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2005-NMCA-027: State v. Eric Patrick Morales

Special Insert:

CLE AT SEA 2005
State Bar of New Mexico Annual Meeting

“Back to the Basics: Building Blocks for a Better Practice”

Ruidoso Convention Center
Ruidoso, NM

Save the Dates - September 22-24, 2005

Hotel Blocks:

Inn of the Mountain Gods
287 Carrizo Canyon Road
(800) 545-9011
($149 - $179)

Holiday Inn Express
400 W. Highway 70
(800) 465-4329 or (505) 257-3736
($79.95)

Hawthorn Suites
107 Sierra Blanca Dr.
(866) 211-7727
($109 - $129)

Swiss Chalet Inn
1451 Mechem Drive
(800) 477-9477 or (505) 258-3333
($65)

Comfort Inn of Ruidoso
2709 Sudderth Drive
(866) 859-5146 or (505) 257-2770
($89.99 to $109.99)

Condotel Corp.
(For condo, cabin and house rentals)
Cindy or Susie (800) 545-9017
(rates from $120/night)

(Be sure to mention State Bar of New Mexico Room Block to receive the group rate.)

For exhibitor and sponsorship information, please contact Mary Patrick at (505) 797-6059.
The KOB LawLine 4 Call-In is regularly scheduled for the third Wednesday of each month. The hours are 5:00 p.m. until 7:30 p.m. We do not schedule a session in December.

PLEASE CONSIDER SIGNING UP NOW SO YOU CAN CALENDAR YOUR PARTICIPATION. This is a tentative commitment: someone will call you 10 days to 2 weeks in advance of each scheduled date to confirm the date, time and your continued ability to participate.

*******************************

(Check the box after the DATES AND TIMES you want to sign up for)

<table>
<thead>
<tr>
<th>April 20</th>
<th>5:00 – 7:30 p.m.</th>
<th>August 17</th>
<th>5:00 – 7:30 p.m.</th>
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<td>May 18</td>
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<td>September 21</td>
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<td>June 15</td>
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<td>October 19</td>
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<td>July 20</td>
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<td>November 16</td>
<td>5:00 – 7:30 p.m.</td>
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NAME: _____________________________ PHONE: _____________________________

I have some questions. Please call me at: ________________________________________

I have an attorney associate/ friend/ acquaintance that might be interested in participating. Call ____________________________

(Name)     (Telephone Number)

You may use my name as a reference:     DO NOT use my name as a reference:

PLEASE RETURN TO: Richard Spinello
                    Director, Public & Legal Services Department
                    State Bar of New Mexico
                    P.O. Box 92860
                    Albuquerque, NM 87199-2860

OR FAX TO: 505 797-6074
MARCH

24
Cashing Out: Six Ways Business Owner Clients Can Sell Their Businesses
Thursday, March 24, 2005 • Luncheon (provided): 11:30 a.m. to Noon, CLE Workshop: Noon to 1:30 p.m.
State Bar Center, Albuquerque • 1.8 General CLE Credits

Co-Sponsor: Business Law Section
Presenter: Darrel Arne, CPA
This 90-minute workshop will be presented by a CPA, business appraiser and business intermediary who specializes in business owner transfers to privately held business owners. In this presentation, business lawyers will be provided a framework which they can use in advising their business owner clients about selling their businesses. Discussion will include a business owner's wealth accumulation life cycle, the four key elements to growing a business to maximize its value, the right and wrong timing for selling a business, the levels of value for different buyers, and some of the advantages, disadvantages and specific exit strategies for various sale or transfer options. The workshop will be preceded by a luncheon co-sponsored by the Business Law Section.
☐ Standard and Non-Attorney $59  ☐ Government & Paralegal $49
☐ Business Law Section Member $49

30
2005 Professionalism
Lawyers Concerned for Lawyers
Substance Abuse and Addiction
Issues in the New Mexico Legal Community
Wednesday, March 30, 2005 • 10 a.m. • Video Replay
State Bar Center, Albuquerque

2.0 Professionalism CLE Credits

Co-Sponsor: SBNM Commission on Professionalism
SBNM Lawyers Assistance Committee Members: William K. Stratvert, Chair, Briggs F. Cheney, Hon. William F. Lang, 2nd Judicial District Court, Sally E. Scott-Mullins, Jaclyn Sinclair, William E. Snead, Jill Anne Yeagley
Commission on Professionalism: Jan Gilman-Tepper, Chair and Karen Mendenhall
UNM School of Law: Suellen Scarneccia, Dean

The 2005 Commission on Professionalism course, LAWYERS CONCERNS FOR LAWYERS: Substance Abuse and Addiction Issues in the New Mexico Legal Community will focus on the serious issue of addiction and substance abuse. Over 15 million Americans suffer from the disease of alcoholism -- roughly 10 percent of the general population. The percentage of professional men and women, including lawyers and judges who are chemically dependent, appears to be even higher with estimates as high as 15 to 20 percent for attorneys.

The 2005 Commission on Professionalism program will feature justices of the New Mexico Supreme Court and members of the State Bar’s Lawyers Assistance Committee in an informative and broad look at substance abuse. Participants will also receive a perspective from the UNM School of Law and the Disciplinary Board. The program will give participants the tools necessary to help identify abuse and addiction problems, address confidentiality issues, provide resources for how to handle such situations and offer guidance to those who may be suffering through an illness.

Additional Dates for Professionalism Replays:
April 13, April 27, May 11, May 25
☐ Standard Fee $59

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.
(Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours
INTERNET: www.nmbar.org click CLE, then Educational Programs
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Name ____________________________
NM Bar # __________________________
Street ____________________________
City/State/Zip ______________________

Phone _______ Fax _______

Email ____________________________

Program Title ______________________
Program Date ______________________
Program Location ____________________
Program Cost ______________________
☐ Purchase Order (Must be attached to be registered)
☐ Check enclosed $
Make check payable to CLE of the SBNM
☐ VISA  ☐ MC  ☐ American Express  ☐ Discover
Credit Card # ______________________
Exp. Date __________________________
Authorized Signature __________________

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* Professionalism Tip *

With respect to opposing parties and their counsel:

I will refrain from excessive and abusive discovery, and I will comply with reasonable discovery requests.

Meetings

March
22
Solo and Small Firm Practitioners Section Board of Directors, 11:30 a.m., noon, State Bar Center

22
Technology Utilization Committee, 4 p.m., State Bar Center

22
Paralegal Division Board of Directors, 5 p.m., State Bar Center

23
Membership Services Committee, noon, via teleconference

23
Law Office Management Committee, 12:30 p.m., State Bar Center

24
Senior Lawyers Division Board of Directors, 4:30 p.m., State Bar Center

29
Children’s Law Section Board of Directors, noon, Juvenile Justice Center

State Bar Workshops

March
22
Lawyer Referral for the Elderly Workshop, 10 a.m., Jemez Valley Community Center, Jemez Pueblo

23
Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center

23
Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces

24
Consumer Debt/Bankruptcy Workshop*, 5:30 p.m., Branigan Library, Las Cruces

31
Consumer Debt/Bankruptcy Workshop*, 6 p.m., City Commission Chambers, Truth or Consequences

April
11
Lawyer Referral for the Elderly Workshop, 10 a.m., Laguna Rainbow, Laguna Pueblo

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227; or visit the SBNM Web site, www.nmbar.org.
NOTICES

COURT NEWS

NM Supreme Court
Judicial Performance Evaluation Commission
Surveys

The Judicial Performance Evaluation Commission (JPEC) was created by the New Mexico Supreme Court to evaluate the performance of appellate, district and metropolitan court judges standing for retention in New Mexico. The commission’s work in 2005 focuses on the interim evaluations of district court judges. The results of the interim will not be shared with the public since the primary objective of the interim evaluation is self-improvement. A final evaluation is planned for 2008. These results will be released to the public at least 45 days before the November 2008 general election. Because of the large number of District Court Judges, the interim evaluations will be done in two phases. Phase I includes the judges in the Third, Fifth, Sixth, Ninth, Tenth, Eleventh and Twelfth Judicial Districts. Phase II includes the judges in the First, Second, Fourth, Seventh, Eighth and Thirteenth Judicial Districts.

Lawyers who appeared before the PHASE II judges between January 1, 2004 and December 31, 2004 will receive a questionnaire to complete starting the week of April 1. The JPEC would like to see the response rates increase from attorneys with direct experience with the judges. Attorneys are asked to take the time to complete and return the questionnaire. The questionnaires are returned to Research & Polling, Inc., consultant to the JPEC. Research & Polling aggregates the results for the JPEC by population group (lawyers, jurors, court staff, and resource staff). The JPEC does not see individual results. The comments are retyped and submitted to the JPEC for review and not provided to the judges. Research & Polling destroys the individual responses. Thus, the JPEC does not know who completed the survey.

Questions should be directed to Felix Briones, Jr., Chair of the Judicial Performance Evaluation Commission, (505) 325-0258.

First Judicial District Court

Destruction of Exhibits

Pursuant to the Supreme Court Retention and Disposition Schedule, the First Judicial District Court will destroy exhibits filed with the court, in criminal, civil, children’s court, domestic, incompetency/mental health and probate cases for years 1970 to 1987. Counsel for parties are advised that exhibits can be retrieved through April 9. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by order of the court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by order of the court.

Second Judicial District Court

Children’s Court Monthly Judges’ and Managers’ Meeting

The Second Judicial District Children’s Court will hold its monthly judges’ and managers’ meeting at noon, April 5 in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, Albuquerque. Children’s Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. For a copy of the meeting agenda, call (505) 841-7644.

Destruction of Exhibits

Pursuant to the Judicial Records Retention Disposition Schedules, the Second Judicial District Court will destroy tapes filed with the Court in Criminal cases for years 1978 to 1982, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and wish to have duplicates made should verify tape information with the Special Services Division, (505) 841-6717, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after March 24, 2005.

Family Court Open Meetings

Second Judicial District Family Court judges will hold open meetings to discuss ongoing concerns and projects at noon on the first business Monday of each month in the Conference Center located on the third floor of the Bernalillo County Courthouse. The next regular meeting will be held on April 4. Contact Sandra Partida, (505) 841-7531, for more information or to have an item placed on the agenda.

Mailing Procedures

The Second Judicial District Court receives a large volume of mail every day simply addressed to Clerk of the Court, Juanita M. Duran, or Second Judicial District Court. This mail has to be opened and sorted before it can be routed to the proper clerk’s division. In order to expedite processing of paperwork and insure it is delivered to the correct division, follow one of these sample addresses when mailing in paperwork or requests:

ATTN: Civil (or whatever case category)
Second Judicial District Court
PO Box 488
Albuquerque, NM 87103
or
ATTN: Civil (or whatever case category)
Second Judicial District Court
400 Lomas Blvd. NW
Albuquerque, NM 87102
Children’s Court cases should be mailed to:
Children’s Court
5100 2nd St. NW
Albuquerque, NM 87107
Case Categories:
Civil (CV, PB, PQ, SL, MS)
Foreclosure, student loans, name changes, license restoration, probate, personal injury, property damage, malpractice, civil restraining orders
Criminal (CR, ER, LR, CS, SW)
Criminal, extractions, lower court appeals, search warrants
Domestic Relations (DR, DV)
Divorce, custody, paternity, child support, domestic violence restraining orders
Children’s Court (JR, YR, JV, JQ, SA, SQ, SI, JS)
Juvenile delinquent, youthful offender, emancipation, kinship, guardianship, abuse and neglect, termination of parental rights, adoptions (minors and adults), mental health

**Notice to Attorneys**

Effective March 21, Judge Clay Campbell will be assigned to Division XII of the Civil Court and will assume all civil cases formerly assigned to Judge Wendy York. Parties who have not previously exercised their right to challenge or excuse will have ten days from March 21 to challenge or excuse the new judge pursuant to Supreme Court Rule 1-088.1.

**STATE BAR NEWS**

**Attorney Support Group Monthly Meeting**

The next Attorney Support Group meeting will be held at 5:30 p.m., April 4 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month.

For more information, contact Bill Stratvert, (505) 242-6845.

**Bankruptcy Law Section Sixth Annual Golf Outing**

The State Bar Bankruptcy Law Section will host the sixth annual golf outing at 12:30 p.m., May 6 at Four Hills Country Club, Albuquerque. The cost of $65 includes: a round of golf and cart and hors d’oeuvres. A cash bar will also be available.

Non-golfing section members are encouraged to attend the reception following the tournament at 5 p.m., also at the Four Hills Country Club, 911 Four Hills Rd. SE, Albuquerque. For more information or to register, contact Gerald Velarde, (505) 248-1828 or jerryvelarde@hotmail.com. Reservations must be made by May 2. Participants must provide their own golf clubs.

**Employment and Labor Law Section Board Meetings Open to Section Members**

The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be April 6. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Cindy Lovato-Farmer, section chair, (505) 667-3766.

**Paralegal Division Brownbag CLE**

Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., April 13 at the State Bar Center. Registration begins at 11:30 a.m. and the cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. The topic for this month’s CLE is “Internet Legal Research: Find it Fast in 2005”, presented by Ronald Wheeler, the UNM Law School librarian. For more information, contact Debi Shoemaker-Scott, (505) 243-1443.

**Pro Hac Vice**

The New Mexico Supreme Court has established a new rule for practice by non-admitted lawyers before state courts (Pro Hac Vice). The new Rule 24-106 NMRA, is effective for cases filed on or after Jan. 20, 2005. Attorneys authorized to practice law before the highest court of record in any state or territory wishing to enter an appearance, either in person or on court papers, in a New Mexico civil case should consult the new rule. This rule requires non-admitted lawyers to file a registration certificate with the State Bar of New Mexico, file an affidavit with the court and pay a nonrefundable fee of $250. Fees collected under this rule will be used to support legal services for the poor. For more information on the rule, a copy of the registration certificate and sample affidavit, please go to www.nmbar.org. For questions about compliance with the rule, please contact Richard Spinello, Esq., Director of Public and Legal Services, State Bar of New Mexico, (505) 797-6050, (800) 876-6227, or rspinello@nmbar.org.

**Public Law Section Board Meeting**

The next Public Law Section board meeting will be held at noon, April 14 in the Risk Management Division Legal Bureau Conference Room on the first floor of the Montoya Building, 1100 St. Frances Dr., Santa Fe. Contact Deborah Moll, (505) 827-2000, for more information.

**Young Lawyers Division 2005 Summer Fellowship**

The Young Lawyers Division (YLD) of the State Bar is currently accepting applications from law students interested in working in public interest law or the government sector during the summer of 2005. The purpose of the fellowship is to enable one law student to work in public interest law or the government sector in an unpaid legal position. The fellowship award is intended to provide the opportunity for a law student to work in a position that might not otherwise be possible because the position is unpaid. The fellowship award, depending on the circumstances of the position, could be up to $3,000 for the summer.

To be eligible for the fellowship, the applicant must be a current law student in good standing. Applications for the fellowship must include the following: a letter of interest from the applicant that details the student’s interest in public interest law or the government sector; a resume of the applicant; and a written offer of employment to the applicant for an unpaid legal position in public interest law or the government sector for the summer of 2005. Applications must be submitted to the following address: J. Brent Moore, YLD Summer Fellowship Coordinator, Office of General Counsel, New Mexico Environment Department, 1190 St. Francis Dr., Suite N-4050, Santa Fe, New Mexico 87505.

Applications must be postmarked by March 31. Any questions regarding the fellowship should be directed to J. Brent Moore at (505) 476-3783.

**Brownbag Lunch**

The Young Lawyers Division will sponsor a Brownbag Lunch at noon, March 24, in the third floor conference room of the Second Judicial District Courthouse. The topic of the event will be “The Do’s and Don'ts of Practicing in the Second Judicial District Court.” Food will be provided and space is limited so attorneys are asked to R.S.V.P. by March 18 to Briana Zamora, (505) 884-0777, or bhzamora@btlaw.com.

**OTHER BARS**

**National Lawyers Guild Southwest Regional Conference**

Join the members of the National Lawyers Guild for their Southwest Regional Conference April 1 to 3 in Albuquerque. The conference begins with an April Fool’s Day party beginning at 7 p.m., April 1. Panel presentations on April 2 will include: Current Developments in Immigration/
Developments in Immigration/Criminal Law; The Lawyer’s Role in Peace Building – How Lawyers Can Effectively Support the Peace Movement in Their Communities; The International Criminal Court and How to do International Human Rights Legal Work in Your Practice; Progressive Lawyering Tips: How to Find Progressive Lawyering Jobs; and Wounded Knee: Activists Who Were There Discuss What Happened and Why It’s Important to Remember it Today. For registration or for more information, contact Cindy Mars, (505) 262-1867, or cmarrs@flash.net.

Sandoval County Bar Association
March Monthly Meeting
The Sandoval County Bar Association will hold its next monthly meeting from noon to 1 p.m., March 24 at the Pasta Café Italian Grill, 3201 Southern Blvd. SE, Rio Rancho. The program will feature Teresa Berry, director of Mediation Programs for the 13th Judicial District. Anyone interested in attending should R.S.V.P. by close of business on March 22 to (505) 892-1050.

Tonali Legal Alliance of Women
The Tonali Legal Alliance of Women will hold its next meeting at noon, April 7 at the Casa Luna Restaurant, 1340 East Lohman Avenue, Las Cruces. Tonali is an association of women involved with the legal profession, including judges, lawyers, court staff, legal assistants, interpreters and educators. For more information, call Shari Allison, (505)527-6930.

OTHER NEWS
UNM Law Library
Spring Semester Hours
Hours through May 15:
Mon. – Thurs. 8 a.m. to 11 p.m.
Fri. 8 a.m. to 6 p.m.
Sat. 9 a.m. to 6 p.m.
Sun. noon to 11 p.m.
Reference:
Mon. – Thurs. 9 a.m. to 9 p.m.
Fri. 9 a.m. to 5 p.m.
Sat. noon to 4 p.m.
Sun. noon to 4 p.m.
Extended Exam Hours:
Apr. 30 8 a.m. to 10 p.m.
May 1 9 a.m. to 10 p.m.
May 7 8 a.m. to 10 p.m.

MCLE – mcle@nmbar.org ♦ www.nmmcle.org ♦ (505) 797-6015

2004 Annual Compliance Reports
2004 Annual Compliance Reports have been mailed to all active licensed New Mexico attorneys. The reports include all information for courses taken by 12/31/04.

All noncompliant attorneys are assessed a late compliance fee, and the invoice for payment of the fee is included with the Annual Report. Noncompliant attorneys must complete their requirements immediately. All fees assessed are due by 3/31/05. On April 1, 2005 a second late compliance fee will be assessed for those attorneys who continue to be in noncompliance.

Check your records online at www.nmmcle.org to ensure you have completed 2004 credit requirements, and to monitor your credits earned in 2005.

LEGAL SPECIALIZATION – ls@nmbar.org ♦ (505) 797-6015

Legal Specialization is a program of the New Mexico Supreme Court that identifies and certifies attorneys who can demonstrate compliance with certain standards in specific areas of law, including:

- Appellate Practice
- Bankruptcy (Business and Consumer)
- Employment and Labor Law
- Environmental Law
- Estate Planning, Trusts and Probate Law
- Family Law
- Natural Resources (Mineral, Oil & Gas, Water Law)
- Real Estate Law
- Taxation
- Trial Specialists – Civil Law
- Trial Specialists – Criminal Law
- Workers’ Compensation

THANK YOU to the Board of Legal Specialization and the Specialty Committee members. Their talent and effort makes this program possible.

For additional information regarding the Legal Specialization program including a list of Board Certified Specialists, go to www.nmbar.org > Other Bars/Legal Groups, use the Court Regulated Programs tab in the Bench and Bar Directory, or call (505) 797-6057.
Summer Law Clerk Program

University of New Mexico Law Students Get Unique Opportunity to Work at New Mexico Law Firms and Agencies

By Keith Thompson
Editor

For some it was their first professional interview, done nervously in a borrowed business suit, and for others, who entered law school later in life, it was seemingly old hat.

But for all of the 34 University of New Mexico School of Law students who turned up on a Saturday morning hoping to win one of 10 spots in the State Bar's Summer Law Clerk Program, it was a chance to begin a real-life journey into the practice of law in New Mexico.

The Summer Law Clerk Program was begun in 1992 with the goal of providing deserving students, who might not be in the top tier of their law school class, an opportunity for an internship with a large law firm or a governmental law department.

"Because academic standing is not the only indicator of potential success in the legal profession, the Summer Law Clerk Program provides law students with capable research and writing skills the opportunity to demonstrate the drive and excellence that law firms and agencies value most in making employment decisions," said Arturo Jaramillo, the superintendent of the New Mexico Regulation and Licensing Department, and the veteran chair of the Summer Law Clerk Program.

"The State Bar and its participating firms and agencies recognize that differences in the social, educational and economic backgrounds of individual law students can often create barriers to employment that have nothing to do with performance or the potential for success as an attorney," he said.

According to Edith Dunnington, Student and Graduate Services coordinator at the law school, the program gives students an invaluable opportunity to see how what they’ve been learning in their first year of law school applies to the real world of legal practice in New Mexico.

"It makes a big difference if they have an opportunity to work for a firm," she said. "This program is so great for (the students), because it’s for the ones who just need the ability to get in the loop."

With a history of success, the program is continually growing. The 34 applicants this year was well above the 20 or so usual applicants.

This year’s pool was large enough that the hiring firms’ representatives had to break into two small groups to conduct the interviews in one day – where they normally stay together as one group.

The application process is structured similarly to that of an actual job application and interview attorneys could expect when applying to a law firm.

Students must submit a written application and personal statement, their first semester transcripts, writing samples and recommendations. They must then sit through a 20-minute interview with a panel of hiring attorneys.

Once the representatives of the hiring firms have narrowed the pool of applicants down to the finalists, the future law clerk’s names are then placed in a hat and randomly selected by the hiring firms.

Although the interviews may be intimidating for the students, Jaramillo said the process is rewarding for the students, who benefit greatly from the experience, as well as for the firms’ representatives, who have the opportunity to meet highly diverse applicants. "It is by and large a highly satisfying experience for all of us," he said.

"I think that it’s a great program that gives law students a chance," said interviewer Jon Indall, an attorney with Comeau,
Maldegen, Templeman & Indall, LLP. “Last year we had a terrific clerk … and she did a super job.”

In addition to their firms benefiting from getting summer help from promising students, the interviews also gave the hiring attorneys a chance to meet the next generation of New Mexico attorneys.

According to the students, the advantages of the program outweigh the intimidating application process and the forfeit of a Saturday morning for a nerve-wracking interview.

“I’m interested in the program because it provides an opportunity for a first-year [student] to work with a large number of people and several of the largest firms in the state,” said Philip Morin, a law student who came to law school after having earned a Ph.D. in engineering. “First years don’t typically get that opportunity. This program gives an opportunity to people who might otherwise have a difficult time – even in their second year.”

The program has also benefited from word-of-mouth endorsements from previous participants.

Law student Nicholas Marshall said that he’s heard from other students who have participated in the program in the past that it is a wonderful experience. “They said its one of the best opportunities for a first-year student to get a job, especially in some of the big firms,” he said.

Although internships are nothing new to graduate students, the Summer Law Clerk Program is something most other law school students don’t get a chance to participate in.

“I’ve never seen it in any other school,” said Dunnington. “I’ve been with Career Services here for eight years and I’ve talked to people in other schools and they don’t have anything like this. This is a unique program.

“This is a terrific program because I’ve seen so many people go through it and grow so much,” she said.

Editors note: Private firms or government agencies that are interested in becoming an employer with the State Bar’s Summer Law Clerk Program should contact Arturo Jaramillo at (505) 827-4506.

2005 Summer Law Clerks
The following students were paired with the corresponding firm or agency for the 2005 State Bar of New Mexico Summer Intern Program:

<table>
<thead>
<tr>
<th>Student</th>
<th>Firm</th>
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<tbody>
<tr>
<td>Lucy Boyadjian</td>
<td>NM Regulation and Licensing Dept.</td>
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<tr>
<td>Justin Breen</td>
<td>City of Albuquerque</td>
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<td>Minerva Rios Camp</td>
<td>Butt, Thornton &amp; Baehr, PC</td>
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<td>Erin Ferreira</td>
<td>Freedman, Boyd, Daniels, Hollander,</td>
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<td>Goldberg, PA</td>
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<tr>
<td>Leigh Haynes</td>
<td>NM Regulation and Licensing Dept.</td>
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<tr>
<td>Shammara Henderson</td>
<td>Rodey, Dickason, Sloan, Akin &amp; Robb, PA</td>
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<tr>
<td>Elaine Lujan</td>
<td>Comeau, Maldegen, Templeman &amp; Indall, LLP</td>
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<td>Ramona Martinez</td>
<td>Jones, Snead, Wertheim &amp; Wentworth, PA</td>
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<td>Ocean Tama y Sweet</td>
<td>Montgomery &amp; Andrews, PA</td>
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<tr>
<td>Katherine Wray</td>
<td>Keleher &amp; McLeod, PA</td>
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Congratulations!

State Bar of New Mexico
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<th>Date</th>
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| 22   | DUI in New Mexico: Practical Problems and Possible Solutions | State Bar Center, Albuquerque Center for Legal Education of SBNM  
6.7 G  
(505) 797-6020  
www.nmbar.org |
| 22   | Junk Science or Scientific Evidence?                  | Teleconference TRT, Inc.  
2.4 G  
(800) 672-6253  
www.trtle.com |
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| 22   | The Financially Distressed Limited Liability Company: Substantive Legal and Tax Aspects | Teleseminar Center for Legal Education of SBNM  
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(505) 797-6020  
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| 30   | 2005 Professionalism: Lawyers Concerned for Lawyers    | VR - State Bar Center, Albuquerque Center for Legal Education of SBNM  
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| 30   | Ethics Excerpt from Effective Law Office Advertising, Technology Applications and Business Planning | VR - State Bar Center, Albuquerque Center for Legal Education of SBNM  
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(505) 797-6020  
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| 30   | Legal Ethics Updates                                   | Santa Fe TRT, Inc.  
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2.4 G  
(800) 672-6253  
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G = General  E = Ethics  P = Professionalism  VR = Video Replay
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# WRITS OF CERTIORARI

**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court

PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

**Effective March 16, 2005**

## Petitions for Writ of Certiorari Filed and Pending:

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<td>State v. Benally (COA 25,180)</td>
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WRITS OF CERTIORARI

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT
Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

EFFECTIVE MARCH 16, 2005

CERTIORARI GRANTED AND SUBMITTED:
(Submission = date of oral argument or briefs-only submission)

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PROPOSED REVISIONS TO THE RULES OF APPELLATE PROCEDURE

The Supreme Court is considering the following new rules. If you would like to comment on the proposed amendments set forth below, please send your written comments to:

Kathleen J. Gibson, Chief Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Comments must be received by April 8, 2005.

12-208. Docketing the appeal.  * * *
(No amendments are proposed for Paragraphs A through I.)

J. Failure to serve docketing statement. The district court shall conduct a monthly review of its docket to identify all criminal cases in which a notice of appeal has been filed, but the district court has not been served with a copy of a docketing statement or a statement of the issues. If a docketing statement or statement of the issues has not been served on the district court, the district court shall order appellant’s trial counsel within ten (10) days from the date of filing of the order:

(1) if a docketing statement or statement of appellate issues has been filed in the appellate court, but not served on the district court, serve a copy on the district court;

(2) if a docketing statement or statement of appellate issues was not filed in the appellate court and the appellant wishes to pursue the appeal, file a motion with the appellate court for an extension of time to file a docketing statement of the issues and serve a copy of the motion on the district court; or

(3) file a motion to dismiss the appeal and, when required, an affidavit pursuant to Rule 5-702 NMRA stating defendant’s decision not the appeal.

At the time of filing the order, the district court shall forward a copy of the order to the appellate court.

12-213. Briefs.  * * *
(No amendments are proposed for Paragraphs A, B and C.)

D. Supplemental briefs and authorities.

(1) Except for those briefs specified in this rule, no briefs may be filed without prior approval of the appellate court.

(2) When pertinent and significant authorities come to the attention of counsel after counsel’s brief has been filed, or after oral argument but before decision, counsel shall promptly advise the appellate court clerk, by letter [and without argument], with a copy to all counsel, setting forth the citations and attaching a copy thereto, if available. [There shall be a reference] The letter shall state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally to which the citations pertain. The body of the letter shall not exceed three hundred fifty words. Any response to a letter citing supplemental authorities shall be made within fifteen (15) days after the letter is sent. The body of such response shall not exceed three hundred fifty words.

(No amendments are proposed for Paragraphs E, F, G and H.)

12-505 Certiorari to the district court; decisions on review of administrative agency decisions.

A. Scope of rule. This rule governs review by the Court of Appeals of decisions of the district court:

(1) from administrative appeals pursuant to Rule 1-074 NMRA [and] or Section 39-3-1.1 NMSA 1978; and

(2) from constitutional reviews of decisions and orders of administrative agencies pursuant to Rule 1-075 NMRA.

(No amendments are proposed for Paragraphs B through J.)
In this case, we are asked to decide if restrictive covenants are considered property for purposes of eminent domain. Specifically, the question before this Court is whether Defendant Village of Los Lunas (Village) must compensate Plaintiffs Mondy Leigh and Sylvia Leigh (Leighs), owners of Tract 2 in a subdivision, based on the Village’s construction of a drainage pond on Tract 1 in violation of the restrictive covenants imposed on both properties. The Village additionally argues that the district court erred by admitting an appraiser’s report and challenges the sufficiency of the evidence for the damages award. We hold that the government is required to compensate for the diminution in value of the property benefitted by the restrictive covenants. We agree with the Village that the award was unsupported by the evidence; we therefore reverse the district court’s judgment and remand for recalculation of damages in accordance with this opinion.

I. BACKGROUND

1.  In 1995, the Leighs purchased Tract 2 for $21,000. Tract 2 is a lot in a subdivision containing five lots, all of which are subject to covenants restricting use of the land to residential purposes. There is no dispute that the restrictive covenants are valid and run with the land of all lots in the subdivision. The Village acquired Tract 1 for $30,000 for the purpose of constructing a storm drainage pond. The subdivision is located outside the Village, but it is undisputed that the Village may condemn property outside its boundaries “to protect its inhabitants from damage by flood waters.” Tract 1 is adjacent to the Leighs’ Tract 2. On September 26, 2000, the Village began construction of a storm drainage pond on Tract 1; the pond was substantially completed by February 14, 2001. No part of the storm drainage pond was built on the Leighs’ Tract 2.

2.  On January 19, 2001, the Leighs filed an action for damages against the Village, claiming breach of restrictive covenants, inverse condemnation, and trespass. The jury trial was limited to the breach of restrictive covenants and inverse condemnation claims. At the close of the Leighs’ case, the Village moved for judgment on the breach of restrictive covenants claim on the ground that inverse condemnation was the Leighs’ exclusive remedy; the motion was granted. Following trial, the district court entered judgment against the Village that the award was unsupported by the evidence without just compensation. The Village appealed this judgment and remanded for recalculation of damages in accordance with this opinion.

II. DISCUSSION

1.  This case relates to the power of eminent domain, under which a government may take or damage private property. City of Sunland Park v. Santa Teresa Servs. Co., 2003-NMCA-106, ¶ 43, 134 N.M. 243, 75 P.3d 843. This power is limited by the constitutional requirement that just compensation be paid to the owner of the property. Id.; see also N.M. Const. art. II, § 20; NMSA 1978, §§ 42A-1-1 to -33 (1981, as amended through 2001) (setting forth the procedure for condemnation). The usual procedure is for the appropriate governmental entity to condemn property it wishes to put to public use. See § 42A-1-2(C). When a property owner believes property has been taken or damaged by the government but no condemnation petition has been filed, the property owner may institute an inverse condemnation action against the condemnor for taking or damaging the property. See § 42A-1-29. The Leighs proceeded in their claim against the Village under this inverse condemnation provision.

A. Restrictive Covenant as a Compensable Property Right

1.  Article II, Section 20, of the New Mexico Constitution mandates that “[p]rivate property shall not be taken or damaged for public use without just compensation.” Whether the taking of a restrictive covenant falls within the constitution’s mandate presents a purely legal issue. As such, we review it de novo on appeal. See Fed. Express Corp. v. Abeyta, 2004-NMCA-011, ¶ 2, 135 N.M. 37, 84 P.3d
85 (stating that legal issues are reviewed de novo).

{6} The subdivision in question is known as the “Lands of Jayson Epstein,” Epstein being the owner who established and recorded restrictive covenants binding on all purchasers of his land and on their successors in interest. The portion of the covenant at issue specifies that “[n]o lot shall be used except for residential purposes.” The Village constructed a storm drainage pond on the lot but nevertheless asserts that the use of property by a public entity in contravention of a restrictive covenant does not result in a compensable taking under the New Mexico Constitution.

{7} Restrictive covenants are sometimes described as equitable easements or negative easements. Montoya v. Barreras, 81 N.M. 749, 751, 473 P.2d 363, 365 (1970) (stating that restrictions on the use of land are mutual, reciprocal, equitable easements in the nature of servitudes); Restatement (Third) of Prop.: Servitudes § 1.3 cmt. c, at 25 (2000) (referring to restrictive covenants as negative easements). It is well established in New Mexico that restrictive covenants in a subdivision’s general plan convey property rights in the lots burdened by the covenant. See Cunningham v. Gross, 102 N.M. 723, 725, 699 P.2d 1075, 1077 (1985) (stating that restrictive covenants “constitute valuable property rights of all lot owners therein”); Montoya, 81 N.M. at 751-52, 473 P.2d at 365-66 (“Where the covenants manifest a general plan of restriction to residential purposes, such covenants constitute valuable property rights of the owners of all lots in the tract.”); Gorman v. Boehning, 55 N.M. 306, 310, 232 P.2d 701, 704 (1951) (“A restrictive covenant is something of value to all lots in a tract . . . .”); Aragon v. Brown, 2003-NMCA-126, ¶ 10, 134 N.M. 459, 78 P.3d 913 (“[W]e have repeatedly recognized that reliance on restrictive covenants is a valuable property right.”); Wilcox v. Timberon Protective Ass’n, 111 N.M. 478, 485, 806 P.2d 1068, 1075 (Ct. App. 1990) (“Restrictive covenants . . . constitute valuable property rights for all lot owners within the restricted area.”). The purpose of a subdivision’s general plan of restrictions is “to assure uniformity of development and use of a residential area to give the owners of lots within such an area some degree of environmental stability.” Montoya, 81 N.M. at 751, 473 P.2d at 365.

{8} Without question, easements constitute valuable property rights, and their taking requires compensation. See, e.g., Yates Petroleum Corp. v. Kennedy, 108 N.M. 564, 567-68, 775 P.2d 1281, 1284-85 (1989) (determining proper compensation for the partial condemnation of private property for an easement); 2 Julius L. Sackman, Nichols on Eminent Domain § 5.07[2][b], at 5-354-57 (3d ed., rev. vol. 2004) [hereinafter Sackman]. Given New Mexico’s determination that restrictive covenants, as equitable easements, also constitute property rights, we conclude that the covenants are protected by Article II, Section 20, of our state’s constitution. See S. Cal. Edison Co. v. Bourgerie, 507 P.2d 964, 965 (Cal. 1973) (en banc) (concluding that “a building restriction constitutes ‘property’ within the meaning of [the state constitution’s Takings Clause], and compensation must be paid whenever damage to a landowner results from a violation of the restriction”); Hartford Nat’l Bank & Trust Co. v. Redevelopment Agency of Bristol, 321 A.2d 469, 471-72 (Conn. 1973) (reiterating that restrictive covenants are in the nature of equitable easements in the land restricted and that when the restricted land is taken, “the owner of the property for whose benefit the restriction is imposed is entitled to compensation”); Dible v. City of Lafayette, 713 N.E.2d 269, 274 (Ind. 1999) (concluding that restrictive covenants are property rights in the lots restricted and that the owners of those property rights must be compensated when the government condemns a restricted lot for public use); Horst v. Hous. Auth. of Scotts Bluff, 166 N.W.2d 119, 121 (Neb. 1969) (same); Meredith v. Washoe County Sch. Dist., 435 P.2d 750, 752 (Nev. 1968) (same); see also Restatement (Third) of Prop.: Servitudes § 7.8 cmt. a, at 381 (2000) (“Servitude benefits like other interests in property may be condemned under the power of eminent domain and taken by inverse condemnation.”) and reporter’s note, at 383 (“[I]n this Restatement, all servitude benefits are treated as property rights and thus should be entitled to the protection of the Takings Clause.”).

{9} We recognize that there is a split among jurisdictions on the question of whether restrictive covenants are protected property interests: jurisdictions, including those cited above, that consider restrictive covenants to be equitable easements and compensable property interests reflect the “majority view”; jurisdictions that insist the covenants do not convey property rights, thus refusing compensation, reflect the “minority view.” See Sackman, supra § 5.07[4][a], [b], at 5-378-83 (discussing both views and collecting cases); see also Restatement, supra § 7.8, reporter’s note, at 383 (noting that it is “generally accepted” that the benefits of restrictive covenants are protected property rights, “although there are some jurisdictions that treat covenant benefits as non-compensable interests”); R. E. Barber, Annotation, Eminent Domain: Restrictive Covenant or Right to Enforcement Thereof as Compensable Property Right, 4 A.L.R. 3d 1137, 1151-60 (1965) (discussing cases permitting compensation for the violation of building restrictions under the power of eminent domain, as well as cases denying such compensation).

{10} The essence of the minority view is (1) that restrictive covenants are not property entitled to eminent domain protection but are merely contractual rights, (2) that it is against public policy to restrict the government’s eminent domain power through private agreements, and (3) that to require compensation would create undue financial burden for the public. See, e.g., United States v. Certain Lands in Jamestown, 112 F. 622, 628-29 (C.C.D.R.I. 1899); Burma Hills Dev. Co. v. Marr, 229 So. 2d 776, 781-82 (Ala. 1969); Smith v. Clifton Sanitation Dist., 300 P.2d 548, 550 (Colo. 1956) (en banc); Bd. of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637, 642 (Fla. 1955); Anderson v. Lynch, 3 S.E.2d 85, 89 (Ga. 1939). The Village looks to these minority view jurisdictions for support.

{11} We find the Village’s reliance on the minority view cases unpersuasive. First, as we have already stated, restrictive covenants are deemed property interests in New Mexico. Thus, the question of whether the covenants convey mere contract rights has already been decided. See Montoya, 81 N.M. at 751-52, 473 P.2d at 365-66. Second, we are unable to conclude that private agreements restrict the government’s eminent domain power. The agreements do afford the owners of private property benefited by restrictive covenants the ability to be compensated for damages when the government exercises its power. But being able to obtain compensation for the government’s violation of a restrictive covenant does not entail the ability to enforce the covenant against the government. See Town of Stamford v. Visoni, 143 A. 245, 249 (Conn. 1928) (pointing out the clear distinction between the rights of the private landowner, who may be restrained from violating the restrictive covenant, and the rights of the government, which may not be restrained but must make compensation for the violation); Richard I. Brickman, The Compensability of Restrictive Covenants in Eminent Domain, 13 U. Fla. L. Rev. 147, 163-64 (1960) (stating that the weakness of the minority argument is the minority’s inability to make the distinction between obtaining an injunction to prevent the violation of a restrictive covenant and obtaining compensation for the violation).
12. The minority’s third argument concerns costs, particularly pertinent in a large subdivision where restrictive covenants provide all lot owners with property rights in the lot condemned. Minority jurisdictions suggest that compensating these numerous lot owners for the government’s violation of the restrictive covenant would be an intolerable burden on the public. See, e.g., Town of Bay Harbor Islands, 81 So. 2d at 643-44; Anderson, 3 S.E.2d at 88-89. As we will now explain, we are not persuaded that an intolerable burden will result.

13. We stated earlier that restrictive covenants are characterized as equitable easements in the lots burdened by the covenant. See, e.g., Montoya, 81 N.M. at 751-52, 473 P.2d at 365-66. Damages for the partial taking of property by an easement are measured as the difference between the fair market value before and after the taking. See Yates Petroleum Corp., 108 N.M. at 567, 775 P.2d at 1284. This measurement is known as the before and after rule. See Bd. of County Comm’rs v. Harris, 69 N.M. 315, 318, 366 P.2d 710, 712 (1961) (stating that the before and after rule entitles a property owner “to recover as compensation the amount the fair market value of [the owner’s] property is depreciated by the taking”). Similarly, majority jurisdictions use the before and after rule in measuring the value of a restrictive covenant; specifically, the value is the difference between the fair market value of the lot benefitted by the restrictive covenant immediately before the taking and the value of the lot immediately after the taking. See, e.g., Sackman, supra § 5.07[4][a], at 5-380 (discussing majority view, citing to United States v. Certain Land in Augusta, 220 F. Supp. 696, 701 (S.D. Me. 1963), and stating that “[h]olders of the dominant estate are entitled to be compensated for the diminution in the value of their lots as a result of the extinguishment of the equitable servitude”). The purpose of a before and after valuation is to ensure that just compensation is provided for the diminution in value caused by the taking; the “before” value is calculated as if there were no taking, and the “after” value is calculated as if the taking had already occurred. City of Albuquerque v. Westland Dev. Co., 121 N.M. 144, 148, 909 P.2d 25, 29 (Ct. App. 1995).

14. We emphasize that the before and after rule requires that a claimant prove a decline in the value of the claimant’s land caused by the taking. See id.; Vuono, 143 A. at 250 (stating that the lot owner is entitled only to the actual depreciation in the value of her property resulting from the loss of the building restriction on adjacent property taken for public use). Consequently, as the Bourgerie court observed, the public use to which some condemned lots are put would likely injure only those landowners immediately adjoining or in close proximity to the lot taken; the public use of other condemned lots may result in only negligible damages to other lot owners, regardless of the distance from the condemned lot. Bourgerie, 507 P.2d at 968 (remarking that a fire station may result in more damages than a public park, for example); see also Brickman, supra, at 168 (“As the distance of the claimant’s lot from the invaded tract increased, the amount of compensation would rapidly diminish soon to the vanishing point.” (internal quotation marks and citation omitted)).

15. The Village additionally insists that the Leihgs are not entitled to eminent domain damages because the Leihgs failed to meet the requirement under the damages clause of Article II, Section 20: that a property owner’s injury be different in kind from the injury suffered by the general public. See N.M. Const. art. II, § 20 (covering property taken “or damaged” for public use); Estate and Heirs of Sanchez v. County of Bernalillo, 120 N.M. 395, 399, 902 P.2d 550, 554 (1995) (holding that any damage to the plaintiff from zoning regulations was no different from damage to the general public and was therefore not compensable); Pub. Serv. Co. of N.M. v. Catron, 98 N.M. 134, 136, 646 P.2d 561, 563 (1982) (concluding that to be compensable, the damage must affect some right or interest and be “different in kind, not merely in degree, from that suffered by the public in general”).

16. We recognize that both the Leihgs and the Village discuss the purchase of Tract 1 and the destruction of the Leihgs’ property interest in the tract in terms of a damage to property, not a taking. Indeed, the Leihgs insist that the requirement for the damages clause was met. Damages from the violation of the covenants, the Leihgs state, were different in kind from any damages to the public, since only the lots in the subdivision shared the restrictive covenants. We need not decide whether the Leihgs are correct in their statement because we do not agree with the parties that the damages clause of Article II, Section 20, is implicated in this case. When the Village took Tract 1 for public use, it also took the Leihgs’ property interest in enforcing the restrictive covenants as to that tract. The Leihgs’ interest was not merely damaged; it was extinguished. Indeed, the jury was instructed that any damage award would result from the Leihgs’ “inability to enforce their restrictive covenants.” Because the Leihgs completely lost their property interest in Tract 1, we conclude that the Village took the Leihgs’ interest. See Aragon & McCoy v. Albuquerque Nat’l Bank, 99 N.M. 420, 424, 659 P.2d 306, 310 (1983) (stating that a “taking occurs when all beneficial use of property is lost).

17. The Village also claims that the only damages complained of resulted from the Leihgs’ proximity to the drainage pond and so are not compensable. See Aguayo v. Village of Chama, 79 N.M. 729, 730, 449 P.2d 331, 332 (1969) (concluding that the property owners’ mere proximity to a sewage treatment plant does not give rise to compensation, unless the plant is a nuisance per se). The Leihgs acknowledge that there was a great deal of testimony at trial about the negative characteristics of the drainage pond, which was adjacent to their property; they stress, however, that the evidence was introduced to respond to the Village’s position at trial that the pond had, in fact, a residential purpose. The jury, by special verdict, disagreed with the Village’s position, and the Village does not challenge that portion of the verdict on appeal. We cannot conclude, as the Village does, that the evidence introduced means that the damages to the Leihgs were only based on their proximity to the pond. Indeed, the Village offered no objection to the jury instruction directing the jury that it was “not to consider awarding damages due to the proximity of the ponding area to [the Leihgs’] property.” We consequently find the Village’s claim without merit and turn to the issue of the damage award given.

B. Evidence for the Leihgs’ Damages Award

18. We determined above that the proper calculation of damages for the taking of a restrictive covenant is the difference between the fair market value of the property benefitted by the covenant immediately before and immediately after the taking. See Vuono, 143 A. at 249. The jury was properly instructed on the before and after rule and was told that the Leihgs were “only to be awarded damages, if any, for the diminution in the value of their property” resulting from the drainage pond. The jury awarded the Leihgs $50,000 in damages.

19. The Village disputes the adequacy of the evidence for the award. Specifically, the Village asserts that the district court erred in
admitting the report of the Leighs’ appraiser because it was not a proper before and after appraisal. The Village also challenges the competency of the Leighs’ testimony—which, according to the Village, did not present the fair market value of their property. The standard of review for the admission of evidence is abuse of discretion. Hourigan v. Cassidy, 2001-NMCA-085, ¶ 21, 131 N.M. 141, 33 P.3d 891. However, even if erroneously admitted, the evidence complained of must be prejudicial for this Court to reverse. Id. Error in admitting evidence is not prejudicial if there is other admissible evidence that substantially supports the verdict. Stephenson v. Dale Bellamah Land Co., 80 N.M. 732, 733, 460 P.2d 807, 808 (1969). We review the competency of evidence under a de novo standard. See Dick v. City of Portales, 118 N.M. 541, 544, 883 P.2d 127, 130 (1994).

The Village does not dispute its failure to object to the appraiser’s testimony; the only objection was to the admission of the report immediately following the appraiser’s testimony. Again, the Village’s objection to the report was based on its lack of a before and after appraisal. The Village does contest the Leighs’ assertion that any error in the court’s admission of the report was cumulative and therefore harmless. See Leithead v. City of Santa Fe, 1997-NMCA-041, ¶ 31, 123 N.M. 353, 940 P.2d 459 (reiterating that the erroneous admission of evidence that was merely cumulative of separate, substantial evidence is harmless). The Leighs also challenge the preservation of the Village’s objection to their own testimony. We review the Leighs’ testimony and the appraiser’s testimony to determine if they provide substantive evidence that would render the report cumulative; we therefore need not address the preservation arguments.

We agree with the Village that the court abused its discretion by admitting the report into evidence because the report failed to use the proper method of appraisal: the before and after rule. See Yates Petroleum Corp., 108 N.M. at 567-68, 775 P.2d at 1284-85. The report stated that its purpose was “to determine the current market value of the [Leighs’] property . . . and the effect on marketability the storage pond has on the [Leighs’] property.” To that end, the report stated that the appraised value of the property on a single day, June 29, 2001, was $60,000 without the pond and $0 with the pond.

The Leighs suggest that the values of their property “without the pond and with the pond” as opposed to “before and after the pond” appear to be a difference in semantics. The “with and without” terminology used by the Leighs’ appraiser is not a serious problem if the method used actually calculated before and after values. See State v. Doyle, 735 P.2d 733, 737 (Alaska 1987) (determining that the method used by the appraisers, “inside-outside,” in fact calculated the before and after values of the property).

In this case, however, we cannot conclude that the appraiser used a before and after calculation. Indeed, the appraiser who authored the report testified at trial that she had not done an appraisal of the property before and after the taking. She acknowledged that such an appraisal was required in a condemnation proceeding but said the Leighs had not asked her to do this type of appraisal. Instead, she was asked to determine the market value of the Leighs’ lot on the effective date of the appraisal, which was after the installation of the pond, and to determine what effect the pond and the violation of the restrictive covenant had on the lot. Her $60,000 appraisal of the fair market value of the Leighs’ property without the pond was based on sales of four comparable properties. Comparable sales may be considered in determining the fair market value of property condemned. See UJI 13-717 NMRA 2004; State ex rel. State Highway Comm’n v. Bassett, 81 N.M. 345, 346-47, 467 P.2d 11, 12-13 (1970).

The appraisal of the worth of the property after the pond, however, seems to have been based on the health and safety concerns with the presence of the pond, including the pond’s attractive nuisance to small children and the possible infestation of flies, mosquitoes, and snakes, as well as the pond’s odors. The appraiser quoted the addendum of her report, which states, “It appears that the [$60,000] value of this lot has been negated by the actions of an external party.” She interpreted that statement to mean the lot was worth $60,000 without the pond and nothing with the pond. We find no attempt to assess the property’s fair market value with the pond. The appraiser did not, for example, compare the value of lots next to drainage ponds. There is no suggestion that such comparables are unobtainable; apparently, at least three of the approximately thirty-eight drainage ponds in thirty-one area subdivisions have standing water on a regular basis. We note that the Village’s appraiser, after comparing the market values of similar lots adjoining drainage ponds and those not adjoining drainage ponds, reported that the Leighs’ property suffered no diminution in value from the construction of the drainage pond. We disagree, therefore, with the Leighs’ assumption on appeal, contrary to their appraiser’s own trial testimony, that the report’s “with and without” calculation is the same as a before and after valuation. We find the report’s admission in error. Since the appraiser testified to the contents of her report, we disagree with the Leighs that the appraiser’s trial testimony constituted separate and substantial evidence that would render the inadmissible report cumulative.

The only other testimony offered as to valuation was the Leighs’ own testimony. A landowner may offer testimony as to the value of the property. UJI 13-716 NMRA 2004; State ex rel. State Highway Comm’n v. Chavez, 80 N.M. 394, 396-97, 456 P.2d 868, 870-71 (1969). However, the testimony must be directed to the fair market value. UJI 11-316. The fair market value is what a willing seller would take and a willing buyer would offer for the property if it were put on the open market. See UJI 13-711 NMRA 2004; see also El Paso Elec. Co. v. Pinkerton, 96 N.M. 473, 474, 632 P.2d 350, 351 (1981). Our review of the testimony leads us to conclude that the Leighs did not testify as to fair market value; they testified to the lot’s value to them personally.

Ms. Leigh testified that the value “to us was about $60,000” and that the land now, as a hazard and nuisance, “is worthless to us.” On cross-examination, she explained that the basis for the $60,000 figure was the amount of time the Leighs expended in finding the perfect property and its suitability to them for building a home. In contrast, later in the cross-examination, she acknowledged that the value of the property as an investment was $30,000. Similarly, Mr. Leigh testified that in his opinion, the value of his property prior to the construction of the pond was priceless “[t]o me,” and the land after the construction was useless “[t]o me.” He stated that he was not a market analyst and would have to depend on the appraisal done in that point of time but was willing to sell the property for $50,000. He also testified that he currently had Tract 2 on the market for $26,000 but would not want to sell it for less than $21,000. He stated that the property did have residual value after the construction of the pond but that “[its value] depends on what I get out of it in the market.” We do not find this sufficient evidence for the verdict.

Neither the Leighs’ testimony nor their appraiser’s testimony provided sufficient evidence of the before and after fair market values of the property. We therefore find the erroneous admission of the appraiser’s report to be reversible error. See Roberson v. Bd. of
We address one other related matter: the apparent dispute over the date of the taking. The parties stipulated that the Village began construction of the pond on September 26, 2000. The Village assumed the Leighs meant for this date to be the date of the taking. On appeal, the Leighs remark that the exact date of the appraisal does not appear to be critical, and they suggest that the stipulated date of the pond’s substantial completion, February 14, 2001, is the “more logical date of ‘taking or damaging.’”

Section 42A-1-29 requires that the value of property taken under eminent domain be “at the time the property is or was taken.” See State Highway Comm’n v. Grenko, 80 N.M. 691, 693, 460 P.2d 56, 58 (1969) (stating that real estate values are not constant and that the New Mexico statute in effect at the time, which is similar to Section 42A-1-29, was designed to avoid problems in fluctuating real estate values by setting a fixed time for valuation). The Village did not institute condemnation proceedings, which would have clearly established a date of taking. See § 42A-1-24(A) (establishing the date the condemnation petition is filed as the date for calculating damages). The record indicates that Tract 1 was purchased by the Village from its owners, Gary and Zoe Nelson, on April 4, 1998. On that date, the ability of the Leighs to enforce the restrictive covenant on Tract 1 was “effectively prevented.” Townsend v. State ex rel. State Highway Dept., 117 N.M. 302, 304-05, 871 P.2d 958, 960-61 (1994) (pointing out that property is taken when it is effectively prevented from being used). However, the purchase of the property did not violate the restrictive covenants. It was not until September 26, 2000, that the Village began construction of the drainage pond, and it was not until this point that the Leighs had notice that Tract 1 would be put to public use. The Leighs had the necessary information to contest the Village’s action once construction began. Therefore, the date of taking is September 26, 2000. See Electro-Jet Tool Mfg. Co. v. City of Albuquerque, 114 N.M. 676, 678, 845 P.2d 770, 772 (1992) (reiterating that an element of an inverse condemnation claim is the taking of property for public use).

Having reversed the district court’s judgment, we need not consider the denial of the Village’s motion of JNOV.

III. CONCLUSION

For the reasons stated above, we reverse the district court’s judgment awarding the Leighs $50,000 in inverse condemnation damages, and we remand for a calculation of the value of the Leighs’ property before and after September 26, 2000.

IT IS SO ORDERED.

CELIA FOY CASTILLO,
Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
RODERICK T. KENNEDY, Judge
OPINION

IRA ROBINSON, JUDGE

{1} Parents Frank G. (Father) and Pamela G. (Mother) appeal from an adjudication by the children’s court finding child abuse and neglect of their three-year-old adopted daughter/natural granddaughter (the Child). In an Amended Neglect/Abuse Petition, the Children, Youth and Families Department (CYFD) alleged that Father had sexually abused the Child and that Mother had failed to protect her from that abuse. The children’s court found by clear and convincing evidence that the Child was an abused and neglected child as defined in NMSA 1978, § 32A-4-2(B)(3) and (4) (1999) and NMSA 1978, § 32A-4-2(E)(3) (1999). On appeal, Father and Mother contend that the children’s court erred when it admitted hearsay statements made by the Child regarding the sexual abuse. We affirm the judgment of the children’s court.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Initially, CYFD took the Child into physical custody because of the living conditions in Parents’ home. A neglect and abuse petition was filed in November 2001, alleging that the Child lived in an “unsafe, unsanitary, and uninhabitable home.” The petition stated that the home contained no food, that it was filthy throughout, and that fifteen to twenty dogs and cats lived in the home, resulting in a strong odor of feces and urine. The Child’s hair was dirty and badly matted. Her body and clothing were described as being filthy and having the same strong odor as the home.

{3} After a custody hearing in December 2001, the children’s court placed legal custody of the Child with CYFD and ordered an evaluation of the four-year-old Child. Parents were represented by their individual attorneys and the Child by a guardian ad litem. Parents were granted visitation with the Child and ordered to undergo psychological, parenting, and substance abuse assessments. An adjudicatory hearing was held in January 2002, and Parents entered pleas of no contest to the allegations of the abuse and neglect petition. In the stipulated judgment and disposition, the children’s court found that the Child was abused and neglected, under Section 32A-4-2(B)(4) and Section 32A-4-2(E)(2), and adopted CYFD’s treatment plan. The court ordered that legal custody of the Child should remain with CYFD for a period up to two years and that Parents should participate fully in the treatment plan. Parents do not contest the stipulated judgment and disposition which found the Child to be abused and neglected because of the unsafe and unsanitary condition of Parents’ home. Rather, they challenge only the adjudication on the amended abuse and neglect petition resulting from the allegations of sexual abuse.

{4} The Child was placed in a foster home in January 2002. On March 8, 2002, she told her foster mother about an occurrence of sexual abuse involving Father. The foster mother immediately reported the disclosure to the CYFD social worker assigned to the Child’s case. The social worker came to the home that same day and interviewed the Child. Based on that interview, in which the Child told the social worker about the sexual abuse, the social worker arranged for an interview with a clinical forensic interviewer at the Children’s Safe House at All Faiths Receiving Home in Albuquerque, New Mexico, an agency specializing in the treatment of families affected by sexual abuse. In April 2002, the Child had a physical examination with Dr. Ornelas at Para Los Niños. Dr. Ornelas reported a normal vaginal exam but had concerns about anal penetration; her findings were non-specific. The doctor prescribed an oral antibiotic for the treatment of an anal infection. Subsequently, in April 2002, an amended abuse and neglect petition was filed to include the allegations that Father had sexually abused the Child and that Mother had failed to protect her from that abuse. The Child was referred to a program therapist at All Faiths Receiving Home for diagnosis and for therapy.

Certiorari Granted, No. 29,042, Feb. 21, 2005

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-026

STATE OF NEW MEXICO EX REL. CHILDREN,
YOUTH and FAMILIES DEPARTMENT,
Petitioner-Appellee,
versus
FRANK G. and PAMELA G.
Respondents-Appellants.
IN THE MATTER OF P.A.G., Child.
No. 23,497/23,787 (filed Dec. 17, 2004)

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY
WILLIAM A. SANCHEZ, District Judge

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REBECCA J. LIGGETT
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New Mexico Children, Youth and Families Department
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COLENE FLYNN ROBINSON
Denver, Colorado
for Amicus Curiae National Association of Counsel for Children
An adjudication hearing on the new allegations was set for June 2002, and in May 2002, CYFD filed a notice of its intent to offer the Child’s statements to the foster mother, the CYFD social worker, the Safe House interviewer, and the All Faiths program therapist as exceptions to the hearsay rule. The notice did not indicate which exceptions to the hearsay rule CYFD would be relying upon, but Rule 11-803(X) NMRA 2004 and Rule 11-804(B)(5) NMRA 2004, the two catchall exceptions to the hearsay rule, require prior notice to an adverse party. See Rule 11-803(X)(3); Rule 11-804(B)(5)(c). In response, Father filed a motion in limine to exclude the hearsay statements. He contended that any statements by a “non-competent minor child” would lack the “equivalent circumstantial guarantees of trustworthiness” required by the catchall hearsay exceptions of Rule 11-803(X) and Rule 1-804(B)(5) and would also deny Father his right, under the United States and New Mexico Constitutions, to confront the witnesses against him. Mother concurred in the motion.

At the adjudicatory hearing in June 2002, the children’s court reviewed the motion in limine and heard argument of counsel regarding the admissibility of the Child’s statements. The children’s court ruled that the Child’s statements about the sexual abuse would be admitted conditionally, stating to Parents that it would be mindful of their objections as it weighed the credibility of the statements. In opening remarks, both Parents objected to the admission of the statements on the basis of hearsay, the Child’s competency as a witness, and the confrontation clause. CYFD presented testimony from the Child’s foster mother, the social worker from CYFD, the interviewer from the Children’s Safe House, and the program therapist from All Faiths about the Child’s hearsay statements concerning sexual abuse. Parents did not testify at the hearing or offer any witnesses, other than recalling the CYFD social worker to testify.

The foster mother, a retired registered nurse, testified that the Child had come to her home in January 2002. When she arrived, the foster mother had gone over some house rules with the Child. Among those rules was the importance of telling the truth, including a discussion of the difference between truth and lies. The foster mother testified that she believed the Child understood the difference between truth and lies and also understood that the consequences in the foster home for lying would be a time-out. The foster mother stated that she had never had a reason to put the Child in a time-out for lying. She also described some behaviors the Child had exhibited when she came to live in the foster home that concerned the foster mother. In the beginning, the Child would attempt to kiss the foster parents with her mouth open and also attempt to thrust her tongue into their mouths at the same time. When the foster parents objected, the Child said, “That’s how we kiss at home,” and also stated that was how she kissed Mother. Additionally, when she first came to their home, the Child would perform a song and dance which she called her “Oh, I’m so sexy, oh, I’m so cute” dance. The Child told the foster mother that Father had taught her the dance. The foster mother testified that one morning, while the Child was taking a bath with the foster mother in the room, the Child began to sing “I’m so sexy, I’m so cute” and began “sticking a washcloth up her bottom.” When the foster mother asked her what she was doing, the Child responded, “I’m sexing myself.” The foster mother asked her who had told her about that. When the Child replied, “My Dad,” the foster mother clarified that the Child was referring to Father and not to the foster father. The foster mother testified that the Child had explained her behavior with the washcloth by saying, “This is the way [Mother] and [Father] have sex—[Father] sexes [Mother] back here,” pointing to her anus. The Child then opened her legs, pointed to her vaginal area, and said, “[Father] sexes [Mother] here too.” The foster mother said that the Child went on to say, “And when [Father] was sexing me, I tried to push him off because he was too heavy, and I kept saying ‘No! No!’ , but he wouldn’t get off and I couldn’t push him off.” The foster mother testified that she then told the Child that “Mommies and Daddies don’t touch their kids down there,” to which the Child responded “Yes, they do.” After the foster mother told her husband what the Child had said, the foster parents called CYFD, and the CYFD social worker came to their home. At the adjudicatory hearing, the foster mother also described a number of other disturbing behaviors exhibited by the Child, which included being short-tempered and easily frustrated, tantrums, hitting, and a number of sexualized behaviors. The sexualized behaviors included frequent masturbating with her hand, with her dolls and stuffed animals, and with the family dog. The Child would masturbate openly in front of her foster parents as well as in front of strangers. She also engaged in aggressive play with her dolls as well as simulating acts of sexual intercourse between the dolls.

The CYFD social worker came to the foster home on the same day that the Child told the foster mother about being “sexed” by Father. She talked to the Child in the privacy of the Child’s room in the context of playing with the Child and her toys. The social worker testified that she had been trained in how to interview children and stated that she had asked open-ended questions which were not leading or suggestive when she talked to the Child about the sexual allegations. She testified that before talking to children about any allegations, it was a standard procedure on her part to discuss the difference between truth and lies with them. She stated that she had done so with the Child and was satisfied that she understood the difference and knew that “a lie is something that hasn’t happened, the truth has happened.” The social worker asked the Child what she had talked to the foster mother about during the bath. The Child said that she had told the foster mother about Father having “sexed” her and that Father had gotten on top of her but he was too big for her to push off. The Child told her that this had happened in Parents’ bedroom. The Child said that Mother was in the room and told her “to get out, or get off, and pull up her pants.” The social worker testified that the Child had told her that “Father had poked her ‘wee-wee’ with his ‘wee-wee.’” When the social worker asked her what a “wee-wee” was, the Child pointed to her vaginal area. The social worker testified that, based on her experience, the sexualized behavior exhibited by the Child was atypical for a child her age but it was consistent with victims of sexual abuse. The CYFD social worker described the Child’s narration as having been matter-of-fact and that she considered the Child to be fairly verbal for her age. She stated that all the Child’s disclosures about the sexual abuse had been consistent as to the location (Parents’ home), the parties present (Father and Mother), and the events that occurred.

The CYFD social worker was questioned by Parents about a psychological evaluation prepared for CYFD in January 2002 shortly after the Child was taken into custody. She was asked about the following statement from the evaluation: “While there are no indicators of outright physical or sexual abuse, it does appear that [the Child] grew up in an environment where basic cleanliness, self-respect, and
adequate attention were lacking.” The social worker responded that the psychologist who prepared the evaluation had not been asked by CYFD to undertake a sexual abuse evaluation of the Child and he had not done so. Parents did not seek to introduce the evaluation into evidence, and the psychologist was not called to testify.

Within two weeks of the initial report of sexual abuse, the Child was taken to the All Faiths Children’s Safe House where she was interviewed by a clinical forensic interviewer. The interviewer stated that her job at the Safe House was to interview children and developmentally delayed adults when sexual or physical abuse was suspected. She testified that the interview with the Child was videotaped and that she had explained to the Child that it would be videotaped. The interviewer stated that she was enrolled in a master’s degree program and had received extensive on-the-job training in interviewing techniques, particularly with regard to interviewing children. The videotape of the interview was introduced into evidence and played at the adjudicatory hearing. On the videotape, the Child again made a number of unsolicited disclosures to the interviewer about sexual abuse by Father occurring in Parents’ home. She stated that Father had “poked” her “wee-wee” (again pointing to her genital area) on the skin and her “butt” (pointing to the area between her buttocks) with his “wee-wee” which she described as “a thing that was sticking out” (gesturing outward from the genital area). At two different points in the interview, the Child stated that Mother was in the room and saw Father on top of her. The Child said that Mother told her to “get off,” which she finally was able to do, and that she then pulled up her pants. When asked if Father touched anyone else, the Child responded that when she slept with Parents in their bed, she saw them “fucking.” She said that Father used the word “fucking” to describe what he and Mother did and also what he and the Child did.

Because of the Child’s emotional and behavioral problems, she was referred to a program therapist at All Faiths for an assessment as well as diagnosis and treatment. The program therapist testified at the adjudicatory hearing. She stated that she had a Master’s degree in counseling and clinical social work and continues to receive specialized training under a continuing education program. She is licensed by the state as a master social worker, as defined in NMSA 1978, § 61-31-3(H) (1989). As a licensed master social worker, her scope of practice consists of “assessment, diagnosis and treatment, including psychotherapy and counseling.” See NMSA 1978, § 61-31-6(B)(1) (1996). She testified that she is qualified to diagnose and provide treatment to children and families under the licensing statute. During her two years of employment at All Faiths Receiving Home, she has provided therapy to many parents and children referred to All Faiths because of child abuse and neglect. In the course of treating families, the therapist testified that she had made recommendations about visitation and the potential for reunification. The therapist was then offered as an expert and qualified by the children’s court as an expert on treatment. She stated that in providing therapy to victims of sexual abuse, it was essential for her to know the identity of the perpetrator. This knowledge was necessary, she stated, in order to diagnose and treat the emotional impact of the sexual assault because the treatment for intrafamilial child abuse differs from treatment for abuse by a stranger. In her experience, children who have been abused by family members or other caregivers tend to internalize responsibility for the abuse and also need help in dealing with the consequences of disclosing abuse.

The All Faiths program therapist stated that, at the time of the adjudicatory hearing, she had met with the Child for seven counseling sessions. She testified that she had explained to the Child what therapists do and that they would be talking to help the Child deal with her feelings. She testified that she did not ask the Child about the sexual abuse but instead waited for the Child to raise it on her own. At the initial meeting with the foster parents and the Child, the foster parents had told the program therapist, in the Child’s presence, about the Child’s disclosures while in the bathtub and about the Child’s masturbation. During this meeting, the Child also stated that Father had put his “wee” next to her “wee,” pointing to her genital area, and then added that when Father got off her, she had seen his “wee.” The All Faiths therapist described a later counseling session when just she and the Child were present. In the context of making cookies with clay, the Child had mentioned her Mother. When the therapist asked the Child to tell her about her family, the Child responded, “I don’t like it when [Father] fucks me” and that it made Mother mad when he did that. The program therapist testified that the Child’s statement had been made spontaneously and was consistent with the Child’s earlier statement to her about sexual abuse by Father.

The All Faiths program therapist also described the Child’s behavioral difficulties, including the sexualized behavior which she said would typically be a learned activity in a four-year-old child. These behaviors included masturbation with toys, enactment of sexual activity with toys and stuffed animals, as well as low tolerance to frustration and aggressive behavior that included throwing things and hitting. The Child also suffered from nightmares and sleep disturbances. The therapist testified that, in her opinion, these behaviors were consistent with Post Traumatic Stress Disorder (PTSD): a traumatic event, sexual abuse in this case; re-experiencing the event through masturbation, sexual play with her toys, and nightmares; avoidance of the trauma shown by the Child’s reluctance to talk about the event for any extended period; her distractibility; and her anger. The program therapist testified that it was not her role to evaluate the allegations of sexual abuse or to assess the credibility of the Child. She did state that in diagnosing and treating the Child, she does observe whether what the Child is telling her about the sexual abuse is consistent with what she has told others. The program therapist testified that the Child’s statements to her had been consistent with the other statements and also consistent with the behaviors the Child was exhibiting.

When asked her opinion as to whether the Child could testify about the abuse in a courtroom under oath, the program therapist responded that it would not be an appropriate setting for a Child that age and would be harmful to the Child’s therapy. She stated that being asked to come into a courtroom and answer the questions of strangers would heighten the Child’s anxiety. The therapist noted that the Child already had a tendency to be avoidant about the abuse, a characteristic consistent with PTSD. Being asked questions about the abuse by strangers would only increase the stress and anxiety experienced by the Child in discussing the abuse and might lead to an unwillingness on the part of the Child to discuss her feelings about it at all. When asked whether it would be likely that the Child would talk if she was brought into the courtroom with the attorneys and Parents present, the program therapist replied, “No.”
At the conclusion of the adjudicatory hearing, CYFD offered the admission of all the testimony under Rule 11-803(X), and also offered the All Faiths therapist’s testimony under Rule 11-803(D). The children’s court determined that the Child’s statements were sufficiently reliable to be admissible as exceptions to the hearsay rule and denied Father’s motion in limine. The court then concluded that there was clear and convincing evidence that the Child was an abused and neglected child under Section 32A-4-2(B)(3) and (4) and Section 32A-4-(E)(3), as alleged in the amended petition. See NMSA 1978, § 32A-4-20(H) (1999) (requiring clear and convincing evidence to support a finding of neglect and abuse).

II. DISCUSSION

Parents challenge the admission of the Child’s hearsay statements concerning sexual abuse, contending that all the statements were inadmissible hearsay. They contend that the statements do not fit any hearsay exceptions. They also assert that the improper admission violated their rights to due process in that it denied them the opportunity to confront the witness against them. Although hearsay testimony is generally inadmissible, see Rule 11-802 NMRA 2004, our Rules of Evidence include a number of exceptions to the hearsay prohibition. See Rule 11-803; Rule 11-804. CYFD offered the Child’s hearsay statements under Rule 11-803(X), the catchall exception, and argued that the testimony by the All Faiths program therapist was also admissible under Rule 11-803(D), the exception for statements for medical diagnosis or treatment.

The admission of evidence as an exception to the hearsay rule is reviewed under an abuse of discretion standard. In re Esperanza M., 1998-NMCA-039, ¶ 7, 124 N.M. 735, 955 P.2d 204; accord State v. Massengill, 2003-NMCA-024, ¶ 11, 133 N.M. 263, 62 P.3d 354 (stating, with regard to hearsay admitted under a catchall exception, that “[t]he trial court’s ruling concerning the trustworthiness of an out-of-court statement will be upheld unless there has been an abuse of discretion”) (alteration in original) (quoted authority and quotation marks omitted). Constitutional claims are reviewed de novo. State ex rel. Children, Youth & Families Dep’t v. Mafin M., 2003-NMSC-015, ¶ 17, 133 N.M. 827, 70 P.3d 1266.

A. Rule 11-803(X): Other Exceptions

At the adjudicatory hearing, CYFD argued that all the Child’s statements were admissible under Rule 11-803(X). This Rule provides that a statement that is not specifically covered by any of the other hearsay exceptions, but that has the “equivalent circumstantial guarantees of trustworthiness” of the other exceptions, may be admissible under the following circumstances:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

1. The statement is offered as evidence of a material fact;
2. The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
3. The general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Rule 11-803(X).

When CYFD offered the Child’s hearsay statements under Rule 11-803(X), it relied upon State v. Trujillo, 2002-NMSC-005, 131 N.M. 709, 42 P.3d 814, for authority, a case in which the New Mexico Supreme Court had upheld the admission of a witness statement under Rule 11-803(X). In so doing, the Supreme Court rejected an approach articulated in State v. Barela, 97 N.M. 723, 726, 643 P.2d 287, 290 (Ct. App. 1982), that has been used by this Court in the past to analyze the admissibility of statements under Rule 11-803(X).

The Supreme Court stated that “[t]his narrow interpretation of Rule 11-803(X) has been rejected by a majority of courts, and we decline to adopt it in our jurisdiction.” Trujillo, 2002-NMSC-005, ¶ 16. The Supreme Court concluded that adopting the narrow interpretation of the rule articulated in Barela “would deprive [a factfinder] of reliable probative evidence relevant to the [factfinder’s] truth-seeking role.” Id.

Because Rule 11-803(X) is not a firmly rooted hearsay exception, statements offered under this exception must demonstrate sufficient guarantees of trustworthiness. Massengill, 2003-NMCA-024, ¶ 14. The test for admissibility “under the catch-all rules is whether the out-of-court statement... has circumstantial guarantees of trustworthiness.” Trujillo, 2002-NMSC-005, ¶ 17 (quoted authority and quotation marks omitted). In assessing trustworthiness under the catchall exceptions to the hearsay rule, “the statement must be inherently reliable at the time it is made.” Id. (quoting State v. Williams, 117 N.M. 551, 561, 874 P.2d 12, 22 (1994)). And, as with the firmly rooted exceptions to the hearsay rule, the guarantees of trustworthiness “must likewise be drawn from the totality of circumstances that surround the making of the statement.” Idaho v. Wright, 497 U.S. 805, 820 (1990). In Wright, a case also involving hearsay statements by a sexually abused child, the Supreme Court “declined[d] to endorse a mechanical test for determining particularized guarantees of trustworthiness” but did identify several factors that might be assessed in determining whether a child’s hearsay statement was trustworthy, including spontaneity, consistent repetition, use of terminology unexpected of a child of similar age, and lack of motive to fabricate. Id. at 821-22.

The Court in Trujillo defined the following four primary dangers of hearsay, which might make a statement unreliable:

1. Ambiguity—the danger that the meaning intended by the declarant will be misinterpreted by the witness and hence the jury;
2. Lack of candor—the danger the declarant will consciously lie;
3. Faulty memory—the danger that the declarant simply forgets key material; and
4. Misperception—the danger that the declarant misjudged, misinterpreted, or misunderstood what he [or she] saw.

Trujillo, 2002-NMSC-005, ¶ 17. A reviewing court determines trustworthiness by applying these criteria to statements offered under the catchall exception. Massengill, 2003-NMCA-024, ¶ 32. When CYFD moved the admission of the statements under Rule 11-803(X),
it argued that none of the problems described in *Trujillo* was present in the testimony. We agree. In this case, the Child’s consistent recounting of the sexual abuse possesses sufficient indicia of reliability to allay concerns about the four dangers. As to the danger of ambiguity, the statements were clear and direct, and the language used by the Child in describing the abuse consisted of terms both appropriate for a young child as well as some unexpected terminology. She related in a forthright manner that Father had put his “wee-wee” next to her “wee-wee” and next to her “butt.” See *State v. D.R.*, 537 A.2d 667, 673 (N.J. 1988) (observing that “young children . . . do not necessarily regard a sexual encounter as shocking or unpleasant, and frequently relate such incidents to a parent or relative in a matter-of-fact manner”). The Child also demonstrated on her body what actions and which parts of the body she was describing. It is unlikely that the witnesses who heard these graphic, yet child-like, descriptions of the events misinterpreted their meaning. See *Doe v. United States*, 976 F.2d 1071, 1081 (7th Cir. 1992) (stating that the consistency and graphic descriptions by the three-year-old victim indicated that the statements were reliable). In the matter of candor, no one has suggested that the Child was lying or had any reason to lie when she made these statements. Although Parents contend on appeal that there were others who had access to the Child after she was removed from the home who could have been responsible for the sexual abuse, the Child has always clearly and consistently identified Father and Mother in her statements. It is improbable that she would have confused her Parents with another perpetrator. Further, when the Child first disclosed the abuse, the foster mother carefully asked the Child to distinguish between Father and the foster father, and the Child identified Father as the perpetrator. Parents also suggest that the Child might have imagined sex with Father because the Child stated that she had seen Parents engaged in sexual activity. However, the Child’s statements distinguish between Parents’ sexual acts that she had observed from those acts involving Father and the Child. Her spontaneous statements to the foster mother and to the professionals with whom she spoke about sexual abuse were consistent in their description of the abuse and in their identification of Father as the assailant and Mother as being in the room. See *Doe*, 976 F.2d at 1081 (five-year-old’s statements spontaneous when “she explained what had occurred with little prompting”) (citation omitted). As the CYFD social worker observed in her testimony, all the Child’s disclosures have been consistent as to the location, to the events that happened, and to the parties present. See *State v. Harrison*, 296 F.3d 994, 1004 (10th Cir. 2002) (concluding that the consistency of the victim’s three statements was “a strong indicator of the trustworthiness” of the statements). Finally, it is unlikely that the Child misperceived what happened to her; her statements and her demonstrations of Father’s actions provided clear descriptions of sexual assault.

22 In addition to the requirement of circumstantial guarantees of trustworthiness, the catchall exceptions provide that a hearsay statement must also meet the following conditions to be admissible:

1. the statement is offered as evidence of a material fact;
2. the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
3. the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Rule 11-803(X); Rule 11-804(B)(5). In this case, the Child’s hearsay statements were evidence of material facts—the occurrence of sexual abuse, the nature of the abuse, and the identity of the perpetrator. Parents do not contest that the statements were “offered as evidence of a material fact.” Rule 11-803(X)(1). On appeal, Father asserts that testimony by the Child would have been more probative than the Child’s hearsay statements. Several courts have held to the contrary in responding to similar assertions. In *United States v. Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979), for example, the Court, in discussing the hearsay statement of a three-year-old child who had been sexually assaulted, found the statement to be “unquestionably material” and probative as to the identity of the assailant. The Court concluded that “[t]he declaration to his mother at the time of the event was more, rather than less probative than testimony that he might have been able to give months after the event even if the district court would have found him competent.” *Id.* See *State v. Loughton*, 747 P.2d 426, 429 (Utah 1987) (observing that out-of-court statements made by child victims of sexual abuse regarding the incidents provide more accurate accounts of the incident because they are “made nearer to the time of the incident and removed from the pressure of a courtroom situation”). In this case, the Child’s statements were more probative on the issue of sexual abuse than any other evidence CYFD could procure through reasonable efforts; the only individuals involved were Father, Mother, and the Child. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (recognizing that “[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim”). Finally, the interests of justice were served by admitting the statements of the Child. She had been the victim of sexual abuse, she was the only one who could identify the perpetrator, and her statements provided the only available account of the abuse.

23 We affirm the children’s court admission of the Child’s hearsay statements. In admitting the statements, the children’s court considered the content of the statements and the circumstances in which they were made. The court found that the statements were inherently reliable, noting in particular the age of the Child, the manner in which the issue was raised, the nature of the utterances, and the consistency of her statements. These findings are supported by the record. We conclude that the Child’s hearsay statements are supported by guarantees of trustworthiness equivalent to those which sustain the other enumerated exceptions to the hearsay rule. The children’s court did not abuse its discretion in admitting the Child’s hearsay statements through the testimony of the foster mother, the CYFD social worker, the Safe House interviewer, and the All Faiths program therapist.

24 Parents also assert that the children’s court erred when it permitted CYFD’s witnesses to testify without first determining whether the Child was unavailable and whether the Child was competent. They argue that the children’s court was required to determine whether or not the Child would have been competent to testify as a witness before admitting the hearsay statements. Mother also appears to contend that the Child would have to be found competent before the hearsay statements could ever be admitted. However, neither
Parent has cited to any authority that supports their contention. 

See Rule 12-213(A)(4) NMRA 2004; see also Wolford v. Lasater, 1999-NMCA-024, ¶ 18, 126 N.M. 614, 973 P.2d 866 (stating that issues raised but unsupported by cited authority will not be reviewed on appeal). The cases that Parents do rely upon are not helpful. The cases are factually distinct from this case, and Parents’ argument was not addressed by the cases. See City of Sunland Park v. Paseo Del Norte Ltd. P’ship, 1999-NMCA-124, ¶ 7, 128 N.M. 163, 990 P.2d 1286 (stating that an opinion should not be used as authority for a proposition not explicitly addressed in the opinion).

{25} Nevertheless, this contention was addressed in State v. C.J., 63 P.3d 765 (Wash. 2003) (en banc), in a manner which we find to be persuasive. The Court distinguished between the two concepts as follows:

The different standards for determining testimonial competency and the reliability of an out of court statement are justifiably tailored to satisfy different purposes. The trial setting requires that a witness give reliable testimony and fully participate in cross examination, thus the witness’ ability to distinguish truthful statements from false statements, and knowledge of his sworn obligation to tell the truth, is paramount. On the other hand, hearsay exceptions necessarily contemplate that the declarant’s perception, memory, and credibility will not be explored through the use of cross examination. Instead, the trial court must find that the circumstances surrounding the making of the statement render the statement inherently trustworthy.

Id. at 771. We are in agreement with the Court in C.J. that a determination that a child witness is incompetent to testify at the time of trial would not “resolve the question whether an out of court statement by a child is admissible if the statement is reliable.” Id. at 770. Admissibility would not “depend on whether the child is competent to take the witness stand, but on whether the comments and circumstances surrounding the statement indicate it is reliable.” Id. at 771. In this case, the children’s court found that the circumstances surrounding the Child’s statements made them trustworthy.

Moreover, in this case, the Child’s statements regarding sexual abuse were offered under Rule 11-803(X), and neither Parent objected at the adjudicatory hearing to the use of Rule 11-803(X). Under Rule 11-803, unavailability of the declarant is immaterial to the introduction of evidence under exceptions to the rule against hearsay. Statements that meet the requirements of the hearsay exceptions are not excluded by the hearsay rule, even though the declarant is available as a witness. See generally J. B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence § 807 (Joseph M. McLaughlin ed., 2d ed. 2004) (discussing Fed. R. Evid. 807 which combined the former federal catchall exceptions, Rule 803(24) (availability of declarant immaterial) and Rule 804(b)(5) (declarant unavailable) and which now permits trustworthy statements, regardless of the availability of the declarant); see also Tartaglia v. Hodges, 2000-NMCA-080, ¶ 9, 129 N.M. 497, 10 P.3d 176 (stating that because the declarants were deceased, the appropriate hearsay rule for admitting their testimony was Rule 11-804(B)(5) rather than Rule 11-803(X), but recognizing that the point was inconsequential because the requirements of the catchall exceptions are identical).

A similar argument was addressed by the United States Supreme Court in Wright, in which the Court noted that it had previously refused to create a rule barring the admission of prior hearsay statements made by a declarant “who is unable to communicate to the jury at the time of trial.” 497 U.S. at 825. The Supreme Court observed that “[a]lthough such inability might be relevant to whether the earlier hearsay statements possessed particularized guarantees of trustworthiness, a per se rule of exclusion would not only frustrate the truth-seeking purpose of the Confrontation Clause, but would also hinder States in their own enlightened development in the law of evidence.” Id. (citation omitted). The Supreme Court concluded that “[o]ut-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances, and we do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial.” Id. at 818. We find no error on the part of the children’s court.

B. Rule 11-803(D): Statements for Medical Diagnosis or Treatment

The testimony of the licensed All Faiths program therapist who was providing therapy to the Child was also offered under Rule 11-803(D) which deals with statements made for purposes of medical diagnosis or treatment. As a preliminary matter, we note that the only objection raised by Parents at the adjudicatory hearing went to the application of the Rule. Parents argued that a medical expert should not be allowed to identify the perpetrator of the abuse. On appeal, Parents raise for the first time a number of additional objections to the admission of the program therapist’s statement under Rule 11-803(D). Because these objections were not raised below, we do not consider them. See Rule 1-046 NMRA 2004; Madrid v. Royalal, 112 N.M. 354, 356, 815 P.2d 650, 652 (Ct. App. 1991) (stating that the primary purpose of the preservation rule is to alert the district court to the claimed error so that the court has an opportunity to correct it).

Rule 11-803(D) provides for the admission of statements made for purposes of medical diagnosis or treatment under the following circumstances:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

In State v. Altgilbers, this Court adopted an approach that had been articulated by Justice Powell in Morgan v. Foretich, 846 F.2d 941, 950-53 (4th Cir. 1988) (Powell, J., concurring in part and dissenting in part), writing about Federal Rule of Evidence 803(4) which is identical to our Rule 11-803(D). Altgilbers, 109 N.M. 453, 458, 786 P.2d 680, 685 (Ct. App. 1989). Under that approach the hearsay exception for statements made for medical diagnosis or treatment would apply “so long as the statements made by an individual were relied on by the physician in formulating his opinion.” Id. at 458-59, 786 P.2d at 685-86 (quoting Morgan, 846 F.2d at 952).

In Altgilbers, this Court upheld the admission of the sexual abuse victim’s statement to medical personnel identifying the perpetrator

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because the identification was important to diagnosis and treatment. Id. at 457-60, 786 P.2d at 684-87. “In dealing with child sexual abuse . . . disclosure of the perpetrator may be essential to diagnosis and treatment.” Id. at 459, 786 P.2d at 686. “Statements revealing the identity of the child abuser are ‘reasonably pertinent’ to treatment because the physician must be attentive to treating the child’s emotional and psychological injuries, the exact nature and extent of which often depend on the identity of the abuser.” United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993). In another case involving child sexual abuse, United States v. Renville, 779 F.2d 430, 437-38 (8th Cir. 1985), the Eighth Circuit noted two reasons why the identity of a perpetrator is pertinent to diagnosis in a child sexual abuse case. First, a proper diagnosis of a child’s psychological problems resulting from sexual abuse or rape will often depend on the identity of the abuser. Second, information that a child sexual abuser is a member of the patient’s household is reasonably pertinent to a course of treatment that includes removing the child from the home. Id. at 438.

{31} This Court has previously held that in a civil children’s court action, “if the State establishes a foundation that the identity of the perpetrator was ‘reasonably pertinent’ for medical diagnosis or treatment, the children’s court may admit hearsay testimony identifying a perpetrator under Rule 11-803(D).” In re Esperanza M., 1998-NMCA-039, ¶ 15. In this case, the program therapist from All Faiths testified to the importance of the identity of the perpetrator. She stated that the purpose of her therapy sessions with the Child was for diagnosis and treatment and that, in order to properly treat a child sexual abuse victim, it was essential to know the identity of the abuser. The Child’s statements about the sexual abuse were of the type upon which medical personnel reasonably rely in treatment or diagnosis and meet the standards for admissibility set forth in Rule 11-803(D). The children’s court did not abuse its discretion in admitting the Child’s statements to the All Faiths program therapist.

{32} In In re Esperanza M., this Court observed that “[t]here is support for the broadening of [Rule 11-803(D)] in child abuse cases to embrace statements identifying abusers and describing their acts because such cases involve abuse victims who talk to psychologists and social workers.” 1998-NMCA-039, ¶ 20 (quoted authority and quotation marks omitted). This Court did not reach the decision of whether Rule 11-803(D) would apply to the testimony of social workers because, in that case, a proper foundation for the admission of the social worker’s testimony on that basis had not been laid. Id. In this case, however, the requisite foundation has been established: the program therapist, who is a licensed master social worker, was accepted as an expert on treatment, and she testified that the identity of the perpetrator was pertinent to her treatment of the Child. We believe that recognition of the role licensed social workers play in providing treatment to victims of child abuse and neglect, as well as to others, would be consistent with the Legislature’s recognition of the professional nature of their services. See NMSA 1978, § 61-31-1 (1989); NMSA 1978, § 61-31-24 (1989). As the United States Supreme Court recognized:

Today, social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals. Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers . . . . Drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.

Jaffee v. Redmond, 518 U.S. 1, 15-17 (1996) (quoted authority and quotation marks omitted). We conclude that the children’s court properly admitted the testimony of the licensed social worker under Rule 11-803(D).

C. Due Process

{33} Parents contend that the admission of the Child’s hearsay statements violated their due process rights. At the adjudicatory hearing, they relied upon the confrontation clause to argue that admission of the Child’s hearsay statements would violate their constitutional right to confront the witness against them. See U.S. Const. amend. VI. (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”). On appeal, Parents acknowledge that the confrontation clause does not apply in civil cases. See In re Esperanza M., 1998-NMCA-039, ¶ 15 (observing that in civil cases, Rule 11-803 provides the threshold requirements for the admission of hearsay but that in criminal cases, admissibility is also subject to the limits of the Confrontation Clause); accord Altgilbers, 109 N.M. at 460, 786 P.2d at 687 (distinguishing between admission of statements under Rule 11-803(D) in civil and criminal cases). They now contend instead that the admission of the Child’s statements violated their right to due process under both the federal and state constitutions because they were not able to confront the witness against them, the Child. Although Father mentioned the New Mexico Constitution in the motion in limine to the children’s court, neither Parent has argued on appeal that the New Mexico Constitution provides greater protection than the United States Constitution. See State v. Gomez, 1997-NMSC-006, ¶¶ 22-23, 122 N.M. 777, 932 P.2d 1 (discussing the standard for preserving state constitutional claims for appellate review). We therefore review these claims under the federal constitution.

{34} In Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), the United States Supreme Court adopted a flexible balancing test to determine whether an individual has been afforded due process. See also Mafin M., 2003-NMSC-015, ¶ 19; State ex rel. Children, Youth and Families Dep’t v. Anne McD., 2000-NMCA-020, ¶ 18, 128 N.M. 618, 995 P.2d 1060. The three factors to be weighed in the balancing test are (1) the private interest; (2) whether the procedures used increased the risk of an erroneous deprivation of that interest and whether additional safeguards would lower that risk; and (3) the government’s interest. Mathews, 424 U.S. at 335. In an abuse and neglect case, the parents’ interest in the relationship with their child is the private interest. As to the government’s interest, “[t]he State has an equally significant interest in protecting the welfare of children.” Mafin M., 2003-NMSC-015, ¶ 20. In balancing the parents’ interests and the government’s interest, the second prong of the Mathews test is frequently the determinative factor. Id.

{35} On appeal, Parents contend that there was a high risk of error in the proceedings because the Child did not testify at the adjudicatory hearing. Notwithstanding, at the adjudicatory hearing neither Parent called for the Child to testify or requested the children’s court
to explore alternative procedures for the Child’s testimony. Parents now assert that having the Child testify in a less formal setting than that of the courtroom might have decreased any risk of error. Under Mathews, the purpose of any additional procedures is to reduce the risk of an erroneous decision. 424 U.S. at 335. It is not clear from the record that having the Child testify would have increased the reliability of the outcome. The Child’s therapist expressed serious reservations about the prospect and also stated that it was questionable whether the Child would talk about the abuse in such a setting. See D.R., 537 A.2d at 673 (concluding that “a child victim’s spontaneous out-of-court account of an act of sexual abuse may be highly credible because of its content and the surrounding circumstances” and noting that, in contrast, “the reliability of in-court testimony of a young child victimized by a sexual assault is often affected by the stress of the courtroom experience, the presence of the defendant, and the prosecutor’s need to resort to leading questions”).

The exceptions to the hearsay rules themselves “are designed to facilitate the admission of probative evidence and, at the same time, to minimize the risks of unreliability.” Nick, 604 F.2d at 1203. As the Wright Court stated in discussing the relationship of hearsay statements and the confrontation clause, “if the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial.” Wright, 497 U.S. at 820.

After reviewing the procedures used at the adjudicatory hearing, we conclude that Parents’ rights to procedural due process were not violated. Parents received proper notice of CYFD’s intent to use the Child’s statements. They were each represented by able attorneys who argued vigorously on their behalf and carefully cross-examined CYFD’s witnesses about the reliability and credibility of the Child’s statements, and a guardian ad litem had been appointed for the Child. The children’s court, aware of Parent’s objections, initially admitted the witnesses’ testimony about the hearsay statements conditionally. At the close of evidence, the court was satisfied that the statements were reliable and admitted them. The children’s court concluded the hearsay statements possessed the required reliability, and we have affirmed the court’s decision to admit the statements. Finally, the children’s court determined that there was clear and convincing evidence to support the amended petition before it held that the Child was abused and neglected under Section 32A-4-2(B)(3) and (4) and Section 32A-4-2(E)(3). The admission of the Child’s statements did not violate Parents’ constitutional rights to due process.

D. Sufficiency of the Evidence

Mother also contends that there was insufficient evidence to support the children’s court determination that the Child was a neglected child under Section 32A-4-2(E)(3). This section of the children’s code defines a neglected child as one who was physically or sexually abused “when the child’s parent . . . knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm[.]” Section 32A-4-2(E)(3). Mother bases part of her sufficiency claim on the assumption that the children’s court ered in admitting the Child’s hearsay statements. Because we have determined that the children’s court did not err in admitting the statements, we do not consider this aspect of her claim. Mother also appears to argue that even if the Child’s hearsay statements were properly admitted, the statements, as the sole evidence presented of sexual abuse, would still be insufficient to support the conclusion of the children’s court. We disagree with Mother’s assessment of the merits of the hearsay statements and also note that the hearsay statements were not the only evidence presented. The children’s court heard non-hearsay testimony about the Child’s sexualized and aggressive behavior as well testimony that those behaviors were consistent with PTSD. The remaining part of Mother’s insufficiency claim is based on an attempt to shift responsibility for the sexual abuse from Father and Mother to “someone in one of [the Child’s] foster placements.” She asserts that “there are two absolutely equal inferences” to be drawn from the Child’s statements. Even if we were to credit this blame-shifting assertion, which we do not, Mother’s argument is inapt. On appeal, this Court does not reweigh the evidence but rather views the evidence in the light most favorable to the decision below in reviewing whether there was clear and convincing evidence. In re Termination of Parental Rights of Eventyr J., 120 N.M. 463, 466, 902 P.2d 1066, 1069 (Ct. App. 1995). “An appellate court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence.” State v. Sutphin, 107 N.M. 126, 130-31, 753 P.2d 1314, 1318-19 (1988). The record in this case supports the children’s court determination that the Child had been sexually abused by Father and that Mother had failed to protect her from that abuse. See Section 32A4-2(B)(3), (4); Section 32A-4-2(E)(3).

E. Jurisdiction

Although both parties in this case operate under the assumption that we have jurisdiction over what is a final order, we feel compelled to discuss the issue. After this case was assigned to the general calendar, the Court assigned a number of abuse and neglect cases to the general calendar and directed those parties to brief two questions in addition to the issues being raised by the parties. The questions raised by the Court were (1) whether a judgment adjudicating a child as being abused and neglected is a final order for purposes of appeal and (2) what effect an appeal in a abuse and neglect case has on the jurisdiction of the children’s court to proceed with the case below. Although the parties to this appeal were not asked to address these questions, we nevertheless take this opportunity to resolve the questions because this Court would not have jurisdiction to hear an appeal from a non-final order. Collier v. Pennington, 2003-NMCA-064, ¶ 7, 133 N.M. 728, 69 P.3d 238. We conclude that because an adjudication of abuse and neglect finds the factual predicates for further action by CYFD and for orders by the children’s court as the case progresses through subsequent stages, it is a sufficiently final order for purposes of appeal to this Court. We also determine that the children’s court has jurisdiction to proceed with the case while the abuse and neglect adjudication is on appeal.

The general rule in New Mexico for determining the finality of a judgment is whether “all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible.” Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231,
Although *Kelly Inn* was not dealing with this kind of case, we believe the questions presented in that case were sufficiently analogous for us to rely upon the principles expressed by our Supreme Court for guidance in resolving the questions presented to this Court. In determining finality for purposes of appeal, we are to look to the substance of the judgment, *id.*, keeping in mind a policy of facilitating meaningful and efficient appellate review of issues that affect important rights, *id.* at 240, 824 P.2d at 1042.

{41} The Abuse and Neglect Act, NMSA 1978, §§ 32A-4-1 to -4-33 (1993, as amended through 1999), provides a detailed structure for dealing with the circumstances in which a parent may have abused and/or neglected a child. An abuse and neglect action begins when CYFD files a petition with the children’s court containing the factual basis of the action. Section 32A-1-11 (1993). At the adjudicatory hearing on the petition, the court must determine if the allegations in the petition are admitted or denied. Section 32A-4-20(G) (1999). If the allegations are denied, the court conducts a full evidentiary hearing and then makes findings as to whether the child is an abused and/or neglected child. *Id.* Within the structure of the Children’s Code, by the conclusion of the adjudication hearing, the court has resolved all issues of law and fact before it to the fullest extent possible. It is evident that the adjudication affects important rights—an abuse and neglect case must balance the parents’ interest in their relationship with the child and the State’s equally significant interest in protecting the welfare of children. *See* *MaFin M.*, 2003-NMSC-015, ¶ 20. Additionally, the general provisions of the Children’s Code provide for appeals from a judgment of the children’s court to this Court. *See* Section 32A-1-17. The statute states that “[i]f the order appealed from grants the legal custody of the child to or withholds it from one or more of the parties to the appeal, the appeal shall be heard at the earliest practicable time.” Section 32A-1-17(B). We thus conclude that an abuse and neglect adjudication is a final, appealable order.

{42} While an appeal of an abuse and neglect adjudication is pending, the children’s court has jurisdiction to take further action in the case under Section 32A-1-17(B) which states that an appeal to this Court “does not stay the judgment appealed from.” The Abuse and Neglect Act provides for additional services by CYFD and further hearings by the court to monitor the actions of CYFD, the well-being of the child, and the progress of the parent. *See*, e.g., § 32A-4-20; § 32A-4-21; § 32A-4-25. We are in agreement with the briefs presented to the Court that the further hearings conducted by the children’s court after the adjudicatory hearing are essential to protect both the rights of the parent and the child.

III. CONCLUSION

{43} We conclude that this Court has jurisdiction to hear this appeal. The children’s court did not abuse its discretion when it found that the Child’s hearsay statements possessed equivalent guarantees of trustworthiness and admitted them under Rule 11-803(D) and Rule 11-803(X). The admission of this evidence did not violate Parents’ due process rights. Accordingly, we affirm the judgment of the children’s court.

{44} IT IS SO ORDERED.

IRA ROBINSON, Judge

WE CONCUR:

JAMES J. WECHSLER, Chief Judge
RODERICK T. KENNEDY, Judge
Label OPINION

CElia Foy CastiLlo, Judge

{1} Defendant Eric Patrick Morales appeals from an order denying his motion to suppress evidence of a gun seized from his person by an officer during an investigatory stop. Defendant challenges the constitutionality of the investigatory stop and detention, asserting that the officers lacked reasonable suspicion because the stop was based on an unreliable tip from an anonymous informant. We reverse on the ground that the anonymous tip lacked sufficient indicia of reliability. The investigatory stop was not constitutional, and the search of Defendant’s person and seizure of the gun therefore violated Defendant’s Fourth Amendment rights.

I. BACKGROUND

{2} The material facts of this case are undisputed. Detective Palos (Detective), of the Las Cruces Police Department, testified that he received an anonymous page on the afternoon of February 28, 2002. The message contained a phone number, which the Detective called; an anonymous informant told him that there were two subjects in a blue vehicle at the corner of Alamo and Utah who were “acting rather suspicious[ly]” and were “possibly armed.” The Detective believed that the page may have been the result of his previous assignment to a neighborhood police program, during which time he handed out business cards to encourage the public to contact him and report illegal activity in their neighborhood.

{3} In response to the anonymous tip, the Detective requested assistance, and Officer Rodriguez (Officer) responded. Both officers arrived on the scene, where they saw a blue parked car. Two men were out of the car and leaning against a wall that was inside the property line of the corner house. According to the Detective, the men were acting suspiciously because they were at a corner house, and in his experience, corner houses are common targets for burglaries during the daytime. As both officers approached, they instructed the two men to keep their hands on the wall.

{4} While the Officer talked with the men, the Detective moved past them to check the corner house for signs of burglary, and at this point, he noticed that there was a “large bulge” in Defendant’s pants pocket and that Defendant was awkwardly turning his hip toward the wall. The Detective proceeded to check the house, found no signs of burglary, and returned to where the men were standing.

{5} At that time, the Detective indicated to the Officer that they needed to do a pat-down search for officer safety. Before initiating the search, both officers asked the men if they were armed, and Defendant told them that he had a weapon in his pocket. Defendant was then instructed to put his hands on top of his head so that the Detective could safely reach into the pocket and retrieve the weapon. Defendant was carrying a 9 mm gun in a holster. The gun and holster were consistent with the bulge that the Detective observed earlier. Defendant was arrested and charged with the crime of possession of a firearm by a felon.

{6} Defendant moved to suppress evidence of the gun under the exclusionary rule on the ground that the officers did not have reasonable suspicion for the investigatory stop and thus violated Defendant’s Fourth Amendment rights. The district court denied the motion to suppress and provided the following rationale for the decision: first, the Detective had experience receiving tips in this manner, and on many occasions, the tips had led to fruitful investigations of crimes; and second, when both officers arrived at the corner, they saw a blue car and two men as described in the tip. The district court viewed this as sufficient reason for the officers to approach the individuals and ask questions. When the officers did so, the Detective observed a bulge in Defendant’s pocket, again matching the information provided, and saw Defendant suspiciously leaning against the wall as if he were trying to hide the bulge. In the district court’s opinion, the bulge provided reasonable suspicion because it was against the law to carry a concealed weapon. The district court stated that for safety reasons, the officers are trained to ask if there are weapons and to do a pat-down and that their search did reveal there was a loaded weapon.

{7} Following a denial of his motion to suppress, Defendant pled guilty to the charge and was convicted and sentenced. Additional pertinent facts are set out in our discussion of the issues.

II. DISCUSSION

A. Standard of Review
On appeal from a district court’s ruling on a motion to suppress, we determine whether the law was correctly applied to the facts. State v. Cline, 1998-NMCA-154, ¶ 6, 126 N.M. 77, 966 P.2d 785. Such a mixed question of law and facts is reviewed de novo, particularly when the question involves predominantly legal conclusions and constitutional rights. State v. Attaway, 117 N.M. 141, 145-46, 870 P.2d 103, 107-08 (1994). The reasonableness of a search and seizure under the Fourth Amendment is such a question. State v. Martinez, 94 N.M. 436, 440, 612 P.2d 228, 232 (1980). The facts in this case are not in dispute; we therefore review only the legal conclusions of the district court in denying Defendant’s motion to suppress.

B. Police-Citizen Encounter

The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. U.S. Const. amend. IV. The New Mexico Constitution also protects against unreasonable searches and seizures. N.M. Const. art. II, § 10. However, because Defendant does not argue that the New Mexico Constitution affords him greater protection than the United States Constitution does, we review his appeal only under the Fourth Amendment. State v. Jason L., 2000-NMSC-018, ¶ 9, 129 N.M. 119, 2 P.3d 856 (stating because the “[d]efendant has not argued on appeal that the New Mexico Constitution affords him greater protection than that afforded under the United States Constitution[,]” the court would “review his claim . . . only under the Fourth Amendment”).

First, police may stop a citizen for questioning at any time, so long as that citizen recognizes that he or she is free to leave. Such brief, consensual exchanges need not be supported by any suspicion that the citizen is engaged in wrongdoing, and such stops are not considered seizures. Second, the police may seize citizens for brief, investigatory stops. This class of stops is not consensual, and such stops must be supported by reasonable suspicion. Finally, police stops may be full-scale arrests. These stops, of course, are seizures, and must be supported by probable cause. Morgan v. Woessner, 997 F.2d 1244, 1252 (9th Cir. 1993) (internal quotation marks and citations omitted).

New Mexico recognizes a fourth type of police-citizen encounter, a community caretaking encounter, which may or may not implicate the Fourth Amendment. State v. Nemeth, 2001-NMCA-029, ¶ 27, 130 N.M. 261, 23 P.3d 936. Under this doctrine, a Fourth Amendment exception may exist if an officer has a “reasonable and articulable belief, tested objectively, that a person is in need of immediate aid or assistance or protection from serious harm.” Id. ¶ 37. Defendant argues that the district court erroneously based its decision on the community caretaking doctrine. The record indicates that the district court considered the initial encounter to be a consensual one and did not discuss the community caretaking exception. We will therefore evaluate the encounter to determine when it progressed from a consensual one to an investigatory stop requiring reasonable suspicion.

Our analysis begins with a determination of when the officers “seized” Defendant for purposes of Fourth Amendment analysis. Law enforcement officers are free to “approach an individual, ask questions, and request identification without the encounter becoming a seizure under the Fourth Amendment.” State v. Walters, 1997-NMCA-013, ¶ 18, 123 N.M. 88, 934 P.2d 282. “A police officer seizes a person for purposes of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” United States v. Harris, 313 F.3d 1228, 1234 (10th Cir. 2002) (internal quotation marks and citations omitted).

In the present case, testimony introduced at the suppression hearing showed that both officers approached the subjects and immediately told them to keep their hands on the wall. According to the Detective, this instruction was given for safety purposes because officers are trained to keep a suspect’s hands in view always. Nothing in the record indicates that Defendant failed to comply with this order; therefore, we assume that he submitted to the officers’ authority. A seizure requires either the “use of physical force” by an officer “or submission by the individual” to the officer’s assertion of authority. Id. When “a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” Terry v. Ohio, 392 U.S. 1, 16 (1968); see United States v. Person, 134 F. Supp. 2d 517, 523 n.1 (E.D.N.Y. 2001) (emphasizing that asking, no matter how politely, a defendant to raise his hands and stand implicates the Fourth Amendment). A reasonable person would not feel free to leave under the circumstances of this case; thus, Fourth Amendment protections applied at the moment Defendant complied with the officers’ order to keep his hands on the wall. See State v. Richards, 798 A.2d 136, 142 n.6 (N.J. Super. Ct. App. Div. 2002) (explaining that a field inquiry escalated into a Terry stop when a defendant was asked to place his hands on the patrol car).

C. Reasonable Suspicion

Defendant argues that the officers lacked reasonable suspicion to stop and detain him and that under the exclusionary rule, any evidence seized during the illegal search must be suppressed. We agree. The police may make an investigatory stop in circumstances that do not rise to the level of probable cause for an arrest if they have a reasonable suspicion that the law has been or is being violated. Terry, 392 U.S. at 21-22; State v. Flores, 1996-NMCA-059, ¶ 7, 122 N.M. 84, 920 P.2d 1038. Terry created a two-prong test for the reasonableness of an investigatory detention and weapons search. United States v. Johnson, 364 F.3d 1185, 1189 (10th Cir. 2004). A court must first decide “whether the detention was ‘justified at its inception.’” Id. (internal quotation marks and citations omitted). The State “‘must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the [sic] intrusion.’” Id. (quoting Terry, 392 U.S. at 21); see Flores, 1996-NMCA-059, ¶ 7 (“Reasonable suspicion must be based on specific articulable facts and the rational inferences that may be drawn from those facts.”). Such facts must show that the defendant has committed or is about to commit a crime. Johnson, 364 F.3d at 1189. “Second, the officer’s actions must be reasonably related in scope to the circumstances [that] justified the interference in the first place.” Id. (internal quotation marks and citations omitted). In both prongs, the reasonableness of an officer’s suspicion “is judged by an objective standard” that takes into account the totality of the circumstances and all information available to the officer at that time. Id. (internal quotation marks and citations omitted).
marks and citation omitted).

{15} As discussed above, Defendant was detained, and not free to leave, when he complied with the officers’ order to keep his hands on the wall. At that time, the officers’ suspicion that he was carrying a weapon was based solely on the information obtained from the anonymous tip. As a general rule, “an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.” Alabama v. White, 496 U.S. 325, 329 (1990).

{16} There are, however, situations in which a corroborated anonymous tip can have sufficient indicia of reliability to furnish reasonable suspicion for making an investigatory stop. See White, 496 U.S. at 330-31. In White, the U.S. Supreme Court found that an important indicator of the reliability of an anonymous tip is that it contains a range of details relating to the future actions of third parties that would not ordinarily be easily predictable. Id. at 332. Although the Court described White as a “close case,” it held that the anonymous tip in that case was reliable because significant aspects of the caller’s predictions were corroborated by police investigation and, thus, there was reason to believe that the caller was honest and sufficiently informed to justify the stop. Id. Similarly, this Court in Flores found an anonymous tip to be reliable when police corroborated significant predictive aspects of the tip, including “the description of the vehicles, the direction of travel, and the time of arrival at the described destination.” 1996-NMCA-059, ¶ 9. We described that case as a “close call.” Id. ¶ 10.

{17} In State v. Bedolla, 111 N.M. 448, 451-52, 806 P.2d 588, 591-92 (Ct. App. 1991), this Court was persuaded that the balance lay on the other side of the line defined in White and Flores and held that the lack of corroboration of predictive detail invalidated a stop based on an anonymous tip. In Bedolla, the tip alleged that two men were dealing cocaine from a room in a particular motel and described the truck that they were driving. 111 N.M. at 452, 806 P.2d at 592. The police only corroborated that the truck arrived at the motel with three adults and that it later departed with two adults, while two others left in a second truck. Id. The tip alleged criminal activity yet lacked predictive detail and was not sufficiently corroborated by the police before the stop for them to form reasonable suspicion. Id. at 451, 806 P.2d at 591.

{18} The U.S. Supreme Court has subsequently clarified the level of predictive detail that an anonymous tip must contain to justify reasonable suspicion for a Terry stop. Florida v. J.L., 529 U.S. 266 (2000). In J.L., the Court analyzed the reliability of an anonymous tip predicting that a young black man would be standing at a particular bus stop, wearing a plaid shirt, and carrying a gun. Id. at 268. The officers arrived at the bus stop and saw three black males “just hanging out[,]” and one of them was wearing a plaid shirt. Id. (internal quotation marks and citation omitted). The Court noted that besides the tip, the officers “had no reason to suspect any of the three of illegal conduct.” Id. The officers did not see a gun, and J.L. did not make any threatening or unusual movements. Id.

{19} One of the officers told J.L. to put his hands on the bus stop, proceeded to frisk him, and seized a gun from his pocket. Id. The Court, in upholding a lower court decision that the search was invalid, stated that an anonymous tip that a person is carrying a firearm is not in itself sufficient to justify a police officer’s stop and frisk of that person. Id. at 274. The Court clarified that under those circumstances, an anonymous tip must have some predictive information to allow the police to verify the informant’s knowledge or credibility. Id. at 271. The “unknown, unaccountable informant . . . neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L.” Id. The fact that a gun was found did not mean that the officers had a “reasonable basis for suspecting J.L. of engaging in unlawful conduct.” Id.

{20} The tip in J.L., which provided an “accurate description of a subject’s readily observable location and appearance[,]” did not “show that the tipster [had] knowledge of concealed criminal activity.” Id. at 272. To form the basis of reasonable suspicion, a tip must be “reliable in its assertion of illegality” and not just in its ability to identify a specific person. Id. The Court therefore held that when an “officer’s authority to make [an] initial stop is at issue[,]” an anonymous tip that lacks sufficient indicia of reliability “does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.” Id. at 274.

{21} Here, Defendant asserts that J.L. is the controlling case in this matter and that the facts are more analogous to those in Bedolla than to those in Flores. This Court recently addressed the J.L. holdings in a case where an anonymous caller described a vehicle that was being driven erratically and thus presented an imminent threat to the public. State v. Contreras, 2003-NMCA-129, ¶ 21, 134 N.M. 503, 79 P.3d 1111. The anonymous tipster called 911 and informed the police “of a possible drunk driver who was driving a grey van, towing a red Geo, and driving erratically.” Id. ¶ 2. The patrol officers found and stopped the vehicle but had not observed the erratic driving themselves prior to the stop. Id.

{22} In analyzing the totality of circumstances in Contreras, we found that reasonable suspicion existed for the stop. Id. ¶ 21. Even in light of J.L., the facts “allow[ed an] inference that the anonymous caller was a reliable concerned motorist; the information given was detailed enough for the deputies to find the vehicle in question and confirm the description; and the caller was an apparent eyewitness to the erratic driving.” Contreras, 2003-NMCA-129, ¶ 21. We weighed the potential “threat of drunk driving to the safety of the public with [the d]efendant’s right to be free from unreasonable seizure.” Id. ¶ 13. Furthermore, “a moving car on a public roadway present[ed] an exigent circumstance that a possessory crime [did] not.” Id. ¶ 15 (citing United States v. Wheat, 278 F.3d 722, 736-37 (8th Cir. 2001) (observing that the critical distinction between gun possession cases and potential drunk driving cases is that in the latter case, an officer cannot initiate a consensual encounter and cannot observe the suspect for a considerable length of time because an erratic and possible drunk driver poses an imminent threat to public safety)). We also observed that the brief stop of a vehicle is “less intrusive than the pat-down search at issue in J.L.” Contreras, 2003-NMCA-129, ¶ 16.

{23} Applying the principles in Contreras, we find that the present case is virtually identical to J.L. Here, the anonymous tip provided a location, the color of the car, and a statement that the subjects may possibly be armed. As in J.L., the tip contained no predictive information that would allow the officers to judge the informant’s knowledge or credibility. The characteristics that it described
were readily observable by anyone, and there was no information as to how the informant might have obtained inside information or knowledge about the gun. In fact, the assertion about the gun was vague at best. The officers failed to establish reasonable suspicion independently before seizing Defendant.

{24} The State argues that J.L. is distinguishable because in this case, the subjects were standing on private property in a high crime area, the officers observed a bulge in Defendant’s pocket, and Defendant's behavior was suspicious. We are not persuaded that reasonable suspicion was developed from the facts that Defendant was leaning against a wall at a corner house in an area where such houses were often targets for burglary. When the officers arrived at the scene, they had no way of knowing whether the house belonged to Defendant or whether he had permission to be on that property. In fact, testimony indicated that the house may have been owned by a relative of one of the men. When asked why the tipster thought Defendant looked suspicious, the Detective stated, “Why this person said they looked suspicious, I can’t say.” The Detective also agreed that the stop was initiated based on the suspicion generated from the tip and not from “officer suspicion.” With regard to the pocket bulge and Defendant’s suspicious behavior, these observations took place after Defendant was seized and thus play no part in determining whether the officers had reasonable suspicion to stop and detain Defendant.

{25} We find that the pat-down search of Defendant on a public corner was an intrusive form of seizure. There was no exigency that precluded the officers from engaging in a consensual encounter that would have allowed time to develop reasonable suspicion. As in J.L. and Bedolla, the anonymous tip that formed the officers’ basis for this investigatory stop lacked sufficient indicia of reliability to form reasonable suspicion. The gun, as evidence seized during an illegal stop, must be excluded. Holding that the initial stop was unwarranted, we do not need to reach Defendant's additional argument that the pat-down was illegal.

III. CONCLUSION

{26} Because the anonymous tip lacked sufficient indicia of reliability and the investigatory stop therefore violated Defendant’s constitutional rights, we reverse the district court’s denial of the motion to suppress.

{27} IT IS SO ORDERED.

CElia FOY CASTILLO,
Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
IRA ROBINSON, Judge
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The Nordhaus Law Firm is seeking an associate attorney with five or fewer years of experience for our Albuquerque, New Mexico office starting immediately. Experience and/or demonstrated interest in Indian law is preferred but not required. We represent Indian Tribes and Tribal entities on economic development projects, in financing transactions, in administrative and regulatory processes, on Tribal governance issues, and before national and state legislative bodies. The firm also handles complex litigation from trial through final appeal on a range of issues including trust responsibility enforcement, jurisdiction, taxation, and natural resource protection and development. We are an equal opportunity employer. Qualified Native Americans are encouraged to apply. To apply, please submit: (1) a cover letter describing your interest in and qualifications for the position, (2) a resume, (3) a legal writing sample, (4) a list of references, and (5) an official law school transcript to Hiring Partner – Albuquerque Office, c/o Vilma Ruiz, 1239 Paseo De Peralta, Santa Fe, NM 87501. You may submit your application by email to hiringpartner@nordhauslaw.com with the application documents in PDF, WordPerfect, or MS Word format.

Attorney Position
Capable, productive attorney wanted for busy plaintiff personal injury practice. This is a great opportunity for a talented, focused attorney to work in a friendly environment where good efforts and good results are justly rewarded. Experience in personal injury required. Medical malpractice, wrongful death and insurance bad faith litigation experience a plus. Excellent benefits and salary commensurate with experience. Forward resume and salary requirements. E-mail: hlo@nm.net; fax: (505) 881-6668.

Commercial Transaction Attorney
Sutin Thayer & Browne is accepting resumes for a lawyer with 2 to 5 years experience in business and commercial law. Experience in entity formation and operation and mergers and acquisitions preferred. The position is in our Albuquerque office. Applicants must be licensed in New Mexico. All replies will be kept confidential. Please send a letter of interest, resume, writing sample and transcript to Recruiting Coordinator, Sutin Thayer & Browne, P.O. Box 1945, Albuquerque, NM 87103, or email to or fax to 505-888-6565.
Las Cruces Attorney
Statewide law firm has an immediate need for a transactional attorney with five or more years experience in the areas of estate and business planning, real estate, or taxation for a rapidly growing practice in the Las Cruces, New Mexico office. Send resumes to Managing Partner, Miller Stratvert Law Firm, P.O. Box 25687, Albuquerque, NM 87125-0687.

Paralegal
Wanted for local downtown law office in Albuquerque, N.M. Paralegal with experience in work compensation and insurance defense. Benefits include paid health insurance, life insurance, short and long term disability, paid parking. 401K plan. Please send your resume and references to Civerolo, Grealow, Hill and Curtis, P.A., P.O. Drawer 887, Albuquerque, N.M. 87103.

Paralegal
Experienced, competent, hard working paralegal sought to work in busy plaintiff personal injury firm. Must be able to work on an active litigation caseload. Good writing and computer skills are necessary along with knowledge of forms and procedures to support litigation. Excellent benefits and salary commensurate with experience. Send resume with cover letter and references. E-mail: hlo@nm.net; fax (505) 881-6668.

Legal Secretary/Paralegal-Part Time
Kelley, Streube, Mortimer & Middlebrooks, LLC seeks part-time assistance from an individual with a minimum of four years experience. Must have knowledge of NM and federal rules and procedures and be able to prepare cases for discovery and trial. Some knowledge of business transactions helpful. Submit resume, references, availability, and salary requirements to Office Manager, 315 5th Street NW, Albuquerque, NM 87102 or fax to (505) 848-8593.

Legal Secretary
Keleher & McLeod, P.A. is looking for a full-time litigation secretary with a minimum of four years experience. Some administrative law experience helpful. Must have knowledge of NM court rules and procedures and be a detail oriented, self-motivated, team player with strong work ethic, organizational and communication skills. Excellent benefits. Send resume and references to Administrator, Keleher & McLeod, P.A., P.O. Box AA, Albuquerque, NM 87103; or fax to (505) 346-1370.

Legal Support
High Desert Legal Staffing seeks legal secretaries and paralegals with strong computer skills for both temporary and permanent positions with leading firms in Albuquerque and Santa Fe. E-mail: L.Brown@highdeserstaffing.com; fax (505) 881-9089; or call (505) 881-3449 for immediate interview.

Runner/Entry Level Office Assistant
An established Plaintiffs’ firm in Albuquerque, NM, seeks a Runner/Entry Level Office Assistant. Cheerful person for busy law office. Knowledge of downtown area. Duties include, but not limited to, court filing, office errands, opening files, answering phones. Computer knowledge and typing skills a plus. Starting pay $7.50. Please email resume to law@spinn.net or fax to 842-1848.

Experience Paralegal
An established Plaintiffs’ firm in Albuquerque, NM, seeks an experience Paralegal. This is a full-time position. Candidate should have experience in personal injury, medical malpractice litigation, strong organizational skills, ability to work under pressure and maintain flexibility. Position requires the ability to type a minimum of 60 wpm and strong computer skills. Pay is dependent on qualifications. Please email resume with references to law@spinn.net.

POSITIONS WANTED

Precise and Conscientious Legal Research
Terence Grant. Qualifications: J.D. (magna cum laude) and J.C.L. canon law (magna cum laude). 3 years experience as litigation attorney. Full-time research for New Mexico attorneys since 1997. My resources include LEXIS and the State Supreme Court Law Library. Phone: 505-989-4173. Fax: 505-989-8619.

Got Work?
Paralegal 20+ years experience seeks part-time contract work, 15-20 hours per week, flexible. Excellent organizational, investigative, litigation skills; proficient in records management including medical/employment (collect, organize, summarize), state/federal rules application and appeals brief organization, tables, indices. Virginia 480-5428. 833-7011. Current references/resume available on request.

CONSULTING

Forensic Psychiatrist
Trained at Yale University in Forensic psychiatry. Board certified and licensed in New Mexico. Available for expert witness testimony. Experienced in criminal and civil matters. Call Dr. Kelly at 505-463-1228.

OFFICE SPACE

Professional Office Suites
Downtown
Large offices with separate secretarial area, free client parking, receptionist, library/conference room, kitchen, telephone, high-speed Internet connection, copier, fax, security. Call Lynda at 842-5924.

Offices for Lease Downtown
Spacious remodeled offices with furnished secretarial space. ($425.00 - $650.00) Two conference rooms; kitchen, telephone, free DSL, Cat. 5 networking, fax, free client parking, security & janitorial. Walking distance to all courts - Congenial atmosphere. Call Deborah at (505) 843-9171.

For Lease
For Lease, 2142 sq. ft. on Central at 12th, very clean space with plenty of on-site parking. 5 offices plus conference room $1200/month call Dan Hernandez M: 480-5700, O: 247-0444 at Berger Briggs Real Estate & Insurance Inc.

Uptown Space-Albuquerque
Small office space (8’ x 11’) available in prestigious Uptown area. Includes use of reception area, library/conference room and kitchenette. $375.00 per month. Receptionist/secretary, phones, fax and internet available at share cost. Call (505) 872-1322 and ask for Danette, or email danettegabaldon@yahoo.com.

Louisiana/Candelaria Corner!
Office suite w/ staff station. Shared conference room, reception area, copy room/kitchen. Phone system, janitorial. 889-3899.

Uptown Square Office Building
Prestigious Uptown location, high visibility, convenient access to I-40, Bank of America, companion restaurants, shopping, two-story atrium, extensive landscaping, ample parking, full-service lease. 3747SF. Buildings include reception counter/desk and separate kitchen area. Competitive Rates. Available Soon! Call Ron Nelson or John Whisenant 883-9662.

Office For Lease – Historic Sunshine Bldg.

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Technology, e-Commerce and the Practice of Law: A 2005 Update

Friday, April 8, 2005 • 9 a.m.  
State Bar Center, Albuquerque  
6.1 General and 1.1 Ethics CLE Credits

Co-Sponsors: Real Property, Probate & Trust Section and the Business Law Section

Presenters:
Professor Raymond T. Nimmer, University of Houston Law Center  
Holly K. Towle, Preston Gates & Ellis LLP, Seattle, Washington  
Professor Michael J. Norwood, UNM School of Law  
Colin Adams, Esq., PNM; Dale Alverson, M.D., Medical Director, UNM HSC Center for TeleHealth;  
Terry Boulanger, President, New Mexico Technet;  
Leonard Sanchez, Miller Stratvert P.A.; James Widland, Esq., Miller Stratvert P.A.

This special seminar will feature two leading international authorities in the area of technology and e-commerce law, Raymond T. Nimmer, Professor of Law at the University of Houston Law Center and Holly K. Towle of Preston Gates & Ellis LLP in Seattle. Nimmer is the author of a national award winning book, The Law of Computer Technology, as well as numerous other books and articles. He is a frequent speaker internationally in the areas of intellectual property, business and technology law. He is listed in both the International Who’s Who of Internet Lawyers and the International Who’s Who of Business Lawyers and was instrumental in the drafting of UCC Article 2 and the Uniform Computer Information Transactions Act (UCITA). Towle, leading author of The Law of Electronic Commercial Transactions (with co-author Nimmer), a treatise that explains the legal landscape of commercial law when electronics or electronic settings are involved is listed in the International Who’s Who of e-Commerce Lawyers. Towle also speaks and is published nationally and internationally on e-commerce, licensing and online services having commented on behalf of trade organizations and other clients for more than a decade on proposed state and federal legislation regarding computer information transactions, e-commerce, software licensing and proposed revisions to UCC Article 2 and consumer protection rules. Also included in this seminar are exciting sessions on security issues and ethical responsibilities, as well as updates on joint ventures, drafting, telemedicine and technology trends in New Mexico.

Friday, April 8, 2005 • State Bar Center, Albuquerque  
6.1 General and 1.1 Ethics CLE Credits

☐ Standard and Non-Attorney $199  ☐ Government and Paralegal $189  
☐ Real Property, Probate & Trust Section Members $179  ☐ Business Law Section Members $179

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Mail this form to: Center for Legal Education of the NM State Bar Foundation, PO Box 92860 Albuquerque, NM 87199 or Fax to (505) 797-6071.

Register Online at www.nmbar.org
Second Annual Seminar & Reception:
Dementia, Capacity & Undue Influence of the Elderly

Friday, April 1, 2005 • 1 p.m.
State Bar Center, Albuquerque
4.2 General CLE Credits

Co-Sponsor: Elder Law Section of SBNM

Presenters: Kevin D. Hammar, Esq., William Foote, Ph.D., Anne R. Simpson, M.D., and Hon. Linda M. Vanzl

The Elder Law Section of the State Bar of New Mexico presents its Second Annual Seminar and Reception with a program that focuses upon legal and medical issues designed to help attorneys and their elder clients. The seminar features renowned speakers on the topics of dementia and its many causes, competency and capacity of the elder client and the practical treatment of these issues in legal cases. A reception will immediately follow in the lobby of the State Bar Center.

Schedule of Events

1:00 p.m. Introductory Remarks
1:05 p.m. Causes of Dementia
2:15 p.m. Break
2:30 p.m. Undue Influence & Capacity
3:40 p.m. Break
3:55 p.m. Practical Treatments of Dementia, Undue Influence & Capacity in Legal Cases
5:00 p.m. Reception - All are welcome to attend.

REGISTRATION

DEMENTIA, CAPACITY & UNDUE INFLUENCE OF THE ELDERLY
Friday, April 1, 2005 • State Bar Center, Albuquerque
4.2 General CLE Credits

☐ Standard and Non-Attorney $99  ☐ Government and Paralegal $89  ☐ Elder Law Section Members $79

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Register Online at www.nmbar.org
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