who performed the scans. We review de novo a challenge made pursuant to the Confrontation Clause. *State v. Lasner*, 2000-NMSC-038, ¶ 24, 129 N.M. 806, 14 P.3d 1282.

{45} The Confrontation Clause of the United States Constitution guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. amend VI. This is interpreted to mean that a defendant has the "right to confront those who bear testimony against him." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009) (internal quotation marks and citation omitted). A statement is "testimonial if the declarant made the statement primarily intending to establish some fact with the understanding that the statement may be used in a criminal prosecution." *State v. Navarette*, 2013-NMSC-003, ¶ 8, 294 P.3d 435. Pursuant to the Confrontation Clause, "an out-of-court statement that is both testimonial and offered to prove the truth of the matter asserted may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant." *State v. Smith*, 2016-NMSC-007, ¶ 42, 367 P.3d 420 (internal quotation marks and citation omitted).

{46} The merchandise price lists were not testimonial because the underlying price data was not prepared for litigation but, instead, kept in the ordinary course of business. *See Melendez-Diaz*, 557 U.S. at 324 ("Business . . . records are generally admissible absent confrontation . . . because[,] . . . having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial[,] they are not testimonial."). However, the selection of merchandise to scan was testimonial. The selection of merchandise to scan was intended to prove—by inference after scanning to obtain store prices—the value of the merchandise taken by Defendant.

{47} Defendant had an opportunity to

confront those who offered testimony against him about the merchandise that was scanned. Live testimony was provided by a police officer that the merchandise was gathered and given to Davidson. Davidson testified that he received the items from the police. Davidson testified that he handed each item received from the police to the customer service manager to scan and supervised the scanning of each item. Defendant was thus provided with the opportunity to confront the witness providing the testimonial statement establishing the fact used against him—i.e., the selection of the merchandise to be priced.

{48} Another approach to Defendant's argument is to analyze whether the customer service manager's act of scanning the merchandise given to her by Davidson and printing the resulting price lists was testimonial, triggering the right to cross-examine her about the creation of the price lists. We conclude that her act of scanning the merchandise and printing out the resulting price lists was not testimonial. This case is dissimilar to *Bullcoming v. New Mexico*. 564 U.S. 647, (2011). In *Bullcoming*, the United States Supreme Court held that the testimony of a surrogate analyst without personal knowledge of the defendant's test could not serve as a substitute for the in-court testimony of the analyst that undertook a scientific interpretation of a gas chromatography test that required adherence to good analytical practices and entailed the possibility for human error at "each step." *Id*. at 2711 n.1, 2713. We distinguish *Bullcoming* for two interrelated reasons. First, the work performed by the customer service manager produced raw data and, therefore, she did not make an affirmation. According to Davidson's testimony, the customer service manager was required to set the sales register to training mode, but beyond that, the process was either performed by computer (the pricing and sums of the scanned merchandise) or rote (the scanning). Unlike the gas chromatography analyst in *Bullcoming* who made representations "not revealed in raw, machine-produced data," the price lists resulting from the scanning performed by the customer service representative entailed no representations by the customer service manager. *See id.* at 2714 (stating that the representations of "past events and human actions not revealed in raw, machine-produced data" by the original analyst triggered a right to confront him and not a surrogate without personal knowledge of the test performed); *id.* at 2722 (Sotomayor, J., concurring in part) ("[*Bullcoming*] is not a case in which the [s]tate introduced only machine-generated results."). Second, the scanning was entirely supervised by Davidson, who provided live testimony and was cross-examined. In *Bullcoming*, an analyst with personal knowledge was replaced in court by a surrogate analyst without any personal knowledge of the defendant's test. *Id.* at 2711-12. By contrast, Davidson had personal knowledge of the creation of the price lists. *See id*. at 2722 (Sotomayor, J., concurring in part) ("[*Bullcoming*] is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue."). Unlike the New Mexico Supreme Court in *Bullcoming*, the district court in this case did not permit the testimonial statement of one witness to enter into evidence through testimony in court of another because, unlike *Bullcoming*, the witness who did not testify did not make an independent testimonial statement. *See id*. at 2713 (stating that the error of the New Mexico Supreme Court was allowing the testimonial statement of one witness—the original lab analyst—to enter into evidence through testimony in court of another—the surrogate lab analyst). We conclude that Defendant's right to confront the witnesses against him did not include the customer service manager who scanned the merchandise given to her by Davidson and performed her task under Davidson's direct supervision.

{49} For the reasons stated, we hold that the Confrontation Clause was not violated.

III. EXCLUSION OF THE WITNESS

{50} Defendant contends that the district court committed reversible error when it declined to grant Defendant's motion to exclude Davidson. We review the district court's decision not to exclude Davidson for an abuse of discretion. *See State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25 (stating that the decision to impose sanctions for a discovery order violation rests within the discretion of the court).

{51} On May 14, 2013, Defendant informed the district court that Davidson missed a pretrial interview scheduled for May 2, 2013. Davidson had left his employment, and the State no longer knew how to locate him. The district court ordered that the interview take place by June 13, 2013. That order provided that the June 13, 2013, deadline would be extended only for good cause and that Davidson would be excluded as a witness if the deadline was missed. On May 30, 2013, the State informed counsel for Defendant that Davidson had been located and asked whether Defendant would like to set up an interview. Counsel for Defendant timely provided two potential interview dates. The State did not respond to Defendant until June 13, 2013, which was after the potential interview dates had passed. The State then offered to set up the interview sometime in July. Rather than set up the interview for July, Defendant filed a motion to exclude on June 24, 2013. On July 23, 2013, the district court heard and denied the motion without prejudice. The district court extended the deadline and ordered that the interview take place within two weeks. The interview took place on August 1, 2013, which was within the extended deadline of the district court.

{52} Exclusion of an essential witness is a severe sanction to be used only in extreme cases. *Id*. ¶ 21. "The trial court . . . should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible." *Id*. ¶ 16 (omission in original) (internal quotation marks and citation omitted). ("[T]he refusal to comply with a district court's discovery order only rises to the level of exclusion or dismissal where the [s]tate's conduct is especially culpable, such as where evidence is unilaterally withheld by the [s]tate in bad faith, or all access to the evidence is precluded by [s]tate intransigence." *Id.* ¶ 17. In the absence of an "intentional refusal to comply with a court order, prejudice to the opposing party, and consideration of less severe sanctions[,]" exclusion of a witness is improper. *Id.* ¶ 15.

{53} The district court did not abuse its discretion when it denied without prejudice Defendant's motion to exclude Davidson. At the time of the hearing on the motion, the trial was more than one month away. The State had already offered to set up the interview in July, thus demonstrating good faith. In the end, the interview was conducted, and, eventually, the trial was continued for more than three months at Defendant's request. The record does not suggest that Defendant was unable to effectively use the information from the interview at trial. *See id.* ¶ 20 (stating that when disclosure is delayed, exclusion is not proper when the defendant's counsel has not been prevented from using the material effectively). Under those circumstances, we conclude that this case falls considerably short of the standard for exclusion.

IV. CROSS-EXAMINATION OF DEFENDANT ABOUT CONDUCT RELATED TO DEFENDANT'S CONDITIONAL DISCHARGE

{54} Defendant filed a motion in limine seeking to exclude reference to Defendant's prior criminal record pursuant to Rules 11-401, 11-403, and 11-609 NMRA. Specifically, Defendant sought to exclude reference to a case in which Defendant pleaded guilty to larceny and criminal damage to property and was granted a conditional discharge. The district court excluded reference to Defendant's criminal case. However, the district court allowed cross-examination of Defendant about the underlying conduct to the extent that it was probative of truthfulness or untruthfulness, pursuant to Rule 11-608(B) NMRA. The district court ruled that the State could not introduce extrinsic evidence, but, instead, was bound by Defendant's answers. Defendant chose not to testify. On appeal, Defendant argues that the district court improperly ruled that Defendant could be cross-examined about conduct probative to his character for truthfulness related to the underlying case for which Defendant received a conditional discharge. We review the decision of the district court to admit or exclude evidence for an abuse of discretion. *State v. Guerra*, 2012-NMSC-014, ¶ 36, 278 P.3d 1031.

{55} Pursuant to Rule 11-608(B)(1), cross examination about specific instances of conduct probative of the witness's character for truthfulness is generally admissible, although extrinsic evidence is not admissible. This includes a defendant who chooses to testify. *See State v. Casillas*, 2009-NMCA-034, ¶ 43, 145 N.M. 783, 205 P.3d 830 (stating that a defendant can be cross-examined on conduct not resulting in a criminal conviction that is probative of truthfulness or untruthfulness). The ruling of the district court was a relatively straightforward application of Rule 11-608(B)(1). Defendant argues that his guilty plea that resulted in a conditional discharge did not equate to a conviction. That does not change the result under Rule 11-608(B) in Defendant's favor. We hold that the district court did not abuse its discretion in ruling that Defendant could be cross-examined on specific instances of conduct related to Defendant's conditional discharge to the extent that the conduct was probative of Defendant's character for truthfulness. *See* Rule 11-608(B) (stating that a court may allow cross-examination regarding specific instances of conduct not resulting in a criminal conviction that are probative of the witness's character for truthfulness).

V. SUFFICIENCY OF THE EVIDENCE

{56} Defendant argues that his conviction for felony shoplifting pursuant to Section 30-16-20(A),(B)(3) was not supported by sufficient evidence. Specifically, Defendant argues that the value of the merchandise was not more than $500, a required element. *See* § 30-16-20(B)(2),(3) (stating that shoplifting merchandise with a value of more than $250 and not more than $500 is a misdemeanor but shoplifting merchandise of more than $500 and not more than $2500 is a fourth degree felony). Defendant contends that "[s]ome of the videos [used to determine the value shoplifted] were from another store."

{57} When reviewing a sufficiency of the evidence claim on appeal, we ask whether the evidence is such that, when viewed "in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict[,] . . . a rational jury *could* have found beyond a reasonable doubt the essential [elements] required for a conviction." *State v. Astorga*, 2015-NMSC-007, ¶ 57, 343 P.3d 1245 (internal quotation marks and citations omitted).

{58} The jury received evidence in the form of testimony and a store-generated training receipt that the value of the merchandise recovered from Defendant and his accomplice was $556.39, without tax. There was testimony that only items from that store would have scanned into the proprietary database, and that items from another store would not have registered a value in the store's database. On the basis of the foregoing evidence, we conclude that a rational jury could have concluded beyond a reasonable doubt that all of the merchandise on the price lists belonged to the store from which Defendant was accused of shoplifting and that the value of the items on the price lists was the value of that merchandise. Therefore, the State introduced sufficient evidence to convict Defendant of shoplifting of merchandise with a value of more than $500. *See id.* (stating that sufficient evidence exists where a rational jury could have found beyond a reasonable doubt all necessary elements to convict).

CONCLUSION

{59} For the reasons stated, we affirm Defendant's convictions.

{60} IT IS SO ORDERED.

STEPHEN G. FRENCH, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
LINDA M. VANZI, Judge

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16-17-005
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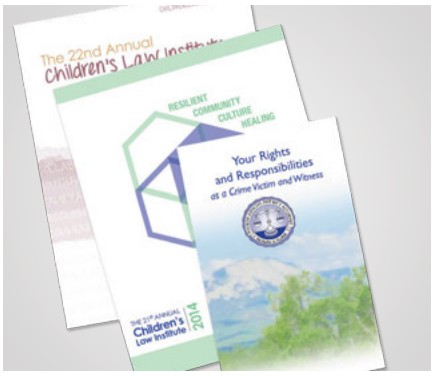

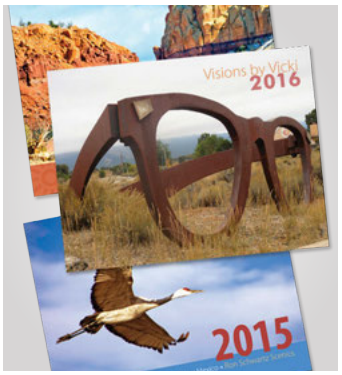

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