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2005-NMCA-073: Joanne M. Beiser v. Feidhlim O’Cleireachain, M.D.

2005-NMCA-074: State v. Clara Notah-Hunter
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Recent Changes to the UCC in New Mexico

Wednesday, July 13, 2005
Lunch: 11:30 a.m. - Noon • CLE: Noon - 1 p.m.
State Bar Center, Albuquerque
1.2 General CLE Credits

Co-Sponsor: Business Law Section
Presenter: Jack Burton, Esq.

This seminar will feature attorney Jack Burton who, as a UCC Law Commissioner, helped to draft recent changes to the code in New Mexico. In 2004, he was named Business Lawyer of the Year by the SBNM Business Law Section and has spent the past 36 years with the Rodey Law Firm. The focus of his presentation will be on Articles 1, 7 and 9 of the code as they apply to general provisions, documents of title and secured transactions.

☐ Standard Fee $39

Lawyering With Emotional Intelligence

Friday, July 15, 2005 • 1:30 - 4:30 p.m.
State Bar Center, Albuquerque
2.0 Professionalism and 1.2 Ethics CLE Credits
Reception: 4:30 - 6:30 p.m.

Co-Sponsor: New Mexico Hispanic Bar Association
Presenters: Arturo Jaramillo, Superintendent, NM Dept. Regulation and Licensing

There are both professional and ethical considerations involved in the practice of law. The principles of emotional intelligence provide an innovative approach for attorneys that can be used to enhance communication skills, listening skills and general effectiveness in presentations. The focus of this program will be on the fundamentals of emotional intelligence and how these learned competencies can be utilized to further one’s practice.

☐ Standard and Non-Attorney $79
☐ Government & Paralegal $69
☐ NM Hispanic Bar Member $59

FOUR WAYS TO REGISTER

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(Please have credit card information ready)
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MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

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Contributions and announcements to the Bar Bulletin are welcome, but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy available upon request.

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**Professionalism Tip**

With respect to the courts and other tribunals:

I will be respectful toward and candid with the court.

**Meetings**

**July**

6 Employment and Labor Law Section Board of Directors, noon, State Bar Center

6 Trial Practice Section Board of Directors, 4:30 p.m., State Bar Center

7 Elder Law Section Board of Directors, noon, State Bar Center

11 Public Legal Education Committee, noon, State Bar Center

11 Attorney Support Group, 5:30 p.m., First Methodist Church

14 Public Law Section Board of Directors, noon, RMD Legal Bureau, Santa Fe

**State Bar Workshops**

**July**

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

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

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

**August**

10 Landlord/Tenant Workshop - Landlords, 6 p.m., State Bar Center

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

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-888-876-6227; or visit the SBNM Web site, www.nmbar.org.
NOTICES

COURT NEWS
Supreme Court
Law Library Holiday Hours
The following are the hours of the New Mexico Supreme Court Law Library during the July Fourth holiday:
July 4 Closed
July 5 Open at 8 a.m.

Notice on Address Changes
All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information may be e-mailed to the Supreme Court, Supvnm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848.

Compilation Commission Request for Proposals for Attorney Services
Pursuant to Sections 13-1-111 through -119.1 NMSA 1978, the New Mexico Compilation Commission and its Advisory Committee request competitive sealed proposals for an attorney to provide legal drafting and research services. The duties of the Compilation Commission and the Advisory Committee are set forth in the NMSA 1978. A copy of the Request for Proposals may be obtained from:
New Mexico Compilation Commission
Kathleen Jo Gibson, Secretary
PO Box 848
Santa Fe, NM 87504-0848
Competitive Sealed Proposals must be received on or before 5 p.m., July 20.

Judicial Performance Evaluation Commission
Upcoming Meeting
The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission's next meeting will be from 8 a.m. to 5 p.m., July 22 at the Farmington Public Library, 2101 Farmington Ave. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

NM Board of Legal Specialization
Comments Solicited
The following attorneys are applying for certification as specialists in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA. The Rules of the New Mexico Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon any of the applicant's qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 92860, Albuquerque, NM 87199.

Appellate Practice
Steven L. Tucker

Federal Indian Law
Robert O. Allan

Family Law
Sanford H. Siegel

First Judicial District Court
Criminal Bench and Bar
Brownbag
The First Judicial District Court Criminal Bench and Bar will have a brownbag meeting at noon, July 19 in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to any of the First Judicial District Court's Criminal Divisions.

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, July 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: Criminal and Children
Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the court in the criminal cases for years 1980 to 1991, and children cases for years 1985 to 1989, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Exhibits may be retrieved from now until July 16. Attorneys who have cases with exhibits should verify exhibit information with the Special Services Division, at (505) 841-7596/7405, from 8 a.m. to noon, and from 1 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.

Destruction of Exhibits: Domestic
Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the court in the domestic cases for years 1980 to 1985, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Exhibits may be retrieved from now until July 22. Attorneys who have cases with exhibits should verify exhibit information with the Special Services Division, at (505) 841-7596/7405, from 8 a.m. to noon, and from 1 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 entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

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 every other month beginning in September. The meeting is held in the Conference Center located on the third floor of the Bernalillo County Courthouse. The meeting will be held on Sept. 12. Contact Sandra Partida, (505) 841-7531, for more information or to have an item placed on the agenda.

Thirteenth Judicial District Court
Sandoval County Court Operations Moving
The new Sandoval County Courthouse is now ready for occupancy. In order to accommodate moving the Bernalillo clerk’s office, the Thirteenth Judicial District Court there will be closed for moving July 21 and July 22. The court will reopen on July 25 at its new location. The new address is: Thirteenth Judicial District Court 1500 Idalia Road, Building A, Bernalillo, NM 87004.
All current phone numbers will stay the same, but the court asks that attorneys be patient with communications as the new phone and computer systems come on line. For more information call Theresa Valencia, chief clerk, (505) 867-2376.

STATE BAR NEWS
Annual Meeting Resolutions and Motions
The 2005 Annual Meeting of the State Bar of New Mexico will be held at noon, Sept. 23, at the Ruidoso Convention Center in Ruidoso. Resolutions and motions to be considered must be submitted in writing and received in the office of Joe Conte, executive director, PO Box 92860, Albuquerque, NM 87199; fax, (505) 828-3765; or e-mail, jconte@nmbar.org, by 5 p.m., Aug. 23.

Appellate Practice Section
Annual Meeting
The annual meeting of the Appellate Practice Section will take place at 1 p.m., Aug. 19 at the State Bar Center. It will be held in conjunction with the 16th Annual Appellate Practice Institute, which will be held that day at the State Bar Center from 8:20 a.m. to 4:30 p.m. All members of the section and other interested persons are invited to attend and to participate.

Attorney Support Group Monthly Meeting
The next Attorney Support Group meeting will be held at 5:30 p.m., July 11 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month, but is meeting on the second Monday due to the Fourth of July holiday.
For more information, contact Bill Stratvert, (505) 242-6845.

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 July 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.

Lawyers Assistance Committee Wanted: Lawyers in Recovery in Las Cruces
The Lawyers Assistance Committee is looking for attorneys in recovery in Las Cruces who are willing to make 12-Step calls. Attorneys who are able to help, call Bill Stratvert, (505) 242-6845.

Legal Career Center
Legal Administrators Luncheon
Join Stat Bar Membership Services and the Legal Career Center for lunch from noon to 1 p.m., July 20 at the State Bar Center. The Legal Career Center has added a new recruiting tool to its Web site and would like an opportunity to introduce it over a delicious lunch – as well as get feedback on how it can enhance the service to best meet the legal community’s needs. Not only is the Legal Career Center picking up the check, but it’s also providing a coupon for a free online job listing including résumé database access for members to use as the need arises. Attendees can expect:
- Delicious lunch by one of the top caterers in Albuquerque
- 15-minute overview of the services offered with the NMBar Career Center
- Q&A session on the services the legal community would like to see added to the Career Center
- Free 30-day online job listing including résumé database access for those attending

Legal Administrators can take a pre-tour of the Career Center by going to www.nmbar.org and clicking on the “Career Center” button at the bottom of the homepage. Attendees should RSVP to Richard Hackett at rhackett2@qwest.net, (800) 659-5589.

Paralegal Division Brownbag CLE
Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., July 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 “Water Issues in New Mexico: The Pueblo Perspective,” presented by Jessica Aberly, Esq. 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 appear-
ance, 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, 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, July 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 Judicial Luncheon with the Chief Justice

The Young Lawyers Division (YLD) will sponsor a judicial luncheon with Chief Justice Richard C. Bosson of the New Mexico Supreme Court. This is a great opportunity to learn about the New Mexico State Supreme Court, appellate practice, and get to know YLD members. The luncheon is from noon to 1 p.m., July 12 at the New Mexico Supreme Court, 237 Don Gaspar Ave., Santa Fe. Lunch will be provided by the YLD. R.S.V.P. no later than July 7 to Erika Anderson, (505) 982-8405, sanderson@nmnet, or Brent Moore, (505) 476-3783, bren_tmoorc@nmenv.state.nm.us.

Other Bars

Albuquerque Bar Association Monthly Luncheon and CLE

The Albuquerque Bar Association’s monthly luncheon will be held at noon, July 5 at the Albuquerque Petroleum Club. The luncheon speaker will be Ed Boles, who will present a special slide presentation of the Duke City’s landmark and historic zones in observance of Albuquerque’s 300-Year Celebration. This showing comes from his collection of many years of working in this area and will highlight Albuquerque’s cultural mix. The CLE program will follow the lunch at 1:30 p.m. Charles Price and Bill Dodge will present “Historic Preservation Laws and Regulation.” This CLE will be directed at the Albuquerque general practitioner who has little or no knowledge of the subject, but would benefit by knowing the overall framework. The presenters will discuss the federal, state and local statutes and regulations, and provide examples of situations in which these laws might be applied. Register online at www.abqbar.com, by e-mail at abqbar@abqbar.com or by calling (505) 243-2615.

Hispanic National Bar Association 30th Annual Convention

Alan M. Varela, president of the Hispanic National Bar Association has announced the 30th Annual HNBA Convention in Washington D.C. at the Mandarin Oriental Hotel Oct. 16 to 20. The convention provides an opportunity to network with hundreds of the most influential Hispanics in the nation and will include world-class legal education seminars focusing on crucial issues facing the legal profession and the nation. On Oct. 19 a professional job fair will be held for law students and experienced attorneys seeking employment with Fortune 500 corporations and the nation’s most prestigious law firms. “Unidos in Washington” will feature social events at various venues, such as the Mexican Cultural Institute for a “Taste of Latin America and the Caribbean.”

Registration for the convention can be found at the HNBA Web site, www.hnba.com, and completed entirely online. The convention is open to all interested legal professionals. There are special discounted rates for HNBA members as well as those who sign up for the early bird rate now until Aug. 31. Job fair employers may also register online at the HNBA Web site for the job fair. The registration fee for job employers includes day passes for two interviewers, prominent listing in the convention program book and one full day of interviews with one of the highest caliber talent pools in the United States. The HNBA is a non-profit, national association that represents the interests of over 27,000 Hispanic American attorneys, judges, law professors, law students and legal professionals throughout the United States and Puerto Rico. For more information go to www.hnba.com or contact the HNBA Washington office, (202) 223-4777.

National Association of Counsel for Children 28th National Children’s Law Conference

This summer, the National Association of Counsel for Children will hold its annual national child advocacy training Aug. 25 to 28 at the Hollywood Renaissance Hotel in Los Angeles. Each year in America, over one million children suffer abuse and neglect. These are serious incidents of beatings, sexual assault, and the kind of neglect that results in serious health problems. NACC members serve as child advocates for these children and guide them through the difficult legal process that determines their fate. The NACC is a nonprofit agency that provides the professional training and technical assistance the child advocates need to do their work. For more information, contact NACC at (888) 828-6222, or visit its Web site at www.NACCchildlaw.org.

New Mexico Defense Lawyers Association 2005 Outstanding Civil Defense Lawyers Nominations

Nominations are being accepted for the 2005 Outstanding Civil Defense Lawyer. The award will be presented at the 2005 DLA Annual Meeting Oct. 27 in Albuquerque. This award is given to one or more attorneys who, over long and distinguished legal careers, have, by their ethical, personal, and professional conduct, exemplified for their fellow attorneys the epitome of professionalism and ability. Letters of nomination should be sent to: NMDLA, PO Box 94116, Albuquerque, NM 87199, faxed to (505) 797-6017 or e-mail to nmdefense@nmdl.org. Deadline for nomination submissions is July 31.

Advanced Trial Techniques

The NM Defense Lawyers Association will present a CLE program Aug. 25 at the State Bar Center entitled “Advanced Trial Techniques.” Registration information will be
**SUMMER HOURS**

UNM Law Library

Contact Vedra Baca, (505) 476-4890.

Attorneys interested in being appointed should contact the NM Board's Nomination Commission.

### OTHER NEWS

#### NM Board of Social Work Examiners

**Attorney Position Available**

The NM Board of Social Work Examiners is seeking to fill an attorney position on its board that meets six times per year. Any attorney who is in need of special accommodations, contact Renee Blechner, (505) 841-6083.

#### Workers’ Compensation Administration

**Notice of Public Hearing**

Notice is hereby given that at 1:30 p.m., July 13 the New Mexico Workers’ Compensation Administration will conduct a public hearing on the emergency rule change to Part 7 of the Workers’ Compensation Rules requiring payers to provide in-patient hospital data. Comments will also be accepted concerning the proposed addition to Part 3 of the rules interpreting the Court of Appeals ruling in Church's Fried Chicken v. Hanson and, also, concerning updates to the mandatory forms. The hearing will be conducted at the Workers’ Compensation Administration, 2410 Centre Avenue SE, Albuquerque. Videoconferencing may also be made available in the WCA Field Offices upon request. Contact Renee Blechner at (505) 841-6083 to reserve videoconferencing.

#### Other News

The NM Board of Social Work Examiners is seeking to fill an attorney position on its board that meets six times per year. Any attorney who is in need of special accommodations, contact Renee Blechner, (505) 841-6083.

#### UNM Law Library Summer Hours

Law Library hours through Aug. 21:

- Mon. – Thurs. 8 a.m. to 9 p.m.
- Fri. 8 a.m. to 6 p.m.
- Sat. 9 a.m. to 6 p.m.
- Sun. noon to 9 p.m.

Reference:

- Mon. – Fri. 9 a.m. to 6 p.m.
- Sat. noon to 4 p.m.
- Sun. noon to 4 p.m.

Exceptions:

- July 4 Closed

#### Visit the State Bar of New Mexico’s web site

[www.nmbar.org](http://www.nmbar.org)

#### Attorney/Firm Finder

By Veronica Cordova

SBNM Webmaster

The Attorney/Firm Finder (AFF) is an online directory of all active and inactive members of the State Bar.* It’s available to both members and to the public. The navigation link is third from the left at the top of the home page. This directory provides the most current member contact information since it’s directly linked to the State Bar’s database.

Search methods for the AFF are numerous, with the most common being by first, last or informal name. The directory can also be searched by firm/organization, state of practice, counties were cases are accepted and foreign language ability. The AFF also searches by section membership and legal specialization. Searches in this manner result in immediate access to rosters of the 19 practice sections or certified specialists in 14 specialty areas.

In addition, other features have been added to increase value to this search tool. Searching by practice areas has been added for attorneys who wish to purchase a premium listing. Unlike basic listings that include name, address, phone, fax, e-mail and attorney status, the premium listings add a color photo, a direct e-mail and Web link, practice areas, date of admission to the State Bar, and other bars, law school, and a brief biography of the member. A premium listing can be an effective marketing tool for a member’s law practice. Members should contact Marcia Ulibarri for more information, (505) 797-6058 or mulibarri@nmbar.org.

Contact (505) 797-6039, or e-mail webmaster@nmbar.org with comments or suggestions for continued improvement to the State Bar’s site and look for this column next month for more information on nmbar.org.

* Some members opt to not be included in the online directory.
Depression, Alcohol or Drug Problems?
Help is as close as your phone.

The Lawyers Assistance Program is a statewide network of recovering lawyers and substance abuse professionals dedicated to helping others within the profession get the help they need. Discuss your concerns with professional staff who will answer your questions, provide information, give support and offer a plan of action. At your request, you may be put in touch with an attorney in recovery who can share his or her experience with you.

Free Confidential* 24-Hour Hotline
Albuquerque (505) 228-1948
(800) 860-4914

*The NM Rules of Professional Conduct (Rule 16-803) and the NM Code of Judicial Conduct (Rule 21-300) provide for strict confidentiality.

The State Bar of New Mexico

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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 July 1, 2005**

**PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:**

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**CERTIORARI GRANTED BUT NOT SUBMITTED:**

(Submission = date of oral argument or briefs-only submission)

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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 Fe, NM 87504-0848 • (505) 827-4860

**EFFECTIVE JULY 1, 2005**

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**PETITION WITHDRAWN:**

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IN THE MATTER OF SUSANA CHAPARRO,
Magistrate Judge, Doña Ana County, New Mexico

JAMES A. NOEL, ESQ.
Albuquerque, New Mexico
for Judicial Standards Commission

RAY TWOHIG, ESQ.
Albuquerque, New Mexico
for Respondent

From the New Mexico Supreme Court
No. 2003-82, consolidated for purposes of final disposition with Nos. 2002-26 and 2002-43

INQUIRY CONCERNING A JUDGE
No. 27, 923

PER CURIAM

1. This matter is before the Court on a Petition for Discipline filed by the Judicial Standards Commission (Commission) against Respondent, Magistrate Judge Susana Chaparro. This is the third disciplinary matter involving Respondent. The first two matters (Nos. 2002-26 & 2002-43) were consolidated and resulted in Respondent being formally reprimanded on April 15, 2003, with the requirement that she participate in a mentorship program. The formal reprimand was published in the New Mexico Bar Bulletin on May 8, 2003. The violations that gave rise to the April 15, 2003, formal reprimand arose from ex parte communications Respondent had with a judge presiding over a writ case involving Respondent, and from a controversy involving court interpreters. Important to our disposition of the present disciplinary matter is the fact that Respondent agreed to enter into a Plea and Stipulation Agreement regarding these two matters on February 7, 2003, the very day she was engaged in the conduct giving rise to the present disciplinary matter.

2. The present disciplinary matter arises out of Respondent’s involvement in her son’s citation for speeding and no proof of insurance. The citation was ultimately dismissed on February 7, 2003, due to the officer’s failure to appear. This dismissal took place despite the District Attorney entering an appearance in the case and the officer requesting a continuance of the trial due to a conflict created by his attendance at a mandatory training class for sheriff’s officers. As illustrated by the findings of the Commission, from the day after her son was cited for speeding to the date of the dismissal of the citation, Respondent directly involved herself in the criminal proceedings involving her son by contacting the sheriff to complain about how her son was allegedly mistreated, accessing her son’s file, calling the presiding judge’s clerk to reschedule a hearing due to her son experiencing car trouble, and attending hearings with her son, where members of the public were present, including the scheduled trial where the citation was ultimately dismissed.

3. Respondent does not contest the Commission’s findings. The only issue before this Court is whether the findings support a conclusion that Respondent’s conduct constituted willful misconduct in office. We are convinced that Respondent’s conduct as described hereinafter in the Commission’s findings did constitute willful misconduct in office. Based on the Respondent’s history of misconduct, and after reviewing other Commission dispositions for similar conduct, we reject the Commission’s recommended discipline and impose greater discipline than recommended as hereinafter set forth. See In re Sanchez, Vol. 38, No. 36, SBB13 (N.M. 1999); In re Perea, Vol. 38, No. 36, SBB 14 (N.M. 1999).

4. We emphasize that our ultimate disposition was tempered by Commission finding number 29, that Respondent did not communicate directly with the presiding judge regarding her son’s case prior to the scheduled trial date of February 7, 2003. This finding was made despite testimony by the presiding judge that the day before the scheduled trial, Respondent had talked to him regarding a pending request for a continuance from the sheriff in her son’s case. Had the Commission found that Respondent had communicated with the presiding judge about her son’s case prior to the scheduled trial, the discipline we hereinafter impose would have been greater. However, having read the entire record, we have chosen to accept all of the findings of the Commission, particularly since the findings are not contested.

5. The Commission conducted a trial from February 7-9, 2005, pursuant to N.M. Const. art. VI, § 32, NMSA 1978, § 34-10-2.1 (enacted by Laws 1977), and the Commission Rules. The Commission heard testimony of twenty witnesses and considered and reviewed all exhibits admitted into evidence. Eight Commissioners participated in the hearing, deliberation, decision, and adoption of findings of fact, conclusions of law, and recommendation.

6. The Commission issued findings of fact, conclusions of law, and recommendation for discipline on March 15, 2005. This Court hereby adopts the Commission’s findings of fact as enumerated below:
   1. Respondent, Honorable Susana Chaparro, was elected Magistrate Judge of Doña Ana County, New Mexico, in 1998 and was re-elected in 2002.
   2. The notice of formal proceedings was issued and filed on January 5, 2004.
   3. Respondent’s unverified response to the notice of formal proceedings was filed on January 22, 2004. The response put each count at issue.
   4. A first amended notice of formal proceedings was issued and filed on January 12, 2005.
   5. Respondent’s verified response to the amended notice of formal proceedings was filed on February 1, 2005. The response

6. On the evening of August 29, 2002, Respondent’s son, Michael Benavidez, was cited by a Doña Ana County Deputy Sheriff A. J. Rodriguez for speeding and for not having proof of insurance. The matter was styled State of New Mexico vs. Benavidez, Doña Ana County Magistrate Court Cause Number M-14-TR-200205837.

7. On August 30, 2002, Respondent contacted Doña Ana County Sheriff Juan Hernandez about her son’s allegations that Deputy Sheriff Rodriguez mistreated him and his passengers and held them for an excessive period of time at the scene.

8. Sheriff Hernandez knew that Respondent was a sitting judge on the Doña Ana County Magistrate Court.

9. Sheriff Hernandez investigated the allegations of mistreatment and concluded that no mistreatment occurred.

10. The traffic stop by Deputy Sheriff Rodriguez was videotaped. The videotape depicts no mistreatment of defendant Benavidez.

11. At the request of Deputy Sheriff Rodriguez, the Third Judicial District Attorney through Assistant District Attorney Keythan Park filed an entry of appearance in the case on behalf of the State of New Mexico. The entry was file stamped on September 19, 2002.

12. On November 7, 2002, Doña Ana County Magistrate Court received and file stamped a memorandum from the Third Judicial District Attorney’s Office indicating that the District Attorney would not be entering an appearance in the matter of State v. Benavidez.


14. Respondent and Judge Curran were both sitting judges on the Doña Ana County Magistrate Court at the time Respondent was present in Judge Curran’s courtroom with her son.

15. Judge Curran called the case and asked the parties to come forward. Because Deputy Sheriff Rodriguez was not present in the courtroom, Judge Curran indicated an intent to dismiss the case.

16. Deputy District Attorney Mike Wallace informed Judge Curran that he was from the District Attorney’s Office and was appearing on behalf of the State at the hearing.

17. Judge Curran questioned the appearance based upon the November 7, 2002, memorandum. However, Judge Curran could not locate the memorandum in the Benavidez court file.

18. Deputy District Attorney Wallace contended that the memorandum was sent in error since his office previously had entered its appearance in the case on behalf of the State.

19. After this exchange, Respondent stepped forward and provided Judge Curran with a copy of the District Attorney’s memorandum at issue. Respondent did not have the original of the court document in her possession.


21. Members of the public were present in the courtroom and observed Respondent’s interaction with Judge Curran.

22. On December 27, 2002, on behalf of her son, Respondent called Judge Curran’s clerk, Esther Baca (now known as Esther Molina), and asked Ms. Baca to inform Judge Curran that the “defendant’s mother” called and requested a continuance for the pretrial hearing because her son was experiencing car trouble in Taos, New Mexico. Defendant Benavidez testified that he was stuck in Taos due to a snow storm.

23. Based on Respondent’s communications with Ms. Baca, Judge Curran vacated the December 27, 2002, pretrial hearing and the matter was reset for trial on February 7, 2003.


25. Honorable Reuben Galvan was elected in November 2002 and assumed Judge Curran’s division and caseload on January 1, 2003, including the Benavidez case.

26. On January 29, 2003, Deputy Sheriff Rodriguez transmitted via facsimile a timely request for continuance of the trial of the Benavidez case set for February 7, 2003, because he would be attending mandatory training classes for his new position with the Bernalillo County Sheriff’s Department.

27. On February 5, 2003, Respondent asked a court clerk, Leticia Padilla, to bring Respondent the court file for her son’s case. Respondent testified that she wanted to review the file because she heard that a continuance had been requested.

28. Clerk Padilla retrieved the file from Judge Galvan’s desk and gave it to Respondent as requested. Respondent reviewed the file and later returned it to Ms. Padilla for return to Judge Galvan’s desk.

29. Prior to February 7, 2003, Respondent did not communicate directly with Judge Galvan about her son’s case.

30. Prior to the hearing on February 7, 2003, Judge Galvan was aware of the continuance request by Deputy Sheriff Rodriguez.

31. On February 7, 2003, Respondent’s son appeared for his trial before Judge Galvan. The District Attorney’s Office was not present. Deputy Sheriff Rodriguez was not present.

32. Judge Galvan called out for the officer and waited. During the wait, Respondent came into Judge Galvan’s courtroom and spoke with her son. Respondent then returned to her courtroom for a period of time before returning to Judge Galvan’s courtroom to join her son.

33. While the Respondent was present in Judge Galvan’s courtroom, Judge Galvan called the Benavidez case and dismissed it.

34. Respondent thanked Judge Galvan and then sought documentation for her son to take back to school to explain his tardiness or absence.

35. Respondent and Judge Galvan were both sitting judges on the Doña Ana County Magistrate Court at the time Respondent
was present in Judge Galvan’s courtroom with her son.
36. Members of the public were present in the courtroom and observed Respondent’s interaction with Judge Galvan.
37. Respondent did not sit next to Judge Galvan on the bench at any time during the proceedings in her son’s case.

{7} This Court hereby adopts the Commission’s conclusions of law as enumerated below:

1. The Judicial Standards Commission has jurisdiction of the parties and the subject matter under N.M. Const., article VI, § 32, and Section 34-10-2.1.
2. As alleged in the first sentence of Count I and in Count III, Respondent, by a pattern of conduct and repeated interaction with court personnel, improperly involved herself in, and interfered with, the adjudication of the Magistrate Court matter involving her son, *State v. Benavidez*, Doña Ana County Magistrate Court Cause Number M-14-TR-200205837, and thereby gave the appearance of impropriety, gave the appearance that she was trying to influence the outcome of her son’s case, and compromised the integrity, independence, and impartiality of the judiciary in violation of Canons 21-100 NMRA 1995 and 21-200(A) and (B) NMRA 1995 of the Code of Judicial Conduct.
3. Respondent’s conduct was established by clear and convincing evidence and constituted willful misconduct in office.

{8} **NOW, THEREFORE, IT IS ORDERED** that Honorable Susana Chaparro is hereby disciplined as follows:
1. Respondent shall be suspended without pay for two weeks as soon as practicable beginning at a time selected by the Magistrate Division of the Administrative Office of the Courts. Thereafter, Respondent shall be suspended for six weeks, imposition of which shall be deferred on condition that Respondent successfully complete one year of supervised probation. Failure to satisfactorily complete the period of supervised probation shall result in the imposition of the full six-week deferred suspension without pay.
2. The Judicial Standards commission shall choose a supervising judge to supervise Respondent during the term of probation. Respondent shall meet with her supervising judge at the time(s) and place(s) selected by the supervising judge for counseling and assistance with the requirements of the Code of Judicial Conduct. The supervising judge shall file a report with this Court and the Judicial Standards Commission concerning the results of Respondent’s probation.
3. This Formal Reprimand shall be published in the *Bar Bulletin*.
4. The Judicial Standards Commission’s costs and expenses are hereby assessed against Respondent in the amount of $5,000.00 to be paid by Respondent.

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

Chief Justice Richard C. Bosson
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Edward L. Chávez
OPINION

JAMES T. WECHSLER, JUDGE

[1] Defendant appeals his convictions for second degree murder and tampering with evidence. On appeal, Defendant argues that plain error occurred due to his trial counsel’s failure to file a motion to suppress evidence because the police did not obtain a search warrant prior to collecting evidence from Defendant’s home. In the alternative, Defendant argues that his counsel was ineffective in failing to file the motion. Additionally, Defendant argues that the trial court erred in allowing a witness to testify to a statement made by the victim over Defendant’s hearsay objection, that it erroneously admitted testimony of two police officers, and that statements made by the prosecutor during opening statements and closing arguments constituted fundamental error. After the State filed its brief, Defendant filed a motion to supplement the record and to allow the State the opportunity to address the supplemental record in further briefing. We now deny the motion and affirm.

Factual and Procedural History

[2] On December 3, 2001, police officers responded to a possible suicide call at Defendant’s home. Officer Dino Roden, one of the responding officers, testified that he could see inside through a glass storm door as he approached the home. He noticed debris and broken pottery on the floor and blood on the carpet. As Officer Roden was about to open the door, Defendant approached and stated “well she finally did it.” Officer Roden informed Defendant that he had been dispatched to investigate a suicide and asked where “she” was. Defendant informed the officer that the victim, Defendant’s estranged wife, was in the back bedroom.

[3] Officer Roden and Officer Joshua Perea, who arrived shortly after Officer Roden, located the victim in the back bedroom on the bed. She was dead with an apparent shotgun wound to her chest. She had a four-to-five-inch gash on her upper left thigh from which blood flowed up rather than down. Her hands were badly lacerated, and her right thumb, which was missing, was later found beneath a night stand. She had blood stains on the bottom of one of her feet. There were also marks on her throat and around the back side of her neck, as well as evidence of retinal hemorrhaging. The officers saw a 12-gauge shotgun leaning next to the victim. It had a badly damaged barrel that “was peeled back like a banana.” There was a wooden backscratcher next to the shotgun. They also saw pieces of shrapnel from the shotgun barrel on the wall in the bedroom and pieces of duct tape and fibers of blue cloth attached to the shotgun.

[4] After making these observations, the officers cleared the house, called New Mexico state police crime scene investigators, and set up crime scene tape. Officer Perea stated that Defendant did not appear upset at this point, and, in fact, went outside and began drinking a beer.

[5] The officers questioned Defendant’s neighbors. Witnesses stated that they heard yelling coming from Defendant’s residence, followed by a loud noise, and that they observed a man exit the residence and throw a bag over the fence into another yard approximately ten minutes before the officers arrived. Upon searching the area described by the witnesses, the officers recovered a blue towel “covered with duct tape.” The officers also located a piece of duct tape underneath the bed where the victim was found and a roll of duct tape in one of the other rooms. The evidence indicated to the officers that Defendant had strangled the victim, then used the duct tape to attach the towel to the butt of the weapon and to secure a potato to the end of the barrel, presumably as a silencer. The evidence also indicated to police that Defendant had staged the suicide scene.

[6] Dr. Jeff Nine, a forensic pathologist with the Office of the Medical Investigator, found metal fragments, pieces of duct tape, and potato fragments in the vicinity of the shotgun wound. He testified at trial that the wounds on the victim’s hands indicated that her hands were in front of the barrel of the weapon, but not necessarily grabbing it, as it was fired. He concluded that the victim died from a shotgun wound to her chest. However, he also stated that she had been beaten and strangled prior to being shot, but he did not know if the strangulation rendered her unconscious. When questioned regarding the possibility of the victim having committed suicide, Dr. Nine stated: “I don’t believe there is any way she could [have] done this [by] herself.”

[7] Shortly after the police responded to the incident, Defendant was transported to police headquarters for questioning; he was not yet under formal arrest. Photographs of Defendant, taken at the police station, showed bloodstains on his clothing and a cut on his right hand. There was also blood on Defendant’s boot. While awaiting questioning, Defendant stated, “I can’t believe she did that.” Defendant waived his rights under Miranda v. Arizona, 384 U.S. 436, 479 (1966), and consented to giving a videotaped statement to
police. He stated that the victim had a long history of drug abuse. He also stated that she had threatened to commit suicide previously and that she had pointed the shotgun at Defendant’s friend on a prior occasion. When initially questioned by police, Defendant reiterated his account that the victim had committed suicide following an argument with Defendant. However, when confronted with physical evidence that was inconsistent with suicide, Defendant varied his story, stating that he and the victim had struggled over the gun in the bedroom and that it had accidentally discharged.

[8] At some point after the interview, the police obtained a search warrant and “processed the scene.” Defendant was formally arrested, indicted, and charged with first degree murder and tampering with evidence. After a jury trial, Defendant was convicted of second degree murder and tampering with evidence.

Plain Error

(9) Defendant argues that plain error occurred due to his counsel’s failure to file a motion to suppress evidence because police officers searched his residence without a warrant. We may take notice of plain errors affecting substantial rights even though a defendant did not object to the errors at trial. State v. Gutierrez, 2003-NMCA-077, ¶ 19, 133 N.M. 797, 70 P.3d 787. The plain error doctrine is not as strict as the doctrine of fundamental error in its application. State v. Paiz, 1999-NMCA-104, ¶ 28, 127 N.M. 776, 987 P.2d 1163. Therefore, “we need not determine that there has been a miscarriage of justice or a conviction in which the defendant’s guilt is so doubtful that it would shock the conscience of the court to allow it to stand.” State v. Lucero, 116 N.M. 450, 453, 863 P.2d 1071, 1074 (1993). Nevertheless, because the plain error rule is an exception to the general rule that parties must raise timely objection to improprieties at trial, plain error is to be used sparingly. Paiz, 1999-NMCA-104, ¶ 28. The plain error rule only applies to errors in evidentiary matters. Gutierrez, 2003-NMCA-077, ¶ 19. We apply the rule only if we have “grave doubts about the validity of the verdict, due to an error that infects the fairness or integrity of the judicial proceeding.” Id.

[10] Defendant relies on the United States Supreme Court’s holdings in Flippo v. West Virginia, 528 U.S. 11, 14 (1999) (per curiam), and Mincey v. Arizona, 437 U.S. 385, 390 (1978), in arguing that the officers’ failure to secure a search warrant until December 4, 2001 and his counsel’s failure to file a motion to suppress evidence affected his substantial rights so as to cause plain error. As Defendant acknowledges, Flippo dealt with the denial of the defendant’s motion to suppress based on a “murder scene exception” to the Fourth Amendment. Flippo, 528 U.S. at 12-14. The Court reversed the lower court, and relying on Mincey, found that there was no murder scene exception and that there were no exigent circumstances present. Id. The defendants in Flippo and Mincey did not argue that plain error occurred or that their counsel was ineffective for failing to file a motion to suppress, because counsel in both cases filed pretrial motions to suppress. See Flippo, 528 U.S. at 12; Mincey, 437 U.S. at 389. Therefore, the Supreme Court did not have to perform the completely different analysis necessary to determine whether plain error occurred when the evidence was admitted by the trial court.

(11) Because plain error does not occur in a vacuum, we interpret Defendant’s argument to mean that the trial court committed plain error in failing to suppress evidence sua sponte. No New Mexico case has directly addressed this issue. However, in analogous circumstances, the Tenth Circuit in United States v. Meraz-Peru, 24 F.3d 1197 (10th Cir. 1994), used an approach we consider persuasive. The defendant in Meraz-Peru claimed that his conviction for possession of marijuana should be reversed on appeal because he was stopped without reasonable suspicion. Id. at 1198. He never filed a motion to suppress the evidence at his trial, and the court analyzed the issue for plain error. Id. In affirming the defendant’s conviction, it stated that “[a] reliable appellate determination concerning the [merits of a motion to suppress] is not possible in the absence of factual findings.” Id. It reasoned that when “the error defendant asserts on appeal depends upon a factual finding the defendant neglected to ask the district court to make, the error cannot be ‘clear’ or ‘obvious’ unless the desired factual finding is the only one rationally supported by the record below.” Id. (internal quotation marks and citation omitted).

(12) Similarly, in this case, the factual finding that the police unconstitutionally searched Defendant’s home is not the only one rationally supported by the record. On the contrary, the facts in the record indicate that Defendant called the police reporting the alleged suicide and that he may have consented to their presence in his home. During his taped statement to the police, Defendant stated “I called . . . first and said [the victim] shot herself. . . . I called the police and you were there.” Agent Ortiz stated at trial that he was suspicious and that he knew they were “going to need a search warrant.” During the cross-examination of Agent Ortiz, Defendant’s counsel stated: “But prior to that search warrant [Defendant] had given consent to search his house, correct?” Agent Ortiz responded in the affirmative.

Ineffective Assistance of Counsel

(13) Defendant additionally argues that his trial counsel was ineffective because no reasonable strategy existed for his counsel’s failure to file a motion to suppress evidence. To prevail on this argument, Defendant has the burden to establish a prima facie claim of ineffective assistance. State v. Roybal, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61. Defendant may only establish a prima facie claim by showing that his counsel’s performance fell below the performance of a reasonably competent attorney and that his counsel’s deficient performance prejudiced Defendant. Patterson v. LeMaster, 2001-NMSC-013, ¶ 17, 130 N.M. 179, 21 P.3d 1032. Within the context of a failure to file a motion to suppress evidence, a defendant must establish that the facts support the motion and that a reasonably competent attorney could not have decided that the motion was unwarranted. Id. ¶ 19. To determine whether the facts support the motion, we evaluate the facts present in the record. See Roybal, 2002-NMSC-027, ¶ 19 (stating that “[i]f facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition”); see also State v. Wilson, 117 N.M. 11, 18, 868 P.2d 656, 663 (Ct. App. 1993).

(14) Similar to our analysis of Defendant’s plain error claim, the record is devoid of facts from which we could determine the effectiveness of Defendant’s counsel with regard to whether Defendant consented to a search or when a search warrant was required. Defendant argues that the State merely claimed “perfunctorily at trial that [Defendant] consented to the warrantless search of his residence.” Our review of the record indicates that the issue regarding consent was simply never raised. We agree with Defendant that the State has the
burden to show that the search of Defendant’s home fell under an exception to the warrant requirement imposed by the Fourth Amendment. See State v. Mann, 103 N.M. 660, 663, 712 P.2d 6, 9 (Ct. App. 1985). However, the State’s burden does not arise until Defendant puts facts into issue questioning the validity of the search. Id.

{15} Flippo does not require us to conclude that counsel’s failure to file a motion to suppress was per se unreasonable as Defendant argues. See Flippo, 528 U.S. at 13. As we previously stated, the defendant in Flippo filed a motion to suppress evidence. Id. Defendant appears to be arguing the merits of a motion to suppress evidence he never made. Instead, Defendant must first point to facts in the record that indicate his counsel’s failure to file the motion makes this one of those “rare” cases of prima facie ineffective assistance of counsel. Cf. State v. Baca, 1997-NMSC-059, ¶ 25, 124 N.M. 333, 950 P.2d 776.

{16} This case is also distinguishable from Patterson, upon which Defendant relies for the proposition that a reasonably competent attorney would not have decided that the motion was unwarranted. In Patterson, the defendant argued that his counsel was ineffective for failing to file a motion to suppress evidence obtained during a “showup” identification. Patterson, 2001-NMSC-013, ¶ 15. Our Supreme Court, in reversing the defendant’s conviction, relied on facts contained in the record which supported the motion to suppress. Id. ¶ 26 (“It is likely that there was factual support for a motion to suppress the identifications.”). The Court stated that the record indicated that the showup identification was highly suggestive and likely “lacked the indicia of reliability necessary to outweigh the suggestiveness of that procedure.” Id. The Court went on to state that there were not any facts in the record “which might have led a reasonably competent attorney not to file a motion to suppress.” Id. ¶ 27.

{17} As we have discussed, the record in this case indicates that Defendant’s trial counsel believed Defendant had consented to the entry of police into his home. It also implies that Agent Ortiz was immediately suspicious and at some point realized that a search warrant would be needed. However, except to the extent that Defendant apparently called the police to report the suicide and let them in when they arrived, we cannot determine from the record the extent of Defendant’s consent or the time the police needed to obtain a warrant. See, e.g., State v. Duarte, 1996-NMCA-038, ¶ 25, 121 N.M. 553, 915 P.2d 309 (stating that a failure to file a non-meritorious motion is not ineffective assistance); State v. Baca, 115 N.M. 536, 544, 854 P.2d 363, 371 (Ct. App. 1993) (stating that trial counsel’s strategy and tactics will not be second-guessed on appeal).

{18} Moreover, even if Defendant could show that his counsel’s performance fell below that of a reasonably competent attorney, he has also not shown that his counsel’s failure to file the motion prejudiced his defense such that “there was a reasonable probability that the outcome of the trial would have been different.” State v. Reyes, 2002-NMSC-024, ¶ 48, 132 N.M. 576, 52 P.3d 948. Defendant argues that he was prejudiced because (1) he was not inclined to enter a plea, (2) the evidence was not strong, and (3) “the motion to suppress was crucial because it could have excluded key evidence.” A warrant was obtained to search Defendant’s home, and Defendant fails to state with any specificity which evidence, if any, police collected prior to obtaining the warrant. Given this lack of specificity, Defendant’s allegation of prejudice amounts to a mere assertion. See In re Ernesto M., Jr., 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318 (stating that “[a]n assertion of prejudice is not a showing of prejudice”). We reject Defendant’s claim of ineffective assistance of counsel.

**Hearsay Issue**

{19} Defendant additionally argues that the trial court erred in allowing Officer Perea to testify to a statement made by the victim. Officer Perea testified that he was dispatched on a domestic violence call to Defendant’s residence on October 14, 2001, nearly two months prior to the incident at issue. Because it was Defendant’s home and Defendant indicated he wanted the victim to leave, Officer Perea escorted the victim off the premises. As she was leaving, the victim stated, “next time you guys see me you’re going to find me dead.” The State responded to Defendant’s hearsay objection by arguing that the statement addressed the victim’s state of mind and was allowed under Rule 11-803(C) NMRA.

{20} Defendant argues for the first time in his reply brief that we must address the applicability of the United States Supreme Court’s recent holding in Crawford v. Washington, 541 U.S. 36 (2004), with regard to this issue. Essentially, Defendant argues that the victim’s statement to Officer Perea was “testimonial” under Crawford and therefore must be barred because its admission violated Defendant’s Sixth Amendment right to “confront and cross examine the witness.” However, at trial, Defendant did not base his objection to the testimony on constitutional grounds, but only objected to the testimony at issue on hearsay grounds. See, e.g., State v. Lucero, 104 N.M. 587, 590-91, 725 P.2d 266, 269-70 (Ct. App. 1986) (refusing to reach confrontation clause issue founded on general hearsay objection and argument that the statement at issue did not fall within any exception to the hearsay rule). An objection raising the question must be “sufficiently specific to alert the trial court to the claimed constitutional errors.” Id. at 591, 725 P.2d at 270. Like Lucero, Defendant’s hearsay objection was too broad to raise a confrontation clause issue. See id. The district court was only required to rule on the objection Defendant made: that the statement was not admissible under the Rule 11-803(C) hearsay exception. See Lucero, 104 N.M. at 591, 725 P.2d at 270.

{21} As to the issue of whether the district court correctly ruled that the statement was admissible under Rule 11-803(C), we review the admission of hearsay testimony under an exception to the hearsay rule for abuse of discretion. State v. McLaugherty, 2003-NMSC-006, ¶ 17, 133 N.M. 459, 64 P.3d 486; State v. Mora, 1997-NMSC-060, ¶ 51, 124 N.M. 346, 950 P.2d 789. A trial court abuses its discretion when its “ruling is clearly against the logic and effect of the facts and circumstances of the case.” State v. Simonson, 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983).

{22} The State offered the testimony as a hearsay exception under Rule 11-803(C). Rule 11-803(C) states:

**Then existing mental, emotional or physical condition.** A statement of the declarant’s then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant’s will.

{23} Rule 11-803(C) is applicable in situations in which a defendant puts an alleged victim’s state of mind at issue by arguing self-
defense or suicide. *State v. Baca*, 120 N.M. 383, 389, 902 P.2d 65, 71 (1995); see also *State v. Swavola*, 114 N.M. 472, 478, 840 P.2d 1238, 1244 (Ct. App. 1992) (stating that an utterance by the victim is relevant to the victim’s state of mind under Rule 11-803(C) when the defendant argues self-defense and the statement tends to reduce the likelihood that the victim was the initial aggressor). Defendant took such an approach in this case. His statements to police raised issues of suicide, accidental shooting, and self-defense. He requested and received jury instructions for self-defense and second degree murder. The statement “the next time you guys see me you’re going to find me dead” was offered to show that the victim feared Defendant and was unlikely to attack him or commit suicide. Yet, due to its ambiguity, the statement arguably helped Defendant as much as it did the State because the jury could have just as easily interpreted the statement to mean the victim intended to commit suicide. Despite its ambiguity, the statement was relevant to the issues of suicide and self-defense, and the court did not abuse its discretion in admitting it.

{24} This case is not like *Baca*. In that case, a young victim had made the statement that she feared her father. *Baca*, 120 N.M. at 389, 902 P.2d at 71. Our Supreme Court held that the statement was not admissible under Rule 11-803(C) because it was not offered to show the victim’s state of mind and was therefore irrelevant and prejudicial. *Baca*, 120 N.M. at 389, 902 P.2d at 71. The Court expressed concern that the statement created a substantial risk that the jury could consider the victim’s fear as “somehow reflecting on [the] defendant’s state of mind rather than the victim’s.” *Id.* at 389-90, 902 P.2d at 71-72 (internal quotation marks and citation omitted). The defendant in *Baca* did not raise the issue of self-defense.

{25} Defendant, in his reply brief, argues that there is a reasonable probability that he was prejudiced by the statement because the State used it to headline its closing argument. However, we cannot say that the trial court abused its discretion in allowing the statement given the admissibility of the statement under Rule 11-803(C) and the wide latitude afforded prosecutors and defense counsel during closing argument. See *State v. Venegas*, 96 N.M. 61, 63, 628 P.2d 306, 308 (1981).

{26} Based on *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995), the dissent would hold that the statement is best construed as the victim’s belief that Defendant was going to kill her and is therefore inadmissible hearsay. In *Woodward*, an appeal of a conviction of first degree murder and other charges, a psychologist testified that the victim had told him that the defendant “is going to kill me.” *Id.* at 8-9, 908 P.2d 238-39. Our Supreme Court, relying on *United States v. Joe*, 8 F.3d 1488 (10th Cir. 1993), distinguished a statement that a victim was afraid from a statement that the defendant would kill the victim. *Woodward*, 121 N.M. at 9, 908 P.2d at 239. It held that the former was admissible as a “statement of then-existing mental, emotional, or physical condition,” but that the latter was inadmissible because it was a “statement of memory or belief.” *Id.* (internal quotation marks and citation omitted). However, Defendant did not raise this distinction in the trial court and does not argue it on appeal. We therefore do not address it. See *State ex rel. Human Servs. Dep’t v. Staples*, 98 N.M. 540, 541, 650 P.2d 824, 825 (1982) (stating that appellate courts risk “overlooking important facts or legal considerations when they take it upon themselves to raise, argue, and decide legal questions overlooked by the lawyers who tailor the case to fit within their legal theories” in cautioning this Court against ignoring the arguments presented and searching for alternative grounds for a decision) (internal quotation marks and citation omitted); *State v. Ferguson*, 111 N.M. 191, 196, 803 P.2d 676, 681 (Ct. App. 1990) (“Courts should not take it upon themselves to raise, argue, and decide legal issues overlooked by the lawyers.”). In addition, we note that there was no issue in *Woodward* as to self-defense or suicide.

**Agent Ortiz’s Opinion Testimony**

{27} At trial, Agent Ortiz was accepted as an expert in blood stain pattern analysis and crime scene reconstruction without objection. At the beginning of his testimony, Agent Ortiz stated that “Crime Scene Reconstruction is to evaluate the evidence at the scene. Gather physical evidence and you evaluate it to determine to arrive at a conclusion as to what occurred, what happened at the scene.” He also testified that blood splatter analysis will “assist you in supporting or refuting any statements by witnesses or defendants.” He stated that the evidence did not support Defendant’s assertion that the victim walked down the hallway to the bedroom because there were no carpet fibers on the bottom of her bare feet. On the contrary, Agent Ortiz stated that the evidence supported the conclusion that the victim was carried into the bedroom. He also stated that there were pieces of duct tape and potato on the victim, indicating that those substances were covering the barrel of the shotgun. Agent Ortiz was also able to track the trajectory of the flight of the victim’s thumb and opined that she was propped up on the bed when she was shot.

{28} Agent Ortiz concluded that the victim could not have committed suicide because the lacerations on her hands indicated that they were near the barrel when the shotgun was fired, and therefore, she could not have pulled the trigger. He opined that the covering of the weapon with duct tape and a towel, in addition to the presence of the potato, were all consistent with an effort to prevent gunshot residue from depositing on the person who fired the weapon. He stated that Defendant’s claim that the victim committed suicide was not consistent with the physical evidence. Defendant did not object to these statements. Agent Ortiz then gave a synopsis as to the manner in which he believed the crime occurred based on the evidence. Defendant objected and the court asked the prosecutor to “move along.” Agent Ortiz opined that Defendant fired the shotgun and used the potato as a silencer and then called the police because of the loud explosion. He stated that “physical evidence does not lie” and that the evidence indicated the victim was killed deliberately.

{29} Defendant argues that the trial court erred in overruling his objections to Agent Ortiz’s testimony. We review the trial court’s admission of Agent Ortiz’s testimony for abuse of discretion and we will not disturb its evidentiary ruling absent a clear abuse of that discretion. *State v. Stanley*, 2001-NMSC-037, ¶ 5, 131 N.M. 368, 37 P.3d 85.

{30} Defendant relies on *Lucero* in support of his argument that the trial court erred in admitting the testimony because Agent Ortiz “improperly commented directly on the credibility of [Defendant].” *Lucero* is distinguishable from this case. The expert witness in *Lucero* was a psychologist who examined one of the complaining witnesses. *Lucero*, 116 N.M. at 451, 863 P.2d at 1072. The expert testified that the complaining witness exhibited symptoms of post traumatic stress syndrome caused by sexual abuse. *Id.* at 451-52, 863 P.2d at 1072-73. The expert also commented directly on the credibility of the complaining witness in stating that the complaining witness was consistent both in identifying the defendant as the abuser and in referring to the rooms in which the alleged abuse occurred. *Id.* at 452, 863 P.2d at 1073. The expert also inappropriately commented on the demeanor of the complaining witness, which the expert
claimed changed when the complaining witness talked about the alleged sexual abuse she had endured. Id. The expert testified that “if the complainant were not telling the truth, she probably would have reacted differently than she did.” Id.

{31} Our Supreme Court held that the trial court committed plain error in admitting the testimony and stated that an expert commenting on the credibility of the alleged victim of sexual abuse was improper. Id. at 455, 863 P.2d at 1076. The Court, relying on State v. Alberico, 116 N.M. 156, 861 P.2d 192 (1993), stated that the expert’s testimony was improper because it went outside the bounds of admissible testimony concerning post traumatic stress disorder, which it stated was identical to post traumatic stress syndrome. Lucero, 116 N.M. at 454, 863 P.2d at 1075. It reasoned that “[w]hile PTSD testimony may be offered to show that the victim suffers from symptoms that are consistent with sexual abuse, it may not be offered to establish that the alleged victim is telling the truth; that is for the jury to decide.” Id. (internal quotation marks and citation omitted).

{32} In this case, Agent Ortiz, as a qualified crime scene reconstructionist, gave his opinion as to the credibility of Defendant’s version of events. He did not directly bolster the testimony of any of the State’s other witnesses. We agree with the State that State v. Landgraf, 1996-NMCA-024, 121 N.M. 445, 913 P.2d 252, is directly on point. The defendant in Landgraf had been charged with multiple crimes for causing an automobile crash in which three people died. Id. ¶ 1. The prosecutor offered the testimony of police officers who stated that the defendant’s “complex motor reactions demonstrated deliberation.” Id. ¶ 20. We stated that the defendant had misconstrued Alberico and acknowledged that our Supreme Court had “recognized and acknowledged the continuing validity of its prior decisions that expert testimony is admissible even if it touches upon an ultimate issue to be decided by the trier of fact.” Id. (internal quotation marks and citation omitted). We further stated that the jury is “free to disregard any or all such opinion testimony” and had been so instructed. Id.

{33} Agent Ortiz’s testimony was similar to that of the police officer in Landgraf. His testimony touched upon the ultimate issue to be decided by the trier of fact, whether Defendant was being truthful in his assertions that the victim committed suicide or attacked him. The jury was instructed that it could entirely disregard the testimony of any or all expert witnesses. Therefore, we cannot characterize the trial court’s admission of Officer Ortiz’s testimony as “clearly untenable or not justified by reason.” See Stanley, 2001-NMSC-037, ¶ 5 (internal quotation marks and citation omitted).

{34} Defendant additionally asserts that Officer Perea’s testimony also inappropriately interpreted the evidence to implicate Defendant. We do not reach this issue because Defendant did not brief it. State v. Desnoyers, 2002-NMSC-031, ¶ 11, 132 N.M. 756, 55 P.3d 968 (stating that issues not argued and supported by authority deemed abandoned). Similarly, Defendant argues that his “constitutional rights to a fair trial and a jury trial under the Sixth Amendment to the U.S. Constitution and Article II, § 14 of the New Mexico Constitution were violated” because of the admission of Agent Ortiz’s statements. However, Defendant cites to no authority and also fails to brief the manner in which either constitution was implicated. See Desnoyers, 2002-NMSC-031, ¶ 11. We find no error in the trial court’s admission of the testimony.

Prosecutor’s Assertions During Opening Statement

{35} Defendant additionally argues that assertions made by the prosecutor during opening statement constitute fundamental error. At the end of his opening statement, the prosecutor asserted:

“Just as you have taken an oath and have raised your hand to fairly and truly judge this case, on behalf of the people of the State of New Mexico, I promise you that Ms. Garcia and myself will conduct our case as fairly and as honestly and as truthfully as possible.

{36} Because Defendant did not object to this statement, we only review for fundamental error. State v. Gonzales, 113 N.M. 221, 229, 824 P.2d 1023, 1031 (1992); State v. Diaz, 100 N.M. 210, 212, 668 P.2d 326, 328 (Ct. App. 1983). The doctrine of “fundamental error applies only if there has been a miscarriage of justice, if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been done.” State v. Dartez, 1998-NMCA-009, ¶ 21, 124 N.M. 455, 952 P.2d 450 (internal quotation marks and citation omitted). In the context of analyzing a prosecutor’s alleged improper statements, “fundamental error arises when the prosecutor engages in misconduct that compromises the defendant’s right to a fair trial.” State v. Rojo, 1999-NMSC-001, ¶ 55, 126 N.M. 438, 971 P.2d 829.

{37} Defendant’s reliance on Diaz and Baca is also misplaced with regard to this issue. We agree with Defendant that it is improper for a prosecutor to “precondemn a defendant on the basis of the authority he represents.” Diaz, 100 N.M. at 213, 668 P.2d at 329; Baca, 120 N.M. at 392, 902 P.2d at 75. However, the prosecutor’s conduct in this case did not rise to the same odious level as the cases upon which Defendant relies.

{38} In Diaz, the prosecutor stated:

The taxpayers pay me, pay the judge, even pay Mr. Lane, and they’re gonna pay you for being here two days.

Please remember ladies and gentlemen, that I represent the State, and just like [the defendant] is represented by Mr. Lane, I represent you and all the other people in the Sixth Judicial District which covers three counties. You are my clients. I’m here to protect your rights. I’m here to protect the security of your homes, your places of business. The people of New Mexico come in here and presented this case to you ***.

When you start putting judges on trial, Supreme Court Justices, prosecutors who represent the people ***.

Just remember, the style of this case is State of New Mexico versus [the defendant] ***. And the people of this district ask you to find him guilty of both counts.

Diaz, 100 N.M. at 213, 668 P.2d at 329. In holding that error occurred requiring reversal, we stated that the prosecutor’s improper statements were “substantial” and that he had made “overextensive references to the authority he represents.” Id. at 213, 215, 668 P.2d at 329, 331. In addition, we stated that it was the combined effects of these comments in addition to the prosecutor’s other pronounced and persistent misconduct which likely had “a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.” Id. at 215, 668 P.2d at 331 (internal quotation marks and citation omitted).
In Baca, the prosecutor improperly told the jury that he had a higher ethical duty than defense counsel because he, as a prosecutor, was “bound by law to seek the truth,” whereas the defendant’s counsel, as a criminal defense attorney, was not. Baca 120 N.M. at 392, 902 P.2d at 74. Our Supreme Court, in reversing the defendant’s convictions based on cumulative error, admonished the state to avoid making the same improper statements on remand. Id. However, it did not factor these comments into its cumulative error determination and expressly stated that they did not amount to fundamental error. Id.

In this case, the prosecutor did not engage in the extensive and egregious misconduct admonished in Diaz and Baca. He merely stated that he promised to present his case “honestly” and as “truthfully” as possible. While arguably improper, the prosecutor’s statements during opening statement were not fundamental error.

Prosecutor’s Statements During Closing Argument

During the State’s rebuttal closing argument, the prosecutor personally admonished Defendant, stating that Defendant “continues to disgrace and deface her memory. Shame on you, Gilbert Torres! And I hope you feel my outrage. I hope that as a society . . . .” Defense counsel objected, and the trial court told the prosecutor to “tone it down.” The prosecutor then stated:

And as a society we should feel outraged. We are a nation of law, not of men. The true test of our greatness is how well we treat the least of our citizens. The true test of our greatness is how we uphold the principle that everybody’s entitled to life, liberty and the pursuit of happiness.

Defendant argues, relying on Diaz, 100 N.M. at 214, 668 P.2d at 330, Ferguson, 111 N.M. at 194, 803 P.2d at 679, and State v. Vallejos, 86 N.M. 39, 42, 519 P.2d 135, 138 (Ct. App. 1974), that the trial court erred in overruling Defendant’s objection to the prosecutor’s statements. We disagree.

Because Defendant objected to the statements, we review for abuse of discretion. State v. Clark, 1999-NMSC-035, ¶ 52, 128 N.M. 119, 990 P.2d 793. Our Supreme Court has stated:

The prosecution is allowed reasonable latitude in closing argument. The district court has wide discretion to control closing argument, and there is no error absent an abuse of discretion or prejudice to defendant. . . . The question on appeal is whether the argument served to deprive defendant of a fair trial.

State v. Chamberlain, 112 N.M. 723, 729, 819 P.2d 673, 679 (1991) (citations omitted). The defendant in Ferguson objected to the prosecutor’s statement of “I think you should return . . . a guilty verdict for a crime here. Yes.” Ferguson, 111 N.M. at 195, 803 P.2d at 680. The defendant immediately moved for a mistrial arguing that the words “I think” in reference to the verdict the jury was to give was an improper injection of personal opinion into the case by the prosecutor. Id. In upholding the trial court’s grant of the motion for mistrial, we stated that a key component of our reasoning was that the standard of review was deferential to the trial court. Id. (stating that deferring to the trial court in these situations makes sense because “[t]he trial court judge was present, and therefore she was in a better position to resolve this question than we are”). We acknowledged that the trial court could have reasonably decided either way on the issue and therefore affirmed its ruling. Id. at 196, 803 P.2d at 681.

In this case, Defendant objected to the prosecutor’s statement and the trial court expressed its concern. Defendant did not move for a mistrial or request any curative instruction to the jury. The trial court did not abuse its discretion by not taking further action.

This case is also distinguishable from Diaz and Vallejos. In both of those cases, the prosecutors made multiple improper comments, and we based our holdings on cumulative error. Diaz, 100 N.M. at 215, 668 P.2d at 331; Vallejos, 86 N.M. at 42, 519 P.2d at 138. Moreover, in this case, the State presented evidence that Defendant tried to cover up the incident, repeatedly attempted to portray the victim in a negative light by referring to her drug use, and changed his story at least twice when questioned about the shooting by police. It would not have been an abuse of discretion for the trial court to have ruled that the prosecutor’s statements that Defendant continued to disgrace the victim’s memory were a fair comment on the evidence. See State v. Lamure, 115 N.M. 61, 67, 846 P.2d 1070, 1076 (Ct. App. 1992) (“Comments on the evidence are not error or fundamental error.”). Given the facts of this case and our deferential standard of review, the trial court did not abuse its discretion in allowing counsel’s statements during closing argument.

Cumulative Error

Finally, Defendant’s claim of cumulative error also fails because the trial court did not commit the many errors Defendant claims were cumulative. State v. Perea, 2001-NMCA-002, ¶ 26, 130 N.M. 46, 16 P.3d 1105.

Conclusion

For the foregoing reasons, we affirm Defendant’s convictions for second degree murder and tampering with evidence.

IT IS SO ORDERED.

JAMES J. WECHSLER,
Judge

I CONCUR:
LYNN PICKARD, Judge
MICHAEL E. VIGIL, Judge (concurring in part and dissenting in part)

MICHAEL E. VIGIL, JUDGE
(Concurring In Part And Dissenting In Part)

I concur with the majority opinion in all respects except its conclusion that the victim’s hearsay statement that, “next time you guys see me you’re going to find me dead” was admissible under Rule 11-803(C) as a state of mind exception to the hearsay rule. I conclude that the statement was not admissible into evidence under Rule 11-803(C) and that its admission into evidence constituted
reversible error.

[49] Police Officer Joshua Perea was the second officer to arrive at Defendant’s home on December 3, 2001. He was also the State’s second witness. Before Officer Perea was asked about the events of December 3, 2001, he testified about an incident which occurred on October 14, 2001, nearly two months before. Officer Perea testified he was back-up on a domestic violence call to Defendant’s home involving Defendant and the victim. “[W]e walked into the house and the house was kind of [in] disarray. Looked like a fight had taken place.” Officer Perea related that Defendant and the victim had both been drinking and Defendant was stating that he wanted the victim out of the house, that he was tired of her, and did not want a relationship with her anymore. The following then occurred:

[PROSECUTOR]: Uh, did you get an opportunity to speak with [victim] that day in October?

OFFICER PEREZA: I don’t recall speaking with her. I was there listening as she was making comments on who did. I know we did give her some uh, information about places that she could stay to get out of there. Anything from a hotel to a domestic shelter.

[PROSECUTOR]: And did she appear to you that evening?

OFFICER PEREZA: She seemed kind of groggy, like she wasn’t really upset, she wasn’t hyperactive like I honestly she may have possibly be[en] under the influence of something, but I wasn’t completely sure.

[PROSECUTOR]: Do you know if she smelled like alcohol that evening or?

OFFICER PEREZA: Yes she had been drinking.

[PROSECUTOR]: And did you ask anything of her son in response?

OFFICER PEREZA: Her son was going off I believe the whole time. He made a comment, come on Gilbert tell them how you are threatening to get your hells angels friends to kill my mom or something like that.

[DEFENSE COUNSEL]: Judge.

JUDGE: Sustained.

[DEFENSE COUNSEL]: I and I move that that be stricken and that the jury disregard that statement.

JUDGE: It will be stricken and the jury will disregard it.

[PROSECUTOR]: Any thing else you did in response to the call in October of 2001?

OFFICER PEREZA: Just made sure that she left the residence.

[PROSECUTOR]: And did Gilbert Torres ask her to leave that night?

OFFICER PEREZA: Yes.

It was in the foregoing context during the State’s case in chief before any statements of Defendant were admitted into evidence that the victim’s hearsay statement, “next time you guys see me you’re going to find me dead” was admitted as substantive evidence.

[50] The admission or exclusion of hearsay evidence lies within the discretion of the trial court. State v. Balderama, 2004-NMSC-008, ¶ 46, 135 N.M. 329, 88 P.3d 845 (“We review the trial court’s admission of hearsay statements for an abuse of discretion.”). I conclude that admission of the evidence was erroneous and therefore an abuse of discretion. See State v. Brown, 1998-NMSC-037, ¶ 39, 126 N.M. 338, 969 P.2d 313 (stating an abuse of discretion in admitting evidence may occur when its admission is “obviously erroneous.” (internal quotation marks and citation omitted)).

[51] The evidence was admitted under Rule 11-803(C), which provides that certain evidence is not excluded by the hearsay rule which includes:

C. Then Existing Mental, Emotional or Physical Condition. A statement of the declarant’s then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant’s will.

Id.

[52] This rule allows a declarant’s out of court statement of her then-existing state of mind or emotion to be admitted into evidence. However, as the majority agrees, the victim’s statement is ambiguous. At best, it is only a declaration (“next time you see me I’ll be dead”). In context, the victim might have been asserting to Officer Perea that the next time he saw her she would be dead because Defendant’s “hells angels friends” were going to kill her. The statement is not an expression of a state of mind or emotion (such as “I am afraid”). The statement was therefore not admissible. Rule 11-802 NMRA (“Hearsay is not admissible except as provided by these rules or by other rules adopted by the Supreme Court or by statute.”).

[53] The hearsay statement was inadmissible for the additional reason that it was irrelevant. “For an extrajudicial statement of a declarant’s state of mind to be admissible, the state of mind must be relevant.” Baca, 120 N.M. at 389, 902 P.2d at 71. The state of mind evidence must prove or negate action or inaction of the declarant that is relevant to the case. While the victim’s state of mind may be relevant in issues of “(1) self defense (rebutted by extrajudicial declarations of the victim’s passive state of mind), (2) suicide (rebutted by statements inconsistent with a suicidal bent), and (3) accident (rebutted by victim’s fear of placing self in way of such harm).” Id.
The majority suggests that the victim’s statement was relevant because it related to a claim of suicide and self defense. I disagree.

54 The State alleged that Defendant killed the victim with a deliberate intent, and charged him with first degree murder. To prove its case of first degree murder the State introduced two recorded statements Defendant gave to the police. Initially, Defendant contended that he and the victim had argued, victim cut her leg on broken pottery, and she went into the bedroom. Defendant first claimed he heard the shotgun blast come from the bedroom as he sat at his computer. He told the officers about her problems with drugs and the law and claimed she had threatened suicide before. When Defendant was confronted with the physical evidence that was inconsistent with a suicide, and the officers told him they did not believe him, his story changed and he gave a second statement. He now said that while they were arguing the victim pulled the shotgun and she was shot accidentally when he tried to take it away from her. He denied any knowledge of the duct tape, blue towel, or potato, but subsequently admitted he put the towel on the gun trigger, claiming he did so to keep the victim from firing the shotgun. The State introduced these statements into evidence during its case in chief after Officer Perea testified as part of its effort to prove first degree murder. Defendant did not testify. However, Defendant introduced evidence of an incident in which the victim allegedly pulled the shotgun on another person to corroborate the self defense claim his attorney later made in closing argument. Under the circumstances, the victim’s statement “next time you see me I’ll be dead” did not tend to prove or disprove whether she killed herself. Furthermore, because of its inherent ambiguity, it did not tend to prove or disprove whether the victim attacked defendant two months later, or whether she was accidentally killed. Cf. Swavola, 114 N.M. at 478, 840 P.2d at 1244 (stating that the victim’s statement that he desired to reconcile with Defendant was relevant where self defense asserted because it reduced the likelihood he was the first aggressor).

55 The statement is most easily construed as a belief by the victim that Defendant was going to kill her. “In general, where state of mind testimony is sought to be used in an attempt to demonstrate the truth of the underlying facts rather than solely to show state of mind, the evidence must be excluded.” Baca, 120 N.M. at 389, 902 at 72 (quoting United States v. Brown, 490 F.2d 758, 763 n.10 (D.C. Cir. 1973)). The rule itself excludes the admission of “a statement of memory or belief to prove the fact remembered or believed.” Rule 11-803(C). In Woodward, 121 N.M. at 1, 908 P.2d at 231 the defendant was convicted of killing his estranged wife. Over his objection the victim’s statement to a psychologist “[h]e is going to kill me” was admitted into evidence. Id. at 8-9; 908 P.2d at 238-39. The Supreme Court held this was a “statement of memory or belief” rather than a statement of then-existing mental, emotional, or physical condition, and inadmissible. Id. at 9, 908 P.2d at 239. Woodward explains that while Rule 11-803(C) allows the admission of a declarant’s then existing mental or emotional condition, the reason why the declarant has the state of mind is not admissible. The example given by the Supreme Court is from Joe, 8 F.3d at 1492-93, in which the defendant was convicted of killing his estranged wife. Eight days before the murder, she saw a doctor who treated her for rape. During the treatment, she told the doctor she was afraid because the defendant had threatened to kill her. Id. at 1491. Our Supreme Court approved the Joe holding that the first part of the statement that she was afraid was admissible as statement of then-existing mental, emotional, or physical condition but the statement that the defendant would kill her was a prohibited “statement of memory or belief.” Id. at 1493; Woodward, 121 N.M. at 9, 908 P.2d at 239. See also Baca, 120 N.M. at 389, 902 P.2d at 71 (stating that while Rule 803(C) “allows hearsay statements that show the declarant’s then existing mental condition, the rule does not permit evidence explaining why the declarant held a particular state of mind.” (citing United States v. Liu, 960 F.2d 449, 452, (5th Cir. 1992) (a witness could properly testify that the declarant (the defendant) “was scared” and that he had a fear of getting killed, but not why)).

56 I also conclude that the erroneous admission of the victim’s hearsay statement was not harmless error. See State v. McClaugherty, 2003-NMSC-006, ¶ 32, 133 N.M. 459, 64 P.3d 486; State v. Morales, 2002-NMCA-052, ¶ 24, 132 N.M. 146, 45 P.3d 406. In Baca, the defendant’s three-year-old daughter was found with defendant’s dead wife. The State presented evidence that the declarant killed his wife then drove his dead wife and daughter to a remote area, where he ran over them. 120 N.M. at 386, 902 P.2d at 68. The daughter saw a social worker who was allowed to testify that the daughter made a nonverbal statement by nodding her head “yes” that she was afraid of her father when he asked her if she was afraid of him. Id. at 387, 902 P.2d at 69. Our Supreme Court held that admission of the hearsay statement was not only improper, but prejudicial, because of the danger that the jury would consider the statement as reflecting on the defendant’s state of mind as a true indication of his intentions, actions, or culpability, rather than the victim’s. Id. at 389-90, 902 P.2d at 71-72. Where there is a strong likelihood that the jury will make such an inference, “injurious prejudice” is “particularly evident.” Id. (quoting Brown, 470 F.2d at 766). The prosecutor’s opening words in closing argument were: “[Victim’s] prophesy came true: ‘The next time you see me you are going to find me dead.’ She told Officer Josh Perea of the Los Lunas Police Department. And sure enough, the next time Josh Perea saw [Victim], he saw her dead.” The prosecutor then highlighted the physical evidence which it argued demonstrated a first degree murder and Defendant’s inconsistent statements about what occurred, while referring to the hearsay statement again. The inadmissible evidence was therefore used to demonstrate that Defendant killed the victim and to show his state of mind, not the victim’s. This was not harmless error. Baca, 120 N.M. at 390, 902 P.2d at 72 (holding that the use of a hearsay statement was an attempt to demonstrate something other than the victim’s state of mind and that it was unfairly prejudicial). In light of the foregoing conclusions, I need not address whether, or to what extent, Crawford applies.

57 I would reverse Defendant’s conviction and remand for a new trial excluding the victim’s hearsay statement. Since the majority disagrees, I dissent.

MICHAEL E. VIGIL, Judge
OPINION
LYNN PICKARD, JUDGE

{1} Lomos Altos, Inc. and Garden Path Associates (Applicants) submitted three applications to change the point of diversion and purpose of use for their surface water rights in Valencia County to groundwater rights in Sandoval County. The State Engineer conducted a hearing on the applications. Although Protestants argued that the applications should be denied, the State Engineer granted the applications. Protestants appealed the decision to the Sandoval County district court. The district court, upon its de novo review of the State Engineer’s decision to approve the applications and upon cross-motions for summary judgment, granted summary judgment in favor of Applicants. Protestants appealed the district court’s granting of summary judgment.

{2} Protestants argue that the district court (1) did not apply the correct law when it determined that the applications were not for new appropriations of surface water or groundwater, (2) erred in granting Applicants’ motion for summary judgment because a genuine issue of material fact existed regarding the water rights associated with the springs located within the move-to area, (3) did not apply the correct law in determining that Applicants’ transfer of water rights would not impair water rights within the move-to area, (4) erred by not allowing a trial to proceed on the issues of public welfare and conservation, and (5) improperly denied Protestants’ motion for summary judgment.

We hold that the district court correctly applied the law in determining that these applications were not for new appropriations, correctly determined that no genuine issue of material fact existed concerning the water rights associated with the springs within the move-to area, (3) did not apply the correct law in determining that Applicants’ transfer of water rights would not impair water rights within the move-to area, (4) erred by not allowing a trial to proceed on the issues of public welfare and conservation, and (5) improperly denied Protestants’ motion for summary judgment. Furthermore, because Protestants did not respond to Applicants’ assertion that no genuine issue of material fact existed regarding the issues of conservation and public welfare, the district court correctly granted Applicants’ motion for summary judgment concerning these issues. Finally, we conclude that the court correctly denied Protestants’ motion for summary judgment. Accordingly, we affirm.

FACTS AND PROCEEDINGS

{3} Applicants filed three different applications with the State Engineer to transfer a total of 15.05 acre-feet per year of existing water rights from Valencia County, the move-from site, to Sandoval County, the move-to site. The applications sought a permit from the State Engineer to change the purpose of use of Applicants’ water rights. Applicants wanted to change the use from surface water rights utilized primarily for irrigation in Valencia County to groundwater rights used for domestic purposes in Sandoval County. Both the move-from and move-to sites are located within the Middle Rio Grande Basin.

{4} Protestants own and use surface water rights in the Placitas area of Sandoval County. Upon receiving notice of the applications, Protestants informed the Office of the State Engineer that they objected to the granting of the applications. Protestants’ objections were based on their contention that the applications, if approved, would be detrimental to public welfare, would be contrary to conservation, and would impair their existing water rights. By order of the State Engineer, all three applications were consolidated and a hearing was held to determine if the applications should be approved. After a full evidentiary hearing, at which Protestants argued that the applications should
not be granted, the Office of the State Engineer approved the applications. In its order approving the applications, the State Engineer found that the applications would not be detrimental to the public welfare of the state, would not be contrary to the conservation of water within the state, and would not impair existing water rights from their source. Protestants filed a timely appeal to the Sandoval County district court and subsequently filed a motion for summary judgment. Applicants filed a response to Protestants’ summary judgment motion, and they also filed a cross-motion for summary judgment. After a hearing, the district court entered an order granting Applicants’ cross-motion for summary judgment and denying Protestants’ motion. The district court ruled that the applications were approved in accordance with the report and recommendations of the State Engineer’s hearing examiner, but made no separate findings of its own. Protestants appeal from this order. Additional facts appear below as they pertain to this decision.

DISCUSSION

5. We will begin our analysis by discussing whether the applications should be considered a new appropriation of ground or surface water, or whether the applications should be regarded as a transfer of Applicants’ water rights. We will then address Protestants’ argument that the district court erred in finding no genuine issue of material fact as to how certain water rights should be considered by the State Engineer when making an impairment determination, after which, we will discuss Protestants’ contention that the State Engineer misapplied the law regarding the issue of impairment. We will then proceed with a discussion of whether the issues of public welfare and conservation were appropriately decided by the district court’s summary judgment order. We will conclude by analyzing whether the district court should have granted Protestants’ motion for summary judgment.

ISSUE ONE: The district court applied the correct law when it determined that the applications were not for new appropriations of surface water or groundwater.

6. Protestants challenge the district court’s ruling that the applications sought a transfer of water rights. Specifically, Protestants argue that the effect of groundwater pumping pursuant to the applications will result in new depletions of surface water at the move-to site, and these new depletions constitute a new appropriation of surface water as a matter of law. Protestants further argue that, since the surface waters of the Rio Grande stream system are fully appropriated and the State Engineer has expressly forbidden any new surface water appropriations from the Rio Grande, the applications must be denied. Although Protestants do not challenge the fact that the groundwater of the Middle Rio Grande Area has not been fully appropriated, Protestants also argue that the applications should be considered as new appropriations of groundwater.

7. We review the question of whether the district court properly interpreted the applicable law de novo. See Gallegos v. State Bd. of Educ., 1997-NMCA-040, ¶ 11, 123 N.M. 362, 940 P.2d 468 (holding that this Court is “not bound by the conclusions of law reached by the trial court, and the applicable standard of review for such issues is de novo”). We will first discuss whether these applications were for new appropriations of surface water, and then turn our attention to the issue of whether the applications were for new appropriations of groundwater.

A. The applications were not for new appropriations of surface water.

8. In New Mexico, applications seeking new appropriations of surface water must meet different requirements than applications requesting a permit to transfer the location of existing surface water rights. NMSA 1978, § 72-5-7 (1985), which governs applications seeking new appropriations of surface water, requires the State Engineer to reject an application if the State Engineer determines that there is no unappropriated water available. The State Engineer can also reject an application under Section 72-5-7 if the State Engineer finds that the application would be detrimental to public welfare or contrary to conservation of water within the state.

9. In contrast, NMSA 1978, § 72-5-23 (1985), which governs applications seeking to transfer surface water rights, does not require the State Engineer to make a determination that there is unappropriated water available. However, a transfer application may not be approved unless the State Engineer finds that the transfer will not be detrimental to existing water rights. Id. Additionally, Section 72-5-23 requires the State Engineer to find that the transfer application will not be detrimental to public welfare or contrary to conservation within the state.

10. In this case, the district court affirmed the State Engineer’s findings that the applications were requests to transfer existing surface water rights in order to receive a permit for groundwater use. Protestants contend that the applications should be considered new appropriations of surface water since all parties have agreed that new depletions of surface water will occur at the move-to site if the applications are approved. We do not agree.

11. Protestants rely primarily on Durand v. Reynolds, 75 N.M. 497, 406 P.2d 817 (1965), to support their argument that new depletions of surface water at a move-to site may constitute a new appropriation of surface water. In Durand, the State Engineer denied an application for a permit to transfer surface water rights at one location to groundwater rights at another location. Id. at 498, 406 P.2d at 817-18. In that case, the move-from site and the move-to site shared the same source of water, yet no evidence was entered indicating that water from the source flowed evenly to both sites. Id. at 500, 406 P.2d at 819. Protestants rely on the following language from Durand:

It is applicants’ position that they are merely exchanging rights to X number acre-feet of water in the “Nine-Mile Draw” (Move-From) area for X number acre-feet of water at the proposed well location (Move-To) sites. They contend that since there is a common source, the “valley fill,” they cannot impair existing rights. . . . Applicants did not prove that the water in the “Nine-Mile Draw” area flows evenly to the site of the proposed well locations! To the contrary, the record yields expert testimony that certain amounts of the water that would be taken by the proposed wells never contributed to the water taken in the “Nine-Mile Draw” area. Assuming such to be true, the effect of applicants’ application, if granted, would be to grant a new appropriation to water in which they did not previously have any rights.

Id. at 500-01, 406 P.2d at 820 (internal quotation marks and citations omitted). Protestants argue that this principle announced in Durand is applicable to the case at hand. Yet, in Langenegger v. Carlsbad Irrigation District, 82 N.M. 416, 483 P.2d 297 (1971), limited on other grounds by State ex rel. Martinez v. City of Roswell, 114 N.M. 581, 587, 844 P.2d 831, 837 (Ct. App. 1992), our Supreme Court found the language quoted above from Durand was unsupported dictum. The Langenegger Court stated:

If this language found in the Durand decision means a change in point of diversion can legally be accomplished only if the waters to be taken from a proposed point of diversion are identical with the waters that have been taken from a presently
established point of diversion, then there could be very few, if any, changes in points of diversion. *Id.* at 420, 483 P.2d at 301. The Court went on to conclude that the owner of water rights has the inherent right to transfer the location of those water rights, “subject only to the requirement that the rights of other water users not be injured or impaired thereby,” even if the waters between the two points of transfer do not flow evenly. *Id.* at 420-21, 483 P.2d at 301-02.

12 In the present case, unlike *Durand*, the State Engineer has promulgated specific guidelines that apply only to groundwater applications within the Middle Rio Grande. The guidelines cover an area known as the Middle Rio Grande Administrative Area (MRGAA). Because both the move-from and move-to sites in the present case are located within the MRGAA, all parties agree that the guidelines apply to the applications submitted by Applicants. Unlike the situation presented in *Durand*, the guidelines expressly state that all areas within the MRGAA are hydrologically connected and that a groundwater applicant must obtain and transfer surface water rights located within the MRGAA in order to offset the adverse effects the groundwater use may have on the surface flows of the Rio Grande stream system. In *Durand*, the factual basis for the Court’s ruling was that the transfer of water rights from the move-from site to the move-to site was not sufficient to offset the new depletions at the move-to site and there would therefore be an impairment, as the State Engineer found in that case. *Id.* at 500-01, 406 P.2d at 820. Yet, within the MRGAA, the State Engineer has found that because of the hydrological connection of the area, an adequate offset of surface water rights in one area of the MRGAA is sufficient to offset any depletions caused by groundwater use in another area of the MRGAA. See *Stokes v. Morgan*, 101 N.M. 195, 202, 680 P.2d 335, 342 (1984) (holding that the “special knowledge and experience of state agencies should be accorded deference”).

13 Additionally, the Court in *Durand* held that the applicants in that case were requesting a new appropriation of surface water because the water at the move-to site never contributed to the water at the move-from site. *Id.* at 500-01, 406 P.2d at 819. Yet, in this case, Protestants agree that the move-from site is part of the middle Rio Grande stream system. Protestants further conceded below that “the groundwaters in the move-to area are hydrologically connected to the Rio Grande and that the underground waters contribute to the flow of the Rio Grande, thus constituting a part of the source of the stream flow.” Thus, in this case, unlike the situation that was presented in *Durand*, the water at the move-to site contributed to the waters at the move-from site.

14 Protestants do not challenge that the water rights held by Applicants are valid. Protestants also do not challenge the State Engineer’s finding that the surface water rights transferred by Applicants were sufficient to offset any adverse effects upon the Rio Grande. Therefore, we find this case to be distinguishable from *Durand* and conclude that, under the circumstances of this case, new depletions of surface water at the move-to site do not constitute a new appropriation of surface water.

B. The applications were not for new appropriations of groundwater.

15 Protestants also contend that the applications, as a matter of law, should be regarded as new groundwater appropriations. Protestants argue that, while groundwater applications in the MRGAA require transfer of valid water rights in an amount sufficient to offset any adverse effects to the surface flow of the Rio Grande, the applications, if approved, grant a new appropriation of groundwater. We do not agree.

16 As we have previously noted, the guidelines administering groundwater applications within the MRGAA require a transfer of sufficient surface water rights prior to granting a permit for new groundwater use. Because of this requirement, the State Engineer handles applications for a new use of groundwater within the MRGAA as an application to change the point of diversion and purpose of use of the existing water rights. Protestants agree that the State Engineer has handled groundwater applications within the MRGAA in this manner dating back to at least 1975. In New Mexico, the State Engineer has construed Section 72-5-23 and NMSA 1978, § 72-5-24 (1985), as the statutes governing a “change in the point of diversion, or the place or the purpose of use of a valid water right.” Sections 72-5-23 and -24 control the transfer of water rights in New Mexico.

17 In this case, as has been his practice for nearly thirty years, the State Engineer construed the applications as requests to transfer surface water rights and not as new appropriations of groundwater. Long-standing administrative constructions of statutes by the agency charged with administering them are to be given persuasive weight, and should not be lightly overturned, since there is a statutory presumption that the orders of the State Engineer are the proper implementations of the water laws. See NMSA 1978, § 72-2-8(H) (1967). Moreover, the more long-standing the State Engineer’s interpretation of a statute without amendment by the legislature, the more likely the State Engineer’s construction reflects the legislature’s intent. In *re Application of Sleeper*, 107 N.M. 494, 498, 760 P.2d 787, 791 (Ct. App. 1988).

18 Our Supreme Court has also construed statutes governing a change in point of diversion and purpose of use as a transfer of water rights, rather than the granting of a new appropriation. In *In re Application of Brown*, 65 N.M. 74, 332 P.2d 475 (1958), the Supreme Court held:

> Statutes governing a change in point of diversion or a change in well location do not grant; rather they restrict the right of an appropriator to change his point of diversion or well location. In the absence of statutory procedures to effectuate such changes, the water user may change his point of diversion or well location at will, subject to the requirement that other water users will not be injured thereby. *Id.* at 78, 332 P.2d at 477 (emphasis and citation omitted).

19 In this case, the district court concluded that the applications were for transfers of existing surface water rights. As we have discussed, the district court’s ruling regarding this issue is supported by the long-standing practice of the agency that administers the water laws, as well as current law in New Mexico. Therefore, we conclude that the district court did not misapply the law when it determined that the applications, as a matter of law, requested a transfer of existing surface water rights, rather than new appropriations of groundwater.

20 The guidelines provide that applications requesting a permit for groundwater use will be approved if the applications will not impair existing water rights. Section 72-5-23 provides that a transfer of surface water rights may be granted where there is a finding that the applications will (1) not be detrimental to existing water rights, (2) not be detrimental to the public welfare, and (3) not be contrary to conservation of water within the state. Therefore, in the present case, Applicants had the burden of proof to show that the applications would not impair or be detrimental to existing water rights, would not be detrimental to public welfare, and would not be contrary to water conservation within the state. We find no merit in Protestants’ argument that the State Engineer had to find unappropriated water before approving the applications. It is true that a new appropriation of surface water requires a finding of unappropriated water. NMSA 1978, §
72-5-6 (1985). Yet, a transfer of water rights only requires the State Engineer to make a finding of the three factors noted above.

ISSUE TWO: No genuine issue of material fact existed in determining if the water rights associated with the springs are less than the estimated yield of the springs.

Protestants argue that the district court erred in granting summary judgment because a genuine issue of material fact existed regarding whether the water rights associated with springs at the move-to area were less than the estimated yield of the springs from which Protestants obtain their surface water. Protestants contend that the State Engineer did not consider all declared water rights in determining the yield of the Rosa de Castillo spring and the San Francisco spring.

We review de novo whether there is a genuine issue of material fact precluding summary judgment. Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. We do not rule on issues of fact but rather determine if disputed issues of material fact exist. Blauwkamp v. Univ. of N.M. Hosp., 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992). We consider the evidence in the light most favorable to the nonmoving party. LaMure v. Peters, 1996-NMCA-099, ¶ 13, 122 N.M. 367, 924 P.2d 1379. The movant must make a prima facie case showing that it is entitled to summary judgment and then "the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial on the merits." Roth v. Thompson, 113 N.M. 331, 334-35, 825 P.2d 1241, 1244-45 (1992). Once a movant has made a prima facie showing, the non-movant must show the court that a material or genuine issue of fact is present. Spears v. Canon de Carnue Land Grant, 80 N.M. 766, 768, 461 P.2d 415, 417 (1969).

The first step of our analysis is to determine if Applicants made a prima facie showing that the water rights associated with the springs are less than the estimated yield of the springs. See Roth, 113 N.M. at 334, 825 P.2d at 1244. In making this determination, we must first turn to NMSA 1978, § 72-7-1(E) (1971), which provides that in a de novo appeal of a State Engineer’s order, the district court may consider evidence that was introduced at the hearing before the State Engineer. Here, Applicants made their prima facie case that the water rights associated with the springs were less than the annual yield of the springs by entering into evidence a memorandum from Jesse Ward, water resource manager for the Water Rights Division of the State Engineer’s office. The memorandum indicated that Ward had researched the water rights associated with the springs and had determined that the water rights associated with the springs appear to be much less than the estimated yield of the springs combined. Ward reached this conclusion although he acknowledged that the State Engineer had declarations on file indicating rights to use water from the springs to a greater extent than historically used. Yet, in determining that the water rights associated with the springs were less than the annual yield of the springs, Ward only considered the amount of water actually being used by the declarants. The State Engineer’s order approving the applications found that the estimated yield of the springs far exceeded the water rights associated with the springs.

On appeal, Protestants do not challenge the State Engineer’s finding that the annual yield of the springs far exceeded the water needed to irrigate the historically irrigated acres of land. Yet, Protestants do argue that the State Engineer erred in concluding that the water rights associated with the springs were only the amount of water needed to irrigate this smaller number of acres. Protestants assert that Ward had a duty to consider the amount of water actually claimed on the declarations, rather than the amount of water being placed in use by the declarants. Protestants cite to Templeton v. Pecos Valley Artesian Conservancy District, 65 N.M. 59, 332 P.2d 465 (1958), where our Supreme Court held that each time a water right permit is granted, the State Engineer must “consider all prior appropriations to determine if there are any unappropriated waters.” Id. at 69, 332 P.2d at 471.

Apart from the fact that this is not a Templeton case as Protestants admit, since the groundwater of the MRGAA is not fully appropriated, we conclude in this case that the State Engineer did consider all prior appropriations and did measure the water rights as required by New Mexico law. The New Mexico Constitution provides that beneficial use is the basis, the measure, and the limit of the right to the use of water. N.M. Const. art. XVI, § 3. The concept of beneficial use “requires actual use for some purpose that is socially accepted as beneficial.” State ex rel. Martinez v. McDermott, 120 N.M. 327, 330, 901 P.2d 745, 748 (Ct. App. 1995). “An intended future use is not sufficient to establish beneficial use if the water is not put to actual use within a reasonable span of time.” Id. Here, the State Engineer, through Ward, utilized aerial photographs dating back to 1935 and determined that, although the declarations claimed a right to use water from the springs to irrigate a larger number of acres of land, water had only been beneficially used to irrigate a much smaller number of acres of land. We conclude that the State Engineer’s method of measuring water rights associated with the springs is in accordance with New Mexico law and find no genuine issue of material fact in dispute regarding the district court’s ruling that the annual yield of the springs far exceeds the water rights associated with the springs. Therefore, the district court did not err on this ground in granting Applicants’ motion for summary judgment.

Furthermore, we find no merit in Protestants’ argument that the State Engineer adjudicated as forfeited or abandoned the water rights of individuals who had declarations of water rights on file, yet were not putting the water to beneficial use. The record is completely devoid of any such finding by the State Engineer. The State Engineer measured water rights by the amount of water being placed in beneficial use and did not measure water that was declared but was not being beneficially used. In so doing, the State Engineer was not declaring that water rights did not exist, but simply following the basis of measurement as required by the New Mexico Constitution. See N.M. Const. art. XVI, § 3. As our Supreme Court stated in State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957):

Water appropriators and appropriations on each of the artesian basins of the state are numerous. The State is vitally concerned in every appropriation. The need for water is imperative, and often the supply is insufficient. Such conditions lead inevitably to many serious controversies, and demand from the state an exercise of its police power, not only to ascertain rights, but also to regulate and protect them.

Id. at 272, 308 P.2d at 988.

Here, the hearing before the State Engineer’s office was not for the purpose of adjudicating forfeitures or abandonments of water rights; rather it was a proceeding to determine whether the applications would impair or be a detriment to existing water rights, be detrimental to public welfare, or be contrary to the conservation of water within the State. Although certain findings by the State Engineer could be grounds for a conclusion that certain water rights had been forfeited or abandoned, the State Engineer did not draw such a conclusion. Thus, we rule that the State Engineer’s findings were not an adjudication of forfeiture or abandonment of declared water rights that are
that there will be a de minimis effect on water levels that will be impacted by approval of an application. In holding that summary judgment was proper even though disputed facts remain, if those facts are not material).

Applicants' motion for summary judgment.

Depletions to the springs were de minimis; yet we

in that case even though the protestants suffered economic losses due to the State Engineer's approval of groundwater applications.

A. The district court correctly determined that a new depletion of surface water at the move-to site in a fully appropriated stream system is not per se impairment.

In partial response to this argument, we once again point to our Supreme Court's decision in Langenegger, which concluded that there would be very few, if any, transfers of water rights if the waters transferred were required to be identical. 82 N.M. at 420, 483 P.2d at 301. In this case, the State Engineer has issued guidelines determining that a transfer of surface water rights within the MRGAA is sufficient to prevent adverse effects upon the surface flow of the MRGAA. Our Supreme Court has held that the “special knowledge and experience of state agencies should be accorded deference.” Stokes, 101 N.M. at 202, 680 P.2d at 342. The State Engineer ruled that the amount of water rights transferred exceeded the amount that Applicants would be allowed to pump plus any depletion effects to the Rio Grande stream system as a whole. Protestants have not challenged these findings 59-61 of the State Engineer’s order, either below or on appeal, and they have not contended that their claimed issue of fact as to depletion effects, which we discuss below, applies to prevent summary judgment on the aspect of the State Engineer’s order that deals with the effect of the transfer on the surface flow of the Rio Grande stream system as a whole.

We are not persuaded by Protestants’ argument that “under the relevant law and unique facts of this case, any new depletion of surface water, however small, would result in per se impairment.” In considering groundwater, our Supreme Court has held that “[t]he lowering of a water table in any particular amount does not necessarily constitute an impairment of water rights of adjoining appropriators.” Brown, 65 N.M. at 80, 332 P.2d at 479; Mathers v. Texaco, Inc., 77 N.M. 239, 245, 421 P.2d 771, 776 (1966). In Mathers, the Court was faced with a decline of groundwater in a non-rechargeable basin. Id. at 245, 421 P.2d at 776. The Court held that the lowering of water levels in the wells of the protestants did not constitute impairment because such a result is inevitable if the water is to be put to beneficial use and to be made available to more than one appropriator. Id. at 245-246, 421 P.2d at 776. Furthermore, the Mathers Court found no impairment in that case even though the protestants suffered economic losses due to the State Engineer’s approval of groundwater applications. Id. at 246, 421 P.2d at 776 (finding that the protestants would have an increase in pumping costs and a lowering of pumping yields due to the granting of the applications).

Our Supreme Court has also held that “[n]o impairment does not necessarily mean no change in conditions.” Stokes, 101 N.M. at 201, 680 P.2d at 341 (internal quotation marks and citation omitted). Furthermore, this Court has also rejected the argument that a finding of impairment is required where the protestants’ contend that they “need all the water they can get.” Sleeper, 107 N.M. at 499, 760 P.2d at 792 (internal quotation marks omitted). In this case, Protestants make the same arguments that have been rejected by our appellate courts in the two cases mentioned above. Protestants argue that a change of condition to surface water at the move-to site is per se impairment, and that they need all the water they can get due to drought conditions. As our courts have held against these two arguments, we hold that the district court was correct to conclude that new depletions of surface water at the move-to site is not per se impairment.

In response to Protestants’ contention that new depletions of surface water will interfere with declarants whose priorities to water rights are senior to those of Applicants, we conclude that if the diversions of surface water become so great in relation to the supply of surface water so “that priorities must be asserted in order to protect the rights of senior appropriators, then the senior appropriators must enforce their rights in a proper manner, and, if necessary, in a proper proceeding.” Langenegger, 82 N.M. at 422, 483 P.2d at 303.

The district court correctly granted summary judgment because there is no genuine issue of material fact as to whether the applications would impair existing water rights.

Protestants argue that the district court erred when it granted summary judgment in favor of the Applicants because genuine issues of material fact were in dispute. Protestants contend that there was a genuine issue of fact as to whether the depletions to the Rosa de Castillo spring, Harris springs, and San Francisco springs were de minimis. We agree with Protestants that an issue existed regarding whether the depletions to the springs were de minimis; yet we find this issue was not material and therefore the district court did not err when it granted Applicants’ motion for summary judgment. Tapia v. Springer Transfer Co., 106 N.M. 461, 463, 744 P.2d 1264, 1266 (Ct. App. 1987) (holding that summary judgment was proper even though disputed facts remain, if those facts are not material).

Our review of the cases does not suggest that a finding of no impairment by the State Engineer must be based on a determination that there will be a de minimis effect on water levels that will be impacted by approval of an application. In Brown, the Court found no

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impairment where an application to change the location of a well caused a draw down of 3.9 feet in the protestant’s well. 65 N.M. at 80, 332 P.2d at 481. The question of whether an application will impair existing rights is one that must be decided upon the facts of each case. Mathers, 77 N.M. at 245, 421 P.2d at 776.

37] The material issues that were relevant to this case were whether the applications impaired existing water rights, were a detriment to public welfare, and were contrary to conservation of water within the State. See § 72-5-23. In this case, as will be discussed later, Applicants met their burden of proof in establishing that the facts supported a ruling as a matter of law that the Applications were not detrimental to public welfare or contrary to conservation of water within the state. Applicants also established their prima facie case that the applications would not impair existing rights through the affidavit of Ward, which concluded that the applications would not impair existing water rights. Yet, Protestants argue on appeal that a material issue of fact exists because there is a dispute as to the level of depletions at the move-to site. Having already noted that our Supreme Court has held in the case of groundwater rights that “[t]he lowering of a water table in any particular amount does not necessarily constitute an impairment of water rights of adjoining appropriators,” Brown, 65 N.M. at 80, 332 P.2d at 479; Mathers, 77 N.M. at 245, 421 P.2d at 776, we determine that Protestants’ argument, in and of itself, does not present an issue of material fact.

38] In this case, viewing the evidence in the light most favorable to Protestants, the yield of the springs is sufficient to provide for the water rights being put to beneficial use by Applicants and Protestants, as well as other owners of water rights at the move-to site. Protestants did not challenge the findings of the State Engineer, which concluded that the annual yield of the springs as a whole is 291.4 acre-feet per year, that the historically irrigated acreage is 23, and that the current applications are to change the point of diversion of 15 acre-feet per year for a total amount of pumping by Applicants of approximately 30 acre-feet per year. Protestants’ expert determined the surface flow of the springs would be depleted by 8.819 acre-feet per year after 100 years of groundwater pumping by Applicants. Thus, Protestants’ own expert predicted that after 100 years of groundwater pumping at the rate contemplated by the applications in this case, the surface flow of the springs will be depleted by less than five percent and there will still be hundreds of acre-feet of water produced by the springs. Therefore, we find that viewing the evidence in the light most favorable to Protestants, no genuine issue of fact exists as to whether the applications would impair existing water rights at the move-to site.

ISSUE FOUR: The district court did not err in granting summary judgment on the issues of public welfare and conservation.

39] Protestants argue that the district court erred in granting summary judgment in favor of the Applicants due to Protestants’ being entitled to a trial on the issues of public welfare and conservation. Protestants filed a summary judgment motion in district court, which, in part, stated:

In this case, approval of the applications hinge on three criteria: 1) there can be no impairment to existing water rights; 2) the changes must not be detrimental to the public welfare; and 3) the changes may not be contrary to conservation. See NMSA 1978, § 72-5-23, § 75-12-3. This motion is concerned only with the first criterion, namely whether approval of the applications will impair existing water rights.

Applicants filed a response to Protestants’ motion for summary judgment and also filed a cross-motion for summary judgment. Applicants’ motion for summary judgment argued that the State Engineer properly analyzed and considered all relevant factors, including whether the applications would impair existing water rights, be detrimental to public welfare, or contrary to conservation of water within the state. Applicants also noted that Protestants had not challenged the State Engineer’s determination regarding the issues of public welfare and conservation. Therefore, Applicants argued that because the State Engineer had properly analyzed and considered all relevant factors, the district court should affirm the State Engineer’s approval of the applications.

40] Protestants did not address the issues of public welfare or conservation of water in their response to the Applicants’ motion for summary judgment. Protestants also did not address the issues in oral arguments, although both issues were raised by Applicants in their cross-motion for summary judgment. To preserve an issue for review on appeal, it must appear that the appellant fairly invoked a ruling of the district court on the same grounds argued in the appellate court. Woolwine v. Furr’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Crt. App. 1987). Because Protestants did not do this, we conclude that the district court did not err in granting final summary judgment on the issues of public welfare and conservation.

ISSUE FIVE: The district court did not err in denying Protestants’ motion for summary judgment.

41] Protestants argue that the district court erred when it failed to grant Protestants’ motion for summary judgment. Protestants claim under the circumstances of this case, there is per se impairment to the water rights at the move-to location, because it was undisputed that the applications would lead to new depletions of surface water at the move-to site and that the surface water of the Rio Grande stream system is fully appropriated. Having already held against the Protestants on this argument, we conclude that the district court did not err in denying Protestants’ motion for summary judgment. Although no genuine issues of material fact exist in this case, Protestants were not entitled to summary judgment as a matter of law. Self, 1998-NMSC-046, ¶ 6.

CONCLUSION

42] For these reasons, we hold that no genuine issues of material fact exist in this case, and that the district court applied the correct law in granting summary judgment in favor of the Applicants. Accordingly, we affirm.

43] IT IS SO ORDERED.
LYNN PICKARD, Judge

I CONCUR:
JAMES J. WECHSLER, Judge
RODERICK T. KENNEDY, Judge (concurring in part and dissenting in part)
Roderick T. Kennedy, Judge

(Concurring In Part And Dissenting In Part)

[44] I respectfully dissent. In a developing legal climate where we are coming to recognize that water is a necessity in limited supply, the courts should encourage definitive measurement in calculating water availability, should provide clear and consistent parameters for defining terms like “impairment,” and should take on their duties of de novo review with a critical eye and willingness to independently review the evidence before them.

[45] The Majority is correct in holding that the applications are not for new water appropriations, and that a new depletion at the move-to-site is not per se impairment of that source of water. I concur fully with these holdings. Also, it is apparent in this case that Protestants concede other matters that limit the scope of the controversy significantly, which the Majority Opinion correctly addresses. Therefore, my disagreement is limited to discussing what I consider to be sufficient issues of material fact that should have precluded summary judgment and merited a full and proper de novo review of the case.

New Mexico Constitution Is Not a Water Gauge

[46] The salient question is whether “the State Engineer did consider all prior appropriations and did measure the water rights as required by New Mexico law” in coming to its decision. Templeton’s application is broader than the Majority suggests, simply because it holds that “the State Engineer can only grant permits to appropriate waters which are not already appropriated,” and that permits granted are “subject to the rights of all prior appropriators from the same source.” 65 N.M. at 69, 332 P.2d at 472. Templeton fully recognized the duty to appropriate water so as not to impair existing rights. Id. To do so then requires ascertaining the existence and effect of such existing rights.

[47] To accomplish this assessment requires a conceptual jump by the Majority. While the Constitution states that “[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water,” New Mexico Constitution, art. XVI, § 3, beneficial use has little utility as a unit of measurement. In the Majority Opinion, we fail to answer the question of how to deal with rights that are adjudicated not to exist (albeit only for purposes of this case) for lack of beneficial use. To hold that “all prior appropriations” were considered and measured by the State Engineer in its process of granting Applicants’ permits, the Majority relies on the State Engineer’s determinations that not all existing water rights to the springs have been beneficially used, and therefore does not count them against the springs’ yield. These rights should have been counted. Impairment for this case is something that happens to the Protestants’ springs, not the broad water system as a whole. The calculus of determining whether total effect on the springs would be accounted for by their yield lessened by existing rights plus what will be drawn by Applicants’ wells cannot ignore water rights that have not been properly extinguished.

[48] So in this case, “although the [existing] declarations claimed a right to use water from the springs to irrigate a larger number of acres of land,” those rights, though not held by anyone to be abandoned, forfeited, or otherwise extinguished, were not counted because of Ward’s determination that water from the springs “had only been beneficially used to irrigate a much smaller number of acres of land” than the total number represented by all water rights that exist.

[49] The State Engineer in its response to Protestants’ motion for summary judgment explicitly said that his “determinations regarding impairment, or lack thereof, do not constitute adjudications.” Forfeiture of water rights may occur after four years of no beneficial use, but forfeiture of rights requires notice and action from the State Engineer. NMSA 1978, § 72-12-8(A) (2002). No such process has been undertaken to extinguish the prior rights in question for lack of beneficial use of the allocated water since 1863, 1907, 1935, or any other year. Absent such action, I urge that the declared rights should be taken into account when calculating demand.

[50] The Majority’s Opinion thus goes to great lengths in opposite directions, stressing that the uncalculated rights are not abandoned, forfeited, or adjudicated, while ratifying findings of the State Engineer that ignore such rights. When the Majority agrees with this conclusion, it must then appear to the reader to adjudicate those water rights by dicta. I disagree that these rights can be ignored in calculating demand for the springs’ water, and urge that the complete picture should be presented before impairment of a source can be evaluated accurately.

[51] The State Engineer cannot have it both ways. We hold that Protestants’ assertion of impairment was rebutted by the State Engineer’s showing regarding anticipated demand against yield of the springs. For the Majority Opinion to adopt findings that rights not concerned in this action do not exist for calculating demand versus yield in the spring, while explicitly stating that we do not regard them as forfeited or abandoned by legal definition, is contradictory. Otherwise, we appear to impermissibly expand the comment in McLean, 62 N.M. at 272, 308 P.2d at 988, that “[r]egulation . . . is not confiscation,” to a holding that power to regulate implies a power to ignore existing rights. The Majority’s holding that the State Engineer’s findings were not an adjudication requires an explanation as to what the findings really are. Flatly, other rights exist that were considered by the State Engineer to be unimportant to the question of impairment of the springs. Such a determination is therefore at least an incomplete process, at most a credulous statement given how extensively we try to explain how little those rights matter. In this regard, the Majority Opinion fails to deliver its reason clearly enough and makes unwarranted assumptions based on unwarranted findings. Because the rights exist, and were not subtracted from the springs’ output, we do not know, for instance, if the Applicants’ well might still have had a negligible effect on the springs upstream. Taking all the unextinguished rights into account so as to assure a calculation based on fact, not assumption, would generate facts sufficient to ultimately survive or support summary judgment.

That process was short-circuited in this case.

“Impairment” Is a Functional Definition, Not a Policy

[52] The Majority Opinion states that “Protestants are confusing depletion effects on the stream system as a whole with depletion effects at the particular site.” To the Majority, this precludes the issue of impairment of the springs from being sufficiently material as to preclude summary judgment. I believe that the significance flows in exactly the opposite direction—namely that the stream system as a whole is not where impairment is the issue. I am not convinced that whether a system that is “hydrologically connected” in the entire MRGAA answers this case’s problem of small location-specific springs being impaired by groundwater pumping for a 106-unit residential development. Relinquishing surface rights in Valencia County might not have much to do with making sure there is enough water in Las Huertas Canyon to feed a spring. Under our case law, impairment of water rights is a factual question to be resolved on a case-by-case basis.
The Majority cites a number of cases, such as Brown, 65 N.M. at 80, 332 P.2d at 479, and Mathers, 77 N.M. at 245, 421 P.2d at 776, to show that in some circumstances depletion does not equal impairment. The cases cited all stand for the proposition that a global approach and evaluation (the very antithesis of a per se rule) is required to assess the impairment question, not a concentration on a single factor. The Majority Opinion does not go in this direction, taking instead a narrow approach rejected by other cases. For example, Brown discussed the lowering of a water table, but that was a groundwater-only case; well location was one factor the court said had to be considered along with all the characteristics of the aquifer. 65 N.M. at 80, 332 P.2d at 479. Brown did not involve a surface-for-groundwater transfer, but drilling a well under existing rights in a different location and applying for the move after the fact. Id. at 76, 332 P.2d at 476. That a “draw[]down of 3.9 feet in the water table” did not necessarily constitute impairment in that case is not a basis for inferring anything beyond what Brown actually said: “all characteristics of the particular aquifer must be considered along with well locations.” Id. at 80, 332 P.2d at 479 (motion for rehearing) (emphasis added). There were many variables in the Brown equation, which, if applied, might well lead to a better-developed factual basis in a de novo trial for a conclusion as to whether Protestants’ rights were actually impaired.

Our prior cases demonstrate the depth of de novo review that I feel this case should have received below. As the Majority Opinion points out, Mathers dealt with a non-rechargeable basin. 77 N.M. at 245, 421 P.2d at 776. Mathers said that a declining water level is to be expected when one pumps from a finite basin. Id. at 246, 421 P.2d at 776. Mathers held that the lowering water level alone is insufficient for impairment of others’ rights while lamenting that “a definition of ‘impairment of existing rights’ is not only difficult, but an ‘attempt to define the same would lead to severe complications.’” Id. at 245, 421 P.2d at 776 (citation omitted). Stokes, on the other hand, dealt with the encroachment of salty water resulting from increased pumping at the move-to location. 101 N.M. at 201, 680 P.2d at 341. There, the impairment was the expected increase in salinity; though not minimal, the court held that there was no impairment. Id. Sleeper is similarly uninformative—the statement the protestants made there, that they “need[ed] all the water they [could] get,” showed nothing. 107 N.M. at 499, 760 P.2d at 792. The issue was not what the protesters wanted, but whether the applicants were retaining water rights (established with some particularity by the applicants) in the Rio Brazos basin. See id.

Next, Langenegger allowed the owner of surface rights to drill a well upstream in an aquifer that gave water to his surface source so as to pre-capture the water that would eventually get into the Pecos River. 82 N.M. at 419, 483 P.2d at 300. In this case, could Applicants capture surface water before it recharged the source of their wells? Saying that Protestants can later sue if their springs are truly impaired does not obviate today’s responsibility of a full exposition of whether existing rights plus the new use would impair the springs. Our saying that “[n]o impairment’ does not necessarily mean ‘no change in conditions’” only underscores to me the possibility that if things were given an opportunity for real review, the possibility for change in the springs’ flow could be more honestly evaluated. See Stokes, 101 N.M. at 201, 680 P.2d at 341 (internal citation omitted). Overwhelmingly in these cases, a review of all factors involved supported the calculus of impairment. We owe no less breadth of inquiry to the case before us.

Further, the Majority Opinion needs to say what impairment is in general, since we say the effect on the springs is not de minimis. Once we hold that more than a de minimis effect exists, we should encourage district courts, in de novo review, to undertake an evaluation of just what might be impairment of the prior rights. The effect on the springs is a material issue, and one that the Majority Opinion concedes may be more than de minimis. See Spencer v. Health Force, Inc., 2005-NMSC-002, ¶ 26, 137 N.M. 64, 107 P.3d 504 (“Genuine issues of material fact . . . preclude summary judgment.”). The issue is the springs, not the stream system.

Is Trial De Novo Inconsistent with Summary Judgment Based on Administrative Findings?

I am manifestly unsure in a case like this, with so many facts left undetermined, whether summary judgment was appropriate. This uncertainty is compounded by my examination of a district court’s de novo review of State Engineer decisions. Under the New Mexico Constitution, art. XVI, § 5, a proceeding appealing the State Engineer’s ruling “shall be de novo as cases originally docketed in the district court.” This provision established the district court’s power “to find facts[,] . . . to form conclusions based upon those facts, and to enter enforceable judgments, orders and decrees supported by those facts and conclusions.” In re Application of Carlsbad Irrigation Dist., 87 N.M. 149, 151-52, 530 P.2d 943, 945-46 (1974). Our Supreme Court has said that in its de novo review, the district court considers the evidence presented to the State Engineer then it “also hears additional evidence, and is not called upon to determine whether the engineer or the board of water commissioners erred . . . but must form its own conclusion and enter such judgment as the proof warrants and the law requires.” Id. at 150, 530 P.2d at 944 (internal quotation marks and citation omitted) (emphasis added). This has been called “pure de novo review.” Clayton v. Farmington City Council, 120 N.M. 448, 453-54, 902 P.2d 1051, 1056-57 (Ct. App. 1995) (emphasis omitted). Carlsbad Irrigation District also recognized that de novo review may concern the same ultimate issues and facts as were determined by the State Engineer, and that the district court’s findings and those below may well be very similar. 87 N.M. at 152, 530 P.2d at 946. Such a similarity did not mean “that the district court did not consider the evidence anew.” Id. The district court “could and should have recited the substance of its judgment, rather than merely affirming the findings and decision of the Engineer,” but the district court’s failure to do so there did not necessarily deprive the protesters of a de novo review. Id. Unfortunately, in the instant case as opposed to Carlsbad Irrigation District, no new evidence was taken, and the case was resolved by summary judgment. We cannot know if the district court fulfilled the aspirations stated in Carlsbad Irrigation District.

The district court in its de novo review should demonstrate that it has independently decided the case on the facts before it, not affirm by summary judgment the assumptions the State Engineer makes to justify its ultimate decision. This is particularly so where the decision is based on ignoring water rights that are not abandoned, forfeited, or adjudicated not to exist. Those rights should specifically be taken into account or there is a material question of fact as to impairment of the springs.

RODERICK T. KENNEDY,
Judge
OPINION

A. JOSEPH ALARID, JUDGE

PROCEDURAL HISTORY

[1] Defendant was charged by grand jury indictment with conspiracy to commit trafficking in methamphetamine by manufacturing, contrary to NMSA 1978, §§ 30-28-2 (1979) and 30-31-20(A)(1) (1990); or alternatively, with attempted trafficking in methamphetamine by manufacturing, contrary to NMSA 1978, § 30-28-1 (1963) and Section 30-31-20(A)(1). Defendant filed a motion to quash the indictment, arguing, inter alia, that the Legislature intended the conduct charged in the indictment to be punished as either possession of drug paraphernalia pursuant to NMSA 1978, § 30-31-25.1 (2001) or as possession of drug precursors pursuant to NMSA 1978, § 30-31B-12(A) (2004). Defendant ultimately abandoned the argument based on the drug precursor statute. The district court denied Defendant’s motion to quash the conspiracy count, concluding that tablets containing pseudoephedrine are not drug paraphernalia. The district court granted Defendant’s motion to quash the attempted trafficking count, reasoning that Defendant’s actions were “mere preparatory acts and not an overt act in furtherance of the crime alleged.”

[2] The case proceeded to trial on the conspiracy count. Testimony by the State’s witnesses established that on July 27, 2001, a private security officer at a Wal-Mart store in Las Cruces, New Mexico, observed Defendant concealing in his trousers the contents of four boxes of medicine, each containing 96 non-prescription pseudoephedrine tablets in blister packaging. Defendant purchased an additional box of tablets. When Defendant left the store without paying for the four concealed boxes of tablets, the security officer detained Defendant and called the police. Mark Sanchez, a Dona Ana County deputy sheriff assigned to the Las Cruces/Dona Ana County Metro Narcotics division, responded. Agent Sanchez advised Defendant of his Miranda rights. Defendant agreed to talk with Agent Sanchez.

[3] According to Agent Sanchez, Defendant told him that he had heard that the tablets could be used to manufacture methamphetamine. Agent Sanchez recalled Defendant telling him that Defendant had planned to sell them to a person named “Guero” for five dollars a box. Defendant denied manufacturing methamphetamine or using the drug. According to Agent Sanchez, Defendant admitted that he had sold tablets to Guero in the past and that he was aware that Guero used the tablets to manufacture methamphetamine. According to Agent Sanchez, Defendant told him that Guero would call “out of the blue,” asking if Defendant had any tablets to sell. In the course of his investigation, Agent Sanchez was unable to locate Guero.

[4] After the close of the State’s case-in-chief, Defendant moved for a directed verdict. Defense counsel argued that:

I think getting the pills to give to Guero, knowing what he’s going to do with them is different from saying the defendant and Guero had an agreement to manufacture methamphetamine together, which is what the State has to prove. And they don’t have evidence of that. Right now, it’s an arm’s length transaction. That’s all they have. They’ve got an arm’s length transaction. The district court denied Defendant’s motion for a directed verdict, reasoning as follows:

Well, you’re implying some kind of financial interest in the operation above and beyond the profit on the pills. I don’t see that as an element in trafficking, not under the UJI. I think the fact that he stated that he had done this in the past, the jury could infer that he’s part of this operation.

[5] Defendant testified in his defense that:

I happened to see the pills, and I just remembered that I knew somebody that would give me some money for them. So I just—I was—I bought the box because that’s all I could afford. Then I took the rest. When asked how he came up with the plan for selling the tablets, Defendant testified that:

I was just visiting the guy that I know, Danny, and I happened to meet his little brother [Guero], and he told me if I ever ran into these pills, he’d give me like two or three dollars more for them.

[6] Defendant denied having previously sold tablets to Guero. Defendant denied telling Agent Sanchez that he was aware that the tablets were used to make methamphetamine. Defendant denied having a plan with Guero to manufacture methamphetamine.
tion, Defendant conceded that it was “strange” that Guero was willing to pay Defendant more than the tablets cost. Defendant again denied having told Agent Sanchez that he knew that pseudoephedrine was used to make methamphetamine.

[7] At the conclusion of the presentation of evidence, defense counsel requested an instruction on possession of drug paraphernalia. The State objected. The district court refused the instruction, explaining that the State had not charged Defendant with possession of drug paraphernalia and that “[the court] can’t give an instruction on something that has not been charged.” The jury was instructed on the offense of conspiracy to traffic in methamphetamine by manufacture. The jury returned a verdict of guilty on the charge of conspiracy to traffic in methamphetamine by manufacture. Defendant appeals. We reverse.

**DISCUSSION**

[8] After this case was assigned to a panel, we sua sponte requested briefing on the question of whether the conduct proved by the State falls within the statutory definition of conspiracy. We did so to explore a matter implicating fundamental rights of an accused: whether Defendant’s conviction rests on evidence of conduct that does not constitute a crime. See *State v. Maes*, 2003-NMCA-054, ¶ 5, 133 N.M. 536, 65 P.3d 584; *State v. Gabriel M.*, 2002-NMCA-047, ¶ 9, 132 N.M. 124, 45 P.3d 64.

[9] Defendant’s conviction presents a recurring question in the law of conspiracy: does a defendant whose only involvement is supplying generally available goods or services become a co-conspirator merely because he knows that the goods or services he provides may or will be used by another for a criminal purpose? See generally 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2(c)(3) (2003). This is a question of statutory construction, subject to de novo review. See *State v. Barragan*, 2001-NMCA-086, ¶ 22, 131 N.M. 281, 34 P.3d 1157 (recognizing that review of the sufficiency of the evidence supporting a conviction may require a court to engage in statutory construction in determining whether evidence viewed in the light most favorable to the State constituted the charged offense); *State v. Rael*, 1999-NMCA-068, ¶ 5, 127 N.M. 347, 981 P.2d 280 (recognizing that review of a district court’s denial of a motion for directed verdict may turn upon resolution of matters of statutory interpretation, subject to de novo review).

[10] New Mexico law defines the crime of conspiracy as “knowingly combining with another for the purpose of committing a felony within or without this state.” Section 30-28-2(A) (emphasis added). Our Supreme Court has interpreted this statute to require proof of two mental states: (1) the intent to agree and (2) the intent to commit the offense that is the object of the conspiracy. *State v. Trujillo*, 2002-NMSC-005, ¶ 62, 131 N.M. 709, 42 P.3d 814. No New Mexico case has considered whether the twin intent requirements of a conspiracy can be established by evidence that the defendant agreed to sell goods to another, knowing that the other might use the goods for an illegal purpose.

[11] We are reluctant to extend Section 30-28-2(A) to an otherwise lawful sale of goods. It is not at all clear to us that in ordinary usage a seller “agrees” with a purchaser’s intended use of goods or services simply by engaging in an arm’s length sale. Similarly, we are not persuaded that a defendant-seller shares a purchaser’s intent to commit a crime merely because the defendant had knowledge of the purchaser’s intended use of those goods or services at the time of the sale. In this context, knowledge of the other’s criminal objective is not necessarily equivalent to an intention to bring about the objective. 1 LaFave, *supra*, § 5.2(b), at 342-43 n.9 (citing conspiracy as an area of criminal law where there may be “good reason” for distinguishing between knowledge and intent); 2 LaFave, *supra*, § 12.2(c)(3) at 280 (observing that intent rather than mere knowledge of the unlawful object is usually required to establish a conspiracy). As Judge Hand aptly observed in reversing convictions for conspiring to operate an illegal still:

> It is not enough that [the defendant] does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use[.]. . . . We may agree that morally the defendants at bar should have refused to sell to illicit distillers; but, both morally and legally, to do so was toto coelo different from joining with them in running the stills. United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940) (rejecting the argument that sellers of sugar, yeast, and five-gallon cans became conspirators with the buyers merely because the sellers knew that the buyers intended to use the goods to illegally distill liquor), aff’d, 311 U.S. 205 (1940); see also Jacobs v. Danciger, 41 S.W.2d 389 (Mo. 1931) (holding that a contract for the sale of brewing hops is not rendered unenforceable on the ground of illegality by the seller’s knowledge that the buyer intended to resell the hops in kits to be used in the manufacture of “home brew”; rejecting the argument that the seller’s “mere knowledge” of the buyer’s intended use was sufficient to establish the vendor’s participation in a conspiracy to violate the National Prohibition Act).

[12] In the present case, a rational factfinder could have found that Guero offered to purchase over-the-counter medications containing pseudoephedrine from Defendant at two or three dollars above the retail price of the drugs; that on one or two prior occasions Defendant sold tablets containing pseudoephedrine to Guero; that Defendant was aware that over-the-counter medications containing pseudoephedrine were used to manufacture methamphetamine; that Defendant believed that Guero manufactured methamphetamine; and that Defendant was in possession of approximately 500 tablets containing pseudoephedrine that Defendant intended to sell to Guero.

[13] Section 30-28-2(A) does not clearly and unequivocally alert a person in Defendant’s position to the possibility of prosecution and punishment for conspiracy to manufacture methamphetamine. The rule of lenity constrains us “to narrowly construe a penal statute to give a person warning of the prohibited conduct.” 1 LaFave, *supra*, § 12.2(c)(3) (2003). This is a question of statutory construction, subject to de novo review.

1 The Legislature enacted the predecessor to Section 30-28-2 in 1919. 1919 N.M. Laws ch. 31, § 1, ch. 31, § 1 provided:

> Any person or persons who shall knowingly combine with any other person or persons for the purpose of committing a felony, within or without this state; or any person or persons who shall knowingly unite with any other person or persons, whose object is the commission of a felony or felonies, within or without this state, shall, on conviction, be fined not less than twenty-five dollars, nor more than five thousand dollars, or imprisoned in the state prison not less than one year nor more than fourteen years, or both in the discretion of the court.
combining with another for the purpose of committing a felony” does not criminalize the conduct proved by the State in this case.

{14} Our opinion should not be understood as invariably insulating suppliers of goods or services from liability for conspiracy. In appropriate cases, evidence of otherwise lawful sales of goods or services combined with other factors may suffice to demonstrate the defendant’s purposeful combination with the buyer in unlawful conduct. Cf. Direct Sales Co. v. United States, 319 U.S. 703 (1943) (distinguishing Falcone, 109 F.2d 579; upholding conspiracy conviction of vendor of morphine sulphate). Our opinion also should not be understood as suggesting that the Legislature lacks the power to criminalize sales of goods or services when the seller knows that the purchaser intends to use the goods or services to commit a crime. 

{15} We offer a few comments in response to Judge Sutin’s dissent.

{16} The concept of substantial evidence is meaningless unless it is linked to a specific definition of a crime. Expand the definition of the crime and evidence that might otherwise be insufficient becomes “substantial.” A court cannot decide whether the State has come forward with substantial evidence of a conspiracy without expressly or implicitly engaging in statutory construction of the conspiracy statute. Defining the outer boundary of the statute prior to conducting substantial evidence review is particularly important where, as here, the prosecution’s theory of its case puts the concept of conspiracy to its theoretical limits.

{17} A trial court “has the right, and it is its duty,” to withdraw a case from the jury and direct a verdict for a defendant when the State has failed to come forward with substantial evidence that the defendant committed the offense charged. State v. Tipton, 57 N.M. 681, 682, 262 P.2d 378, 378 (1953). When a trial court improperly fails to direct a verdict for the defendant it is our responsibility to correct the error by doing so appeal what the trial court failed to do at trial, and we are not precluded from correcting the trial court’s error in even submitting the case to the jury by the fact that a jury has found against the defendant.

{18} As Falcone and Direct Sales Co. demonstrate, there is no clear consensus as to whether the crime of conspiracy has been defined to criminalize the state of mind of a defendant who sells available goods to another knowing that the purchaser will use the items for a criminal purpose. The important question in this case, in our view, is not whether Judge Hand’s decision in Falcone or Justice Rutledge’s opinion in Direct Sales Co. represents the better view, nor is it whether as a matter of public policy the legislature ought or ought not penalize as a conspiracy the type of conduct at issue in this case. Rather, the dispositive question is whether the language employed by the Legislature clearly evinces an intention to extend the definition of conspiracy to the conduct at issue in the present case. This is a question of statutory construction which it is the duty of courts to resolve: “Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime.” Griffin v. United States, 502 U.S. 46, 59 (1991) (emphasis added).

{19} Judge Sutin would have the reader of his dissent believe that he is merely engaging in substantial evidence review. In reality, the dissent turns upon its implicit adoption of a relaxed definition of the state of mind required to establish a conspiracy and the importation of this definition into Section 30-28-2. In the guise of deferring to hypothesized jury inferences, the dissent blurs the crucial distinction between merely knowing that the purchaser may commit a felony and sharing the purchaser’s purpose to commit a felony. The dissent therefore necessarily represents the better view, (although it does have the virtue of maintaining a clear distinction between knowing and intentional conduct). We merely recognize that Judge Hand’s approach represents a view of the state of mind required to establish the crime of conspiracy that is entirely reasonable and that is at least as valid as the approach taken by the Supreme Court in Direct Sales Co. As far as we can tell, there is no legislative history to speak of to shed light on the meaning of Section 30-28-2. Traditional rules of statutory construction do not compel us to choose one approach over another. In such a case, the rule of lenity directs us to resolve doubts in favor of the accused by applying the narrower definition of the offense to the defendant. Our application of the rule of lenity to ambiguous statutory language does not, of course, preclude the Legislature from responding to our construction by enacting a statute that eliminates the statutory ambiguity and that unequivocally criminalizes the conduct in question.

{20} For the reasons set forth above, we reverse Defendant’s conviction.

{21} IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

I CONCUR:
IRA ROBINSON, Judge

JONATHAN B. SUTIN, Judge (dissenting)

2 We note that at least two states have adopted criminal facilitation statutes that clearly and unequivocally eliminate the requirement that the defendant share the co-conspirator’s intent to commit a crime. Ky. Rev. Stat. Ann. § 506.080 (Michie 1995); N.Y. Penal Law, §§ 115.00 to 115.08 (McKinney 2004).

3 Juries do not work from the actual language adopted by the Legislature; they are provided with paraphrases of the Criminal Code in the form of UJIs approved by the Supreme Court. As with any paraphrase, there is the danger that the meaning communicated by the original text will be lost.

4 The dissent seems to us to overstate the degree to which the Supreme Court in Direct Sales Co. qualified Falcone. Consider the following language from Direct Sales Co.:

A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer’s wrongful use or with knowledge, but without stimulation or active incitement to purchase.

319 U.S. at 712 n.8.
I fall readily in line with Judge Learned Hand’s general concern, expressed in United States v. Falcone, about “prosecutors [who] seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders.” 109 F.2d 579, 581 (2d Cir. 1940), aff’d, 311 U.S. 205 (1940). “That there are opportunities of great oppression in such a doctrine is very plain.” Falcone, 109 F.2d at 581. New Mexico’s conspiracy statute, NMSA 1978, § 30-28-2(A) (1979), provides elastic substance for prosecutorial overreach. However, I am unable to concur in the majority’s approach and result.

I agree that, with no history of similar transactions, a court might hold that, as a matter of law, a seller of innocent goods cannot be prosecuted for merely knowing that the goods sold will be used for a felonious purpose. But the evidence in the present case of past transactions permits a jury to reasonably infer the intent necessary to convict. Thus, the issue on review becomes one of sufficiency of the evidence. I do not see how the majority can draw lines where it does both on the facts and the applicable standard of review with the historical evidence. Nor do I think the cases the majority cites in support of the de novo standard of review, involving statutory interpretation with invocation of the rule of lenity used to reach the result the opinion reaches, should be employed in this case.

In this case the majority focuses on the Second Circuit’s opinion in Falcone. See Majority Opinion ¶ 11. The majority’s purpose appears to be the same as that stated by the Second Circuit in Falcone as being to circumscribe the scope of “comprehensive indictments” in order to avoid the “opportunities of great oppression” created by conspiracy statutes.” Falcone, 109 F.2d at 581; see Majority Opinion ¶¶ 11, 13.

I do not read the Second Circuit Falcone case, particularly as discussed in the United States Supreme Court in both Falcone, 311 U.S. 205, and Direct Sales v. United States, 319 U.S. 703, 705-13 (1943), as persuasive authority under our facts. The subject of Judge Hand’s concern in Falcone was the sale of lawful goods such as sugar and yeast to distillers operating illicit stills. 109 F.2d at 580. The Second Circuit stated the question to be “whether the seller of goods, in themselves innocent, becomes a conspirator with--or, what is in substance the same thing, an abettor of--the buyer because he knows that the buyer means to use the goods to commit a crime.” Id. at 581. The Court’s answer was that if the law was to “impose[] punishment [based on conspiracy] merely because the accused did not forbear to do that from which the wrong was likely to follow,” the accused’s “attitude towards the forbidden undertaking must be more positive.” Id.; see also Falcone, 311 U.S. at 207 (reiterating the same).

The seller-defendants in Falcone were not, it appears, charged with conspiracy with or aiding and abetting any particular distiller to engage in illicit distilling, but rather were charged as being part of, or co-conspirators in, a conspiracy among distillers. Falcone, 311 U.S. at 206, 208-10 (clarifying the issue to be “whether one who [with knowledge of a conspiracy to distill illicit spirits] sells materials with knowledge that they are intended for use or will be used in the production of illicit distilled spirits may be convicted as a co-conspirator with a distiller who conspired with others to distill the spirits in violation of the revenue laws.” (emphasis added)). The evidence came up short on whether the seller-defendants knew of that conspiracy. Id. at 206, 210. Thus, the Second Circuit’s holding of lack of sufficient evidence must be read in light of the actual issue in that case: sufficiency of the evidence of a seller’s knowledge of, and thus participation in, a conspiracy among distillers to engage in illicit distilling.

Three years after the Supreme Court’s decision in Falcone, the Court decided Direct Sales, 319 U.S. 703. The Court in Direct Sales noted that the parties were “at odds concerning the effect of the Falcone decision as applied to the facts proved in [Direct Sales].” Direct Sales, 319 U.S. at 705. “The salient facts [were] that Direct Sales sold morphine sulphate to Dr. Tate in such quantities, so frequently and over so long a period it must have known he could not dispense the amounts received in lawful practice and was therefore distributing the drug illegally. Not only so, but it actively stimulated Tate’s purchases.” Id.

In Direct Sales, the defendant attempted to escape conspiracy liability by arguing that its sales to Dr. Tate were no different than the sales in Falcone by the seller-defendants to distillers knowing that the distillers would use the goods in illegal distillation. Direct Sales, 319 U.S. at 708. The Court in Direct Sales took very specific issue with the defendant’s interpretation and application of Falcone. The Court pointed out that the evidence in Falcone failed to establish that the seller-defendants “knew of the distillers’ conspiracy.” Id. at 708-10. The Court distinguished Falcone, stating that, unlike the circumstances in Direct Sales, in Falcone “[t]here was no attempt to link the supplier and the distiller in a conspiracy inter sese.” Id. at 708. Significantly in terms of Falcone’s application to Direct Sales, the Court stated:

Petitioner obviously misconstrues the effect of the Falcone decision in one respect. This is in regarding it as deciding that one who sells to another with knowledge that the buyer will use the article for an illegal purpose cannot, under any circumstances, be found guilty of conspiracy with the buyer to further his illegal end. The assumption seems to be that, under the ruling, so long as the seller does not know there is a conspiracy between the buyer and others, he cannot be guilty of conspiring with the buyer, to further the latter’s illegal and known intended use, by selling goods to him.

The Falcone case creates no such sweeping insulation for sellers to known illicit users. The decision comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally. The Government did not contend, in those circumstances, as the opinion points out, that there was a conspiracy between the buyer and the seller alone. It conceded that on the evidence neither the act of supplying itself nor the other proof was of such a character as imported an agreement or concert of action between the buyer and the seller amounting to conspiracy. This was true, notwithstanding some of the respondents could be taken to know their customers would use the purchased goods in illegal distillation.

319 U.S. at 709.

It is Direct Sales, not Falcone, that must lead the way under the facts of the present case. The majority in this case cites Direct Sales under a “cf.” signal and is otherwise silent on its applicability. There can be little question, however, at least from the view of the United States Supreme Court in both Falcone, 109 F.2d at 581, and Direct Sales v. United States, 319 U.S. at 705, 708, that the fact situation here is identical with the cases discussed in those opinions.
States Supreme Court, that there is a significant distinction to be made between the two cases, and that *Falcone* does not create a “sweeping insulation for sellers to known illicit users.” *Direct Sales*, 319 U.S. at 709.

{31} The present case cannot properly be decided based on the view that, as a matter of law, the New Mexico conspiracy statute did not criminalize Defendant’s conduct. In my view, the conspiracy statute can be applied to reach a seller of otherwise innocent goods when, as in the present case, the seller knows the buyer, knows that the buyer intends to use the goods for a felonious purpose, intends to financially profit from illicit activity using the goods sold, and has engaged in similar past transactions. Under such circumstances, a jury is entitled to draw reasonable inferences that the defendant intended to facilitate or promote the illicit venture through his investment in order to personally profit from the venture’s success. When a seller of goods observes that his past sales of goods for illicit ventures resulted in his further sales of the same goods for further illicit ventures, that seller can be reasonably viewed as participating in the venture, with a stake in the venture. The extent of the investment, minimal or substantial, should weigh on the minds of the jury, not the court. See *State v. Armijo*, 90 N.M. 10, 11, 558 P.2d 1149, 1150 (Ct. App. 1976) (“The size, frequency and manner of the transactions . . . were evidence sustaining defendant’s conviction for conspiracy . . . to traffic in heroin. The jury could properly conclude that the heroin defendant supplied . . . was for resale.”).

{32} As drawn, Section 30-28-2(A) could not, without interpretation, stand as a basis for conviction. Our Supreme Court read into the statute two mental states required for its application: not only an intent to agree, but also “an intent to commit the offense that is the object of the conspiracy.” *State v. Trujillo*, 2002-NMSC-005, ¶ 62, 131 N.M. 709, 42 P.3d 814 (internal quotation marks and citation omitted); *State v. Baca*, 1997-NMSC-059, ¶ 51, 124 N.M. 333, 950 P.2d 776. This interpretation, of course, added elements and thus proof requirements not all that plain from reading the statute. In conspiracy prosecutions under Section 30-28-2(A), a convicted defendant’s appeal will likely include an attack on the sufficiency of the evidence. See, e.g., *State v. Roper*, 2001-NMCA-093, ¶¶ 7-9, 131 N.M. 189, 34 P.3d 133; *State v. Mariano R.*, 1997-NMCA-018, ¶¶ 4-7, 123 N.M. 121, 934 P.2d 315. However, even with our Supreme Court’s and our own attempts in the various cases that come before us to scrutinize the sufficiency of the evidence, the majority sees the case before us as one requiring, as a matter of policy, the conspiracy statute to be limited in scope through further judicial interpretation. Under the facts of the present case, I see the issue as sufficiency of the evidence.

{33} Under UJI 14-2810 NMRA, a defendant and another person must both agree together and intend to commit a crime. The Committee Commentary states that “[t]he offense is complete when the defendant combines with another for felonious purpose” and “[n]o overt act in furtherance of the conspiracy need be proved.” Id.; *State v. Davis*, 92 N.M. 341, 344, 587 P.2d 1352, 1355 (Ct. App. 1978). “Intent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence.” *State v. Sparks*, 102 N.M. 317, 320, 694 P.2d 1382, 1385 (Ct. App. 1985). The agreement required “can be nothing more than a mutually implied understanding that can be proved by the cooperative actions of the participants involved.” *Roper*, 2001-NMCA-093, ¶ 8. “This mutually implied understanding may be established by circumstantial evidence.” *Davis*, 92 N.M. at 342, 587 P.2d at 1353.

{34} On the occasion in question in this case, Defendant bought and stole from one store almost 500 pseudoephedrine over-the-counter pills, known as Sudafed tablets, for the purpose of selling the pills. He knew the pills were a necessary ingredient in the manufacture of methamphetamine. He sold them to a person he knew and who he knew wanted the pills to manufacture methamphetamine. Defendant’s purpose was to make money off the sale transaction. Defendant had engaged in the same sale transactions with the same buyer in the past.

{35} Under the language of the statute, a jury could find that Defendant “knowingly combin[ed] with another for the purpose of committing a felony.” § 30-28-2(A). That is, even applying existing judicial interpretation of the statutory elements, a jury could reasonably infer from the evidence that Defendant knew, from past experience selling to the buyer, of the buyer’s intent to use the pills to manufacture methamphetamine, thereby intending to agree to the sale for that use. In addition, a jury could reasonably infer that Defendant intended to facilitate the manufacture of the illicit drug, and wanted to see the illicit manufacturing venture successful because of the possibility of being asked to engage in further, similar transactions, through which he could make some money and thereby personally profit. A rational jury could believe that the buyer would not engage Defendant to obtain a large number of pseudoephedrine pills and to sell them to the buyer if the buyer simply wanted a long-term supply of allergy medication.

{36} Courts in racketeering cases, in which the term “enterprise” . . . is one of those subjects that the more it is explained—at least in the abstract—the more elusive it becomes,” have held that “an enterprise must be more than ‘an individual who conducts his own affairs through a pattern of racketeering.” *State v. Rael*, 1999-NMCA-068, ¶¶ 11, 16, 127 N.M. 347, 981 P.2d 280 (internal quotation marks and citations omitted). Similarly, a conspirator must be more than an individual who has done nothing more than sell a lawful product knowing that it will be used for a felonious purpose. In the present case, however, there was evidence of Defendant’s knowledge as well as his past and continued involvement in sales and personal profit.

{37} Also, like racketeering cases, where the court interprets the statute to require specific elements to be proven in order to establish the existence of an enterprise, and then examines whether the evidence of an enterprise was sufficient to convict the defendant of racketeering, id. ¶¶ 10-15, in the present case, based on court interpretation of the elements required for conviction under the conspiracy statute, and based on the evidence, this Court should examine whether the evidence of intent was sufficient to convict Defendant of conspiracy. *Cf. State v. Morz*, 1997-NMSC-060, ¶¶ 25-28, 124 N.M. 346, 950 P.2d 789 (determining that the appellate court could not say as a matter of law whether a particular felony was inherently dangerous to human life because the decision was necessarily fact-specific and for the jury to decide, subject to appellate review for sufficiency of the evidence, and holding that it was proper for the jury to determine whether the crime of criminal sexual contact was inherently dangerous for purposes of felony murder and that the verdict could be overturned only upon a showing of insufficient evidence); *State v. Barragan*, 2001-NMCA-086, ¶¶ 25-27, 131 N.M. 281, 34 P.3d 1157 (following discussion of the Court’s interpretation of the word “structure” in the burglary statute to include a separately secured area of a building otherwise open to the public, and also the Court’s interpretation of the possession of burglary tools statute as not requiring that a defendant be convicted of burglary in order to be held liable for possession, holding that there was sufficient evidence to support a finding that the defendant intended to use a device to make an unauthorized entry of a structure).
I realize that the majority’s concern rests on the consequences of permitting a jury under these circumstances to infer a guilty intent to commit the unlawful manufacture of methamphetamine. That concern more particularly is that the State can drag into the web of conspiracy legitimate vendors of lawful products simply because the vendor has informed that the product will be used for illegal, felonious purposes, where the vendor does not have a stake in the illegal operation other than having received the shelf or legitimate market price of the product at the time of the sale. This case, however, does not involve a conspiracy charge against an employee of a recognized, legitimate retail store, or against the store itself, prosecuted because an employee involved in a sale was told by a customer that the product would be used for felonious purposes. I suspect we would be hard pressed to find a case that would permit a conviction under that circumstance.

So the question is, what more is required for prosecution and conviction? The dividing line would appear to be the extent to which the seller of the innocent product, knowing that the buyer intends to use the product for a felonious purpose, intends to personally profit from continued successful illicit ventures using the product sold. The majority determines that the conspiracy statute is unclear and invokes the rule of lenity. Logically then, no matter the extent of the evidence of continuous sales, the majority would still conclude lack of statutory clarity, and invoke the rule of lenity, as opposed to treating the issue as one of sufficiency of the evidence. Yet at the same time, the majority sends a mixed signal by its warning that its determination “should not be understood as invariably insulating suppliers of goods or services from liability for conspiracy,” and, further, that there may be instances in which sale of lawful goods, “combined with other factors may suffice” as sufficient evidence to convict for conspiracy. Majority Opinion ¶ 14.

The underlying principle behind the majority’s decision to abandon sufficiency of the evidence as the basis on which to determine the validity of the jury’s verdict of guilt and to determine instead that the wording of the statute “does not criminalize the conduct proved by the State in this case,” Majority Opinion ¶ 13, is that, pursuant to the rule of lenity, this Court should view the statute as failing to adequately alert and give clear and unequivocal warning to Defendant of the possibility of prosecution and punishment for conspiracy to manufacture methamphetamine. See id. Thus, the majority’s view that the statute does not criminalize Defendant’s conduct is, in effect, a policy decision made along these lines: The statute does not tell a person to what extent his or her knowledge and conduct will suffice as unlawful conduct. Therefore, the Court will look at the circumstances of each case and determine whether, applying the rule of lenity, the statute criminalizes the conduct in question. Therefore, in the present case, the Court will determine that the statute does not criminalize the conduct, even though, under the wording of the statute, even as interpreted by our Supreme Court, a jury might rationally infer that Defendant’s knowledge, conduct, and intent were sufficient to show intent to facilitate and profit from the manufacture of illegal drugs. It may be that in another case, with other evidence, the statute does criminalize the conduct, in which case the question would then become whether the evidence was sufficient to convict.

The problem with the majority’s approach is determining the point at which the statute does criminalize conduct similar to that of Defendant. What evidence is sufficient to permit the jury to draw inferences and conclude guilt? The answer, it seems to me, is that the requisite intent can be inferred from evidence of past sales from which the seller personally profited, the inference being that if the seller engaged in and profited from past sales, knowing the illegal use to be made of the product, and the seller continues to sell expecting the same thing, it is highly probable that the seller intends to facilitate the illegal operation in order to personally profit from it and to personally profit from future illegal operations. It is not this Court’s role to measure the point on the scale at which the number of past sales, the amount of product sold, and the amount of consideration received, tip the balance to permit jury consideration of guilt.

I do not see the benefit or, for that matter, the propriety, of attempting through policy to draw a line between criminal and non-criminal conduct at any point other than perhaps where the only evidence before the jury is that the seller knows that the buyer intends to use the product for an illegal purpose. When there is evidence of ongoing transactions, such as there were in Direct Sales, the issue ought to be one of whether there is sufficient evidence for a rational jury to infer that the seller has a stake in the success of the illegal use of the sold, otherwise legal, product, such that the seller intends to personally profit from the ongoing success of illegal ventures. There should be no question that the conspiracy statute criminalizes one who has a stake in the success of an illegal venture by investing capital to assist in making the venture successful with the expectation of ongoing personal profit from not only the present illegal venture but also, based on past experience, from future similar illegal ventures.

JONATHAN B. SUTIN, Judge
Opinion
JAMES J. WECHELSER, JUDGE

{1} Plaintiff Joanne Belser appeals the district court’s order granting the motion of Defendant Dr. Feidhlim O’Cleireachain (Defendant) to lift a stay and dismiss without prejudice Plaintiff’s medical malpractice complaint. The court had entered a stipulated order staying the proceedings until thirty days after the Medical Review Commission (MRC) rendered a decision on Plaintiff’s claim. Defendant filed the motion in question after Plaintiff did not file an application with the MRC. Because the statute of limitations had run, the dismissal without prejudice effectively dismissed the case on a permanent basis. We affirm the district court’s action on the basis that Plaintiff did not file the application within a reasonable time.

Factual and Procedural History
{2} Plaintiff filed her complaint against Defendant and Presbyterian Healthcare Services (Presbyterian) one day before the expiration of the limitations period contained in the Medical Malpractice Act. NMSA 1978, § 41-5-13 (1976) (setting a period of three years from the act of malpractice to bring action under the Act). The complaint alleges, and Defendant admits in his answer, that Defendant had hospital privileges with Presbyterian; thus the Medical Malpractice Act applied.

District Court’s Authority Over the Stay
{3} We do not agree with Plaintiff that the parties’ contract, if one exists, binds the district court. A district court has control over proceedings before it. Our Supreme Court has held that a district court has the discretion to grant and lift a stay of proceedings. See Segal v. Goodman, 115 N.M. 349, 357-58, 851 P.2d 471, 479-80 (1993). Plaintiff would limit Segal to its facts: the grant of a presumably opposed motion to stay enforcement of a judgment permitted by Rule 1-062(A) NMRA, which authorizes proceedings to enforce a judgment “unless otherwise ordered by the court.” However, Plaintiff’s argument ignores the inherent authority of the district court to manage the cases before it. See State v. Ahasteen, 1998-NMCA-158, ¶ 28, 126 N.M. 238, 968 P.2d 328 (stating that the district court has the inherent power to control its docket, which is the power to “supervise and control the movement of all cases on its docket from the time of filing through final disposition”) (internal quotation marks and citation omitted). The authority to stay proceedings is incidental to the court’s inherent management authority. See Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (stating that “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort”).

{4} The district court did not abuse its discretion by lifting the stay in this case. As interpreted by Plaintiff, the stipulated order stayed the district court proceedings indefinitely until she pursued, and the MRC acted upon, her application with the MRC. Indeed, according to Plaintiff, she did not even have an obligation under the stay to file an application with the MRC. This reading of the stipulated order removes from the district court all control of the proceedings before it. The district court could reasonably have construed its own order to avoid such loss of control of its proceedings and to require Plaintiff to have filed an application with the MRC within a reasonable time. The district court acted within its discretionary inherent authority in the control of its cases to require Plaintiff to act

Certiorari Denied, No. 29,216, June 6, 2005
From the New Mexico Court of Appeals

Opinion: 2005-NMCA-073

JOANNE M. BELSER, Plaintiff-Appellant, versus FEIDHLIM O’CLEIREACHAIN, M.D., Defendant-Appellee. No. 24,380 (filed March 17, 2005)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY WILLIAM F. LANG, District Judge

CHRISTAL K. GRISHAM for Appellant RUTH O. PREGENZER for Appellee

JENNIFER DAVIS HALL MILLER STRATVERT, P.A.
Albuquerque, New Mexico Albuquerque, New Mexico

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within a reasonable period of time to pursue her claim, after Plaintiff had failed to do so.

[5] Plaintiff’s reliance on Ottino v. Ottino, 2001-NMCA-012, 130 N.M. 168, 21 P.3d 37, is misplaced. In Ottino, we concluded that the district court may enforce, as a matter of contract, a post-minority child support agreement entered into by divorcing parties, even though the court did not have the authority to order such support as part of its statutory jurisdiction over divorce matters. Id. ¶¶ 14-16. We recognized that the court’s ability to enforce a contract is independent from its ability to order child support, so that the court could give recognition to the parties’ agreement that exceeded the court’s independent authority. Id. In this case, however, Plaintiff argues that the district court did not have any authority except to recognize the parties’ agreement, as interpreted by Plaintiff. Yet, as we have discussed, the district court had full and independent authority to act on its own with regard to a stay, and the parties invoked this authority by requesting a court order.

District Court’s Authority to Dismiss

[6] Plaintiff additionally argues, relying on Rupp, that the district court did not have the authority to dismiss her complaint. The Medical Malpractice Act provides that a medical malpractice action against a health care provider qualifying under the Act may not be filed in court “before application is made to the medical review commission and its decision is rendered.” NMSA 1978, § 41-5-15(A) (1976). The plaintiff in Rupp had filed her district court complaint and MRC application two days before the expiration of the statute of limitations under Section 41-5-13. Rupp, 2002-NMCA-023, ¶¶ 4-5. Following the Supreme Court’s opinions in Otero v. Zouhar, 102 N.M. 482, 484, 697 P.2d 482, 484 (1985), overruled in part on other grounds by Grantland v. Lea Regional Hospital, 110 N.M. 378, 380, 796 P.2d 599, 601 (1990), and Jiron v. Mahlab, 99 N.M. 425, 426, 659 P.2d 311, 312 (1983), this Court held that the plaintiff could maintain her lawsuit even though it was filed before there was a MRC decision. Rupp, 2002-NMCA-023, ¶¶ 1, 13-16. We considered the early-filed complaint to be valid because an application with the MRC “is not a jurisdictional prerequisite to filing a medical malpractice complaint in district court.” Id. ¶ 16.

[7] Plaintiff bases her argument on dicta in Rupp that states:

We emphasize that the necessity for an MRC determination prior to the filing of a medical malpractice claim remains a mandatory procedural threshold that must be crossed in the ordinary case. However, failure to comply with this requirement should not result in evisceration of the plaintiff’s cause of action; other less drastic remedies are available. For example, if an early complaint is brought to the attention of the district court prior to the MRC decision, the district court should normally dismiss the complaint without prejudice. In addition, if the plaintiff cannot demonstrate a good faith basis for filing the complaint early, it would be appropriate for the district court to consider Rule 11 sanctions against the plaintiff. Id. ¶ 21. Plaintiff argues that the dismissal was not appropriate because it “eviscerated her cause of action” and did not consider less drastic alternatives. She contends that the district court should have followed the general policy of deciding cases on their merits. See Universal Constructors, Inc. v. Fielder, 118. N.M. 657, 659-60, 884 P.2d 813, 815-16 (Ct. App. 1994).

[8] Plaintiff’s argument distorts Rupp. In Rupp, the defendants did not raise their argument concerning the time of the filing of the MRC until fours years after the MRC decision. Rupp, 2002-NMCA-023, ¶¶ 7, 19. We stressed that the plaintiff’s early filing of the complaint did not prejudice the defendants, who were “in no worse position now than they would have been” if the plaintiff had filed her complaint after the MRC decision. Id. ¶ 19. In this case, the district court ordered its dismissal when the stay had been in effect for more than eight months. The surgery at issue had occurred more than four years and two months earlier. Defendant argued at the hearing on the motion to dismiss that he was prejudiced by the delay. Rupp does not contemplate the type of inaction that occurred in this case.

[9] Moreover, the district court dismissed the complaint without prejudice, as proposed in Rupp. See id. ¶ 21. After the dismissal without prejudice, Plaintiff was unable to pursue her claim because the statute of limitations had expired. Although the dismissal without prejudice had the final effect of permanently dismissing the case, the district court had already utilized an alternative to dismissal by entering the stay. The district court has the inherent authority, in its discretion, to “dismiss a case for failure to prosecute when it is satisfied that plaintiff has not applied due diligence in the prosecution” of the case. Prieto v. Home Educ. Livelihood Program, 94 N.M. 738, 742, 616 P.2d 1123, 1127 (Ct. App. 1980). As we have discussed, the stipulation did not give Plaintiff the unbridled discretion to elect when to submit an application to the MRC. Plaintiff did not take any action after the stay to pursue her claim. The district court did not abuse its discretion, or disregard Rupp, by dismissing the complaint.

Conclusion

[10] The district court did not abuse the discretion entailed within its inherent authority or the requirements of Rupp in dismissing this case. We affirm its order.


JAMES J. WECHSLER,
Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge
{1} Defendant appeals from the district court’s order, upon appeal from magistrate court, determining that Defendant was guilty of the offense of aggravated driving while under the influence of intoxicating liquor and affirming the magistrate court judgment. Defendant raises three issues on appeal: (1) whether the district court erred in finding that reasonable suspicion justified the officer in stopping Defendant’s vehicle, (2) whether the district court erred in admitting the breath alcohol test results, and (3) whether the district court erred in finding that the breath test taken nearly ninety minutes after the stop justified the aggravated DWI finding. We affirm in part and reverse and remand for entry of judgment convicting Defendant of DWI.

I. BACKGROUND

{2} Officer Whitman of the McKinley County Sheriff’s Department stopped Defendant’s vehicle in Thoreau, New Mexico, on the night of February 13, 2001. After administering two field sobriety tests, which Defendant was unable to perform, the Officer placed Defendant under arrest and took her to the McKinley County Detention Center for a breath test. Defendant’s first sample indicated 0.17, and the last sample showed a concentration of 0.16. Defendant was charged and later convicted of per se aggravated DWI under NMSA 1978, § 66-8-102(D)(1) (1999). Additional pertinent facts are set out in our discussion of the issues.

II. DISCUSSION

A. Jurisdiction

{3} In its answer brief, the State asserts that this Court does not have jurisdiction to hear Defendant’s appeal. Citing State v. Brinkley, 78 N.M. 39, 40, 428 P.2d 13, 14 (1967) (holding that where a notice of appeal is filed one day late, the Supreme Court is without jurisdiction to hear the appellant’s appeal), the State first argues that Defendant’s notice of appeal was filed one day late and that she has therefore “failed to perfect” her appeal. The New Mexico Supreme Court later modified this rule to “make it clear that timely filing of a notice of appeal is not an inflexible jurisdictional requirement in all cases.” Aragon v. Westside Jeep/Eagle, 117 N.M. 720, 722, 876 P.2d 235, 237 (1994). In State v. Duran, 105 N.M. 231, 233, 731 P.2d 374, 376 (Ct. App. 1986), this Court held that in criminal cases, “failure to file a timely notice of appeal . . . constitutes ineffective assistance of counsel per se” and that such an appeal would be considered timely. We therefore consider Defendant’s appeal to be timely, despite the late filing.

{4} Relying on State v. Ball, the State also contends that this Court lacks jurisdiction because Defendant entered a guilty plea in the magistrate court. 104 N.M. 176, 185, 718 P.2d 686, 695 (1986) (affirming a district court’s dismissal of de novo appeals from the metropolitan court on the basis that no right to appeal exists under the New Mexico Constitution when a defendant enters a guilty plea). Defendant has demonstrated that the magistrate court filed the judgment and sentence on the wrong form, thus giving the impression that Defendant pled guilty. The magistrate court acknowledged the error and filed an amended judgment and sentence reflecting that the guilty verdict was the result of a bench trial. Defendant properly moved to supplement the record on appeal to clarify the judgment, and that motion was granted. The record no longer supports the State’s argument.

B. Reasonable Suspicion to Stop Defendant

{5} Asserting that Officer Whitman lacked reasonable suspicion when he stopped her vehicle, Defendant appeals the district court’s denial of her motion to suppress evidence. The district court’s decision regarding a motion to suppress involves mixed questions of fact and law. State v. Urioste, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964. We review the facts in the light most favorable to the prevailing party and defer to the district court’s findings of fact that are supported by substantial evidence. Id. The district court’s application of law to the facts is reviewed de novo. State v. Attaway, 117 N.M. 141, 145-46, 870 P.2d 103, 107-08 (1994).

{6} Defendant argues that the district court’s decision was not supported by substantial evidence. She testified that she was not speeding and was not driving in the middle of the road, and she contends that the Officer had no reason to stop her vehicle when he simply had a hunch that she was speeding. The Officer testified that “[t]here was light snow falling and the road surfaces were wet." While he acknowledged that the centerline was difficult to see, he stated that Defendant’s car was “going faster than the posted speed limit of twenty-five” and was “traveling down the center of the roadway." In his opinion, a safe speed, given the existing road conditions, would have been between fifteen and twenty miles per hour. The Officer could not get a radar reading and unsuccessfully attempted to pace Defendant’s vehicle. When Defendant slowed down, the Officer engaged his emergency lights, and Defendant stopped her vehicle.
The district court, as the sole judge of the credibility of the witnesses and the weight to be given the evidence, was entitled to believe the Officer and to find, as the court did, that his observations were sufficient to warrant a belief that an offense was occurring. See State v. Salas, 1999-NMCA-099, ¶ 10, 127 N.M. 686, 986 P.2d 482. As we have previously held, a police officer may stop a vehicle if he has an objectively reasonable suspicion that the motorist has violated a traffic law. State v. Vargas, 120 N.M. 416, 418-19, 902 P.2d 571, 573-74 (Ct. App. 1995). Viewing the evidence in the light most favorable to the prevailing party, we find that reasonable suspicion existed for the stop. See State v. Ingram, 1998-NMCA-177, ¶ 5, 126 N.M. 426, 970 P.2d 1151.

C. Substantial Evidence for Conviction of Per Se Aggravated DWI

1. Nexus

Defendant next argues that the district court erred in convicting her of an aggravated DWI based on breath alcohol tests that were performed “nearly ninety minutes after the stop” without evidence relating to the time of alcohol in her system at the time she was driving. We clarify the evidence regarding timing. The record indicates that the arrest was at 10:32 p.m. and that the BAC machine logged the first result at 11:54 p.m. Thus, in our analysis, we will use one hour and twenty-two minutes as the lag time.

This issue was preserved by Defendant in her closing argument when she directed the district court’s attention to State v. Baldwin, 2001-NMCA-063, ¶ 2, 130 N.M. 705, 30 P.3d 394 (holding that if BAC results are marginal and are obtained after a significant lag in time, additional evidentiary requirements are necessary to relate the results to the amount of alcohol in the defendant’s body at the time of driving).

Defendant asserts, and the State does not contest, that the evidentiary nexus requirement outlined in Baldwin for per se DWI cases should also apply to the crime of per se aggravated DWI. We agree. Both crimes require a minimum alcohol concentration at the time of driving; and additionally, the Uniform Jury Instructions for both offenses require that the minimum alcohol concentration relate to the time the “defendant operated a motor vehicle.” See UJI 14-4503, 4506 NMRA.

New Mexico law has primarily dealt with the evidentiary nexus in per se DWI cases. See State v. Martinez, 2002-NMCA-043, 132 N.M. 101, 45 P.3d 41; State v. Christmas, 2002-NMCA-020, 131 N.M. 591, 40 P.3d 1035; Baldwin, 2001-NMCA-063; State v. Cavanaugh, 116 N.M. 826, 867 P.2d 1280 (Ct. App. 1993). But see State v. Burke, 1999-NMCA-031, ¶ 2, 126 N.M. 712, 974 P.2d 1169 (reversing an aggravated DWI conviction where the state conceded absence of relation-back evidence supporting BAC results), overruled on other grounds by State v. Torres, 1999-NMSC-010, ¶ 20, 127 N.M. 20, 976 P.2d 20. As we noted in Baldwin, “[t]iming is an essential element of the crime[,]” requiring the state to demonstrate a nexus between a borderline BAC and the time that the “defendant operated a motor vehicle.” 2001-NMCA-063, ¶ 8 (quoting UJI 14-4503). Establishing a nexus is important because the “longer the delay between the time of [the] incident and [the] sample collection, the more difficult it becomes, scientifically, to draw reasonable inferences from one ‘data point[ ]’ back to the ‘driving’ time.” Id. ¶ 17 (internal quotation marks and citation omitted).

We find this reasoning equally applicable to per se aggravated DWI. Therefore, when a defendant is charged with per se aggravated DWI on the basis of a BAC result of 0.16 or marginally higher that is obtained after a significant lag in time, the State must demonstrate a sufficient nexus between the BAC result and the driver’s alcohol content at the time of driving. This can be accomplished by introducing additional corroborating evidence. As in Baldwin, we do not attempt to provide a comprehensive list of the forms such evidence may take.

Id. ¶ 2. Certainly, properly admitted “expert testimony relating the test result back in time to the time of driving” would be included. Id. In Baldwin, we commented that “a police officer’s observation of significant incriminating behavior on the part of the driver[,]” would also provide evidence of nexus. Id. In cases of aggravated DWI, however, we have concerns about the type of behavior that would allow a reasonably logical inference that a driver had at least a 0.16 BAC at the time of driving, versus some other score. To support a criminal conviction, such an inference must be logical and cannot be just surmise. Cavanaugh, 116 N.M. at 829-30, 867 P.2d at 1211-12 (observing that circumstantial evidence can be the foundation of a conviction if the inferences of guilt are based on logic and not just surmise). This issue is not before us today, and we therefore decline to address it in detail. We do question, however, whether a 0.16 BAC can properly be corroborated by behavior evidence alone.

2. Standard of Review

When reviewing whether the sufficiency of evidence to support a conviction, this Court must “resolve all disputed facts in favor of the State, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary.” State v. Foster, 1999-NMSC-007, ¶ 42, 126 N.M. 646, 974 P.2d 140; accord State v. Sanders, 117 N.M. 452, 456, 872 P.2d 870, 874 (1994). “The reviewing court does not weigh the evidence or substitute its judgment for that of the factfinder as long as there is sufficient evidence to support the verdict.” State v. Mora, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789. The Court is not required to consider the “merit of evidence that may have supported a verdict to the contrary.” State v. Kersey, 120 N.M. 517, 520, 903 P.2d 828, 831 (1995) (internal quotation marks and citation omitted). Rather, we must determine whether the evidence presented could justify, to a reasonable mind, a finding that each element of the crime charged has been established beyond a reasonable doubt. See State v. Coffin, 1999-NMSC-038, ¶ 73, 128 N.M. 192, 991 P.2d 477; State v. Salgado, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661.

3. Analysis

A conviction for per se aggravated DWI, under Section 66-8-102(D)(1), requires that the court find beyond a reasonable doubt that Defendant “operated a motor vehicle” and that “[a]t that time, Defendant had an alcohol concentration of sixteen one-hundredths (.16) . . . or more.” UJI 14-4506. In the present case, Defendant does not dispute that she was operating a motor vehicle. The BAC results were 0.17, followed by an invalid sample, which prompted another twenty-minute observation period. The last sample indicated a level of 0.16. The district court convicted Defendant of per se aggravated DWI on the basis of the BAC results.

We next review the evidence in light of a lapse of one hour and twenty-two minutes between the driving and the test results. In Baldwin, we found that a lag of more than two hours was significant enough to require additional corroborating evidence to relate a marginal BAC level to the time of driving. 2001-NMCA-063, ¶ 2. This Court observed in Martinez that courts having “reversed DWI convictions based upon a lack of relation-back evidence have generally done so when the lapse of time between the time of driving and the time of BAC testing
is at least two hours.” 2002-NMCA-043, ¶ 12. However, in Baldwin, we acknowledged the lack of legislative guidance to assist courts in defining the amount of time beyond which a BAC result would no longer be considered prima facie evidence. 2001-NMCA-063, ¶ 19.

{16} This Court further addressed the issue in Christmas, where we recognized that “both the legislature and our Supreme Court contemplated tolerance of some reasonable and inevitable delay in testing, and intended that otherwise valid test results would be admitted into evidence notwithstanding such a delay.” 2002-NMCA-020, ¶ 23. In that case, the delay was less than one hour, and we commented that “[i]t is difficult to envision a reasonable delay of anything less than an hour.” Id. ¶ 25. Consequently, this Court outlined a “sliding scale” approach for application of the Baldwin principles, which included analysis of pertinent factors like “how long . . . the delay [is]; how much the BAC test results exceed the statutory limit; and the existence of other corroborating behavioral evidence.” Christmas, 2002-NMCA-020, ¶ 24. In other words, the greater the inference of guilt, the less need for relation-back evidence. Id.

{17} In the present case, the delay of one hour and twenty-two minutes is more than the threshold level articulated in Baldwin but less than the two-hour rule of thumb described in Baldwin. The first BAC result was at 0.17, slightly above the statutory limit, and the last result was at the threshold level of 0.16. Our analysis therefore turns on whether there was sufficient corroborating evidence to lead to a conviction. Defendant argues that the evidence is not sufficient for a conviction on per se aggravated DWI, while the State urges that the evidence meets the Baldwin test.

{18} At trial, the Officer testified that after pulling Defendant over, he could smell a “strong odor” of alcohol and noticed that Defendant’s speech was slurred. Defendant admitted that she had been drinking and that she staggered and leaned on the car for support. The Officer administered the finger-count and one-legged–stand field sobriety tests, which Defendant failed. The State, however, did not offer any evidence that this behavior indicated anything more than general intoxication at an unknown level. In fact, Officer Whitman only testified that this behavior indicated to him that “the subject was intoxicated.” The State did not provide expert testimony to address the issue, and this Court is not convinced that such behavior evidence is indicative of intoxication at the 0.16 level. In fact, this same behavior matches observations of intoxication at the 0.08 level described in many of our previous cases. See, e.g., Martinez, 2002-NMCA-043, ¶¶ 3-5; Christmas, 2002-NMCA-020, ¶¶ 3-6; Baldwin, 2001-NMCA-063, ¶ 4.

{19} On balance, with marginal BAC results from a test administered one hour and twenty-two minutes after driving, and without corroborating evidence to substantiate that Defendant was actually driving with a BAC of 0.16 or greater, we reverse the conviction for per se aggravated DWI.

D. Remand for Entry of Judgment on DWI
{20} Defendant argued that the behavior evidence in this case, while “insufficient to support a conviction for aggravated” DWI, “may be relevant to the question of whether a person was driving while impaired.” In closing remarks at trial, Defendant requested a not guilty instruction.

1. Lesser Included Offense
{21} Our courts have determined that under certain conditions a defendant can be convicted of a lesser included offense that was not part of the original charging document. See State v. Meadors, 121 N.M. 38, 41, 45, 908 P.2d 731, 734, 738 (1995); State v. Hernandez, 1999-NMCA-105, ¶¶ 24-25, 127 N.M. 769, 987 P.2d 1156. In Meadors, the New Mexico Supreme Court surveyed the analytical approaches used to determine whether one offense is a lesser included offense of the other. 121 N.M. at 42, 908 P.2d at 735. The Meadors Court described the least flexible and most straightforward approach as the “strict elements” test. Id. Under this test, the “statutory elements of the lesser offense are a sub-set of the statutory elements of the greater offense such that it would be impossible ever to commit the greater offense without also committing the lesser offense.” Id.

{22} While the Court went on to define a “cognate approach” in order to give flexibility to the “strict elements” test, that approach is unnecessary here because the present case meets the “strict elements” test. Defendant could not have committed per se aggravated DWI without also committing DWI. As this Court has stated, “the offense of aggravated DWI itself is not a different crime [from] DWI, but rather only an enhanced ‘degree’ of the DWI offense.” State v. Heinsen, 2004-NMCA-110, ¶ 23, 136 N.M. 295, 97 P.3d 627, cert. granted, 2004-NMCRETRAN-008, 136 N.M. 493, 100 P.3d 198. The “strict elements” test is therefore met, and Defendant can be convicted of the lesser included offense of DWI.

2. Sufficiency of Evidence for DWI Conviction
{23} While DWI can be proven either through a defendant’s alcohol concentration or his/her behavior, we analyze this case under the behavioral prong because we do not need to go further. A conviction for DWI, under Section 66-8-102(A) and UJI 14-4501 NMRA, requires the fact-finder to find beyond a reasonable doubt that Defendant “operated a motor vehicle” and that [a]t the time, [D]efendant was under the influence of intoxicating liquor[,] that is, as a result of drinking liquor[,] Defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public.

UJI 14-4501. As we detailed in paragraphs 6 and 18 above, there is substantial evidence that Defendant was driving while intoxicated.

{24} In State v. Gutierrez, this Court upheld a bench trial DWI conviction based on behavior evidence alone and stated that the defendant “was not convicted of having a particular blood-alcohol level” but was “convicted of the more general offense of driving while intoxicated.” 1996-NMCA-001, ¶ 4, 121 N.M. 191, 909 P.2d 751. In that case, the defendant smelled of alcohol, had bloodshot eyes, failed field sobriety tests, and admitted to drinking alcohol and smoking marijuana. Id. In addition, there was evidence that the defendant’s vehicle was weaving into other traffic lanes. Id. This Court held that even if the BAT card results had not been admissible, the defendant’s DWI conviction under Section 66-8-102(A) was fully supported by the “overwhelming” behavior evidence. Id. Similar evidence was presented in Defendant’s case: Defendant smelled of alcohol, had slurred speech, admitted to drinking alcohol, failed field sobriety tests, and was
speeding while driving down the middle of the road. Based on the analysis in Gutierrez, we conclude that sufficient evidence existed to find Defendant guilty of the lesser included offense of driving while intoxicated in violation of Section 66-8-102(A).

3. Appellate Authority Regarding Lesser Included Offense

{25} The New Mexico Supreme Court has stated that “appellate courts have the authority to remand a case for entry of judgment on the lesser included offense and resentencing rather than retrial when the evidence does not support the offense for which the defendant was convicted but does support a lesser included offense.” State v. Haynie, 116 N.M. 746, 748, 867 P.2d 416, 418 (1994). In Haynie, the Court reversed a conviction for first-degree murder because of insufficient evidence and remanded for entry of judgment and resentencing for the lesser included offense of second-degree murder. Id.

{26} In State v. Villa, 2004-NMSC-031, ¶ 15, 136 N.M. 367, 98 P.3d 1017, the New Mexico Supreme Court further defined the boundaries for appellate application of the direct-remand rule. The narrow question before that court was “whether, following reversal of a conviction due to insufficient evidence, an appellate court may remand for entry of judgment of conviction and resentencing for a lesser [included] offense, where the jury had not been instructed on that lesser offense at trial.” Id. ¶ 8. No remand for entry of judgment on the lesser included offense of attempt was allowed “because a conviction of an offense not presented to the jury would deprive the defendant of notice and an opportunity to defend against that charge and would be inconsistent with New Mexico law regarding jury instructions and preservation of error.” Id. ¶ 1.

{27} The present case is distinguishable from Villa in several ways. First, Villa addressed the direct-remand rule in the context of a jury trial, whereas we are dealing here with a bench trial. In bench trials, we do not look to jury instructions, but rather to the charging document. Second, notice to the defendant of the lesser included charges, as defined by Meadors, was a key issue in Villa, where both sides pursued an “all-or-nothing trial strategy” and neither the state nor the defendant requested jury instructions on the lesser included offense of attempt. 2004-NMSC-031, ¶¶ 12, 14 (internal quotation marks omitted). Here, as described above, there was sufficient notice under Meadors, given that aggravated DWI necessarily encompasses the lesser included charge of DWI. Additionally, Defendant requested that the district court consider the lesser charge of DWI, thus indicating her awareness that the lesser charge was included.

{28} Last, the Villa Court was concerned that even if notice had been adequate, there would be a problem with convicting the defendant of a charge that “he did not in fact defend at trial.” 2004-NMSC-031, ¶ 13. The defendant in that case was not given an opportunity to provide evidence that addressed the elements of the lesser charge. Id. Unlike the defendant in Villa, Defendant in the present case offered a defense to evidence of her impaired behavior. Cross-examination of Officer Whitman elicited testimony that Defendant’s speech was understandable, and the Officer was also questioned as to whether he actually administered one of the field sobriety tests. Although Defendant apparently conceded by the end of the trial that the behavior evidence did support a finding of impairment, the record demonstrates that some defense was presented.

{29} The Villa Court observed that “[i]n deciding whether direct remand is appropriate[,] . . . the inquiry is whether the interests of justice would be served by ordering a new trial.” Id. ¶ 9. The Court cited Haynie as an example of a case where the interests of justice would not have been served by remanding for a new trial. Villa, 2004-NMSC-031, ¶ 9. The Court found it significant that the defendant in Haynie had argued for conviction on a lesser offense and that the jury was provided with the proper instructions on that offense. Villa, 2004-NMSC-031, ¶ 9. As in Haynie, Defendant here argued for conviction on the lesser offense. Jury instructions were not given because Defendant’s conviction was based on a bench trial. Consequently, the interests of justice would not be served by remanding this case for retrial. We therefore remand to the district court for entry of judgment against Defendant for DWI under Section 66-8-102(A).

E. Certification of the BAC Machine

{30} Defendant also argues that the State failed to provide evidence of the BAC machine’s certification and thus did not lay a proper foundation for admission of the BAC results. Given that our remand is based on non–per se DWI, we do not rely on the BAC results; therefore, there is no need to evaluate the admission of this evidence. We reach no conclusion on the merits of Defendant’s argument on this issue.

III. CONCLUSION

{31} We affirm the district court’s denial of the motion to suppress on the ground that the Officer had reasonable suspicion to stop Defendant’s car. Lacking sufficient corroborating evidence to substantiate that Defendant was driving with a BAC of 0.16 or greater, we reverse the conviction for per se aggravated DWI and remand this case for entry of judgment and sentencing on a charge of simple DWI.

{32} IT IS SO ORDERED.

CELIA FOY CASTILLO,
Judge

WE CONCUR:

CYNTHIA A. FRY, Judge
IRA ROBINSON, Judge (specially concurring)

IRA ROBINSON, Judge
(Specially Concurring)

{33} I agree with the result reached by the majority. I do not agree with the way it was reached.

{34} The majority bases its affirmance of Defendant’s DWI conviction on so-called behavioral evidence alone, forsaking the BAC evidence. I am troubled by that.

{35} I have no doubt that the reason the legislature passed the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 1993), was to give some consistency, objectivity, and standardization to DWI enforcement and prosecution.
{36} If we rely upon field sobriety tests alone as the majority does here, administered by different police officers in each and every case, we sacrifice objectivity, consistency, and standardization. What may seem to be a “strong” odor of alcohol on a driver’s breath to one police officer, may not be strong to another police officer. What may seem to be “bloodshot” eyes to one officer, may look less so, or not at all, to another officer. What may seem to be “slurred” speech to one officer, may not to another officer, especially if the individual speaks with a foreign accent, or if for any reason whatsoever it is difficult to understand what he is saying.

{37} This Court considered a DWI case where a police officer testified that the defendant refused to participate in the field sobriety tests requested by that officer, thus imputing consciousness of guilt to the defendant. The officer did not tell the court, as was later evidenced by a videotape taken by the officer, that the defendant had a brace on his leg. So much for objectivity! See State v. Sanchez, 2001-NMCA-109, 131 N.M. 355, 36 P.3d 446.

{38} For many years, one of the most often used field sobriety tests was the Horizontal Eye Gaze Nystagmus Test, commonly referred to as the HGN Test. Recently, this Court has questioned its scientific validity under a Daubert analysis. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); see also State v. Munoz, 2004-NMCA-103, 136 N.M. 235, 96 P.3d 796.

{39} The arresting officer testified that he checked the logs to determine that the machine had been calibrated within five days prior to his administration of the test and that the logs showed that the machine was in working order. He also explained that the machine appeared to be in working order, that he was trained in using the machine, and that he administered the test according to his training, thus satisfying the foundational requirement of State v. Smith, 1999-NMCA-154, ¶ 10, 128 N.M. 467, 994 P.2d 47.

{40} State v. Onsure, 2002-NMCA-082, 132 N.M. 485, 51 P.3d 528, was decided several months after this case. It held that the State must show that a breathalyzer machine has been certified by the State Laboratories Division “in cases where the defendant properly preserves the objection.” Id. ¶ 13. In order to preserve an issue for appeal, a party must make a timely objection that specifically apprises the trial court of the error that is claimed and invites an intelligent ruling thereon from the court. See State v. Jacobs, 2000-NMSC-026, ¶ 12, 129 N.M. 448, 10 P.3d 127. Here, Defendant did not properly preserve her objection.

{41} I agree with the State that the breathalyzer machine was properly used, and the evidence of the breath test, while not reliable to show aggravated DWI, does show at least a BAC 0.08 level for simple DWI. I do not feel confident resting a conviction on field sobriety tests alone. I would rely also on the BAC results.

{42} The majority relies on Gutierrez for a conviction in our case based upon behavioral evidence. But, in Gutierrez, there was evidence that Defendant was weaving into other traffic lanes, and Defendant narrowly missed hitting a truck. Defendant smelled of alcohol and had bloodshot, watery eyes; Defendant also failed three field sobriety tests; and Defendant admitted drinking alcohol and smoking marijuana. From this evidence, the officers concluded that Defendant was intoxicated. 1996-NMCA-001, ¶ 4. In our case, the behavioral evidence is not as strong or convincing as in Gutierrez.

{43} Under the facts of this case, there are essentially two ways for Defendant to be convicted of simple, not aggravated, DWI. One way that Defendant could be convicted of DWI is to be in violation of Section 66-8-102(A), which states that “[i]t is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state.” Id. This violation could be demonstrated by behavioral evidence of the physical appearance, actions, and mannerisms displayed by Defendant at the time of arrest. The second way that Defendant could be convicted of DWI is for a violation of Section 66-8-102(C)(1), which states that it is unlawful for “a person who has an alcohol concentration of eight one hundredths or more in his blood or breath to drive a vehicle within this state.” Id.

{44} I would first note that if the majority found a level of at least 0.08, no behavioral evidence is necessary to support it since that constitutes a presumption of guilt for DWI. However, Section 66-8-110 states:

B. When the blood or breath of the person tested contains:

   (2) an alcohol concentration of more than five one-hundredths but less than eight one-hundredths, no presumption shall be made that the person either was or was not under the influence of intoxicating liquor. However, the amount of alcohol in the person’s blood may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

§ 66-8-110(B)(2). We have a different situation here. If Defendant had a breath alcohol test result of 0.04 to 0.08, there is no presumption one way or the other. But, under this subsection, “the amount of alcohol in the person’s blood may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.” Id. emphasis added.

{45} So, when a defendant is in that middle range of BAC, 0.04 to 0.08, the statute invites us to add other kinds of evidence, like slurred speech, bloodshot eyes, stumbling, or the results of field sobriety tests, to the BAC results, in order to determine if Defendant was driving while intoxicated. There is nothing in the statutes that would prevent us from adding behavioral evidence to a BAC of 0.08, especially if Defendant has presented evidence to challenge the level of intoxication. Furthermore, there was neither a refusal to take the breathalyzer test, nor an accident which could justify an aggravated DWI.

{46} Since the majority has reduced the level or degree of conviction from aggravated, down to simple DWI based upon blood/breath alcohol (BAC) level, it seems to me that they cannot disregard BAC evidence and analyze the case only on behavioral evidence.

{47} A BAC level of at least 0.08 for simple DWI is indeed a lesser included offense of aggravated DWI, which requires a BAC of at least 0.16. There cannot be any aggravated DWI based upon behavioral evidence alone. How can we then conclude that simple DWI based upon behavioral evidence is a lesser-included offense of aggravated DWI based upon a specific BAC level of at least 0.16?

{48} I would not rely upon behavioral evidence alone, which is just too subjective to receive my stamp of approval. I, therefore, combine the behavioral evidence with the “reduced” BAC level of 0.08 to reach an affirmance of Defendant’s conviction of the lesser included offense of simple DWI.

IRA ROBINSON, Judge
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The 11th Judicial District Attorney’s office, Division I (San Juan County) is accepting resumes for positions of Associate Trial Attorney to Senior Trial Prosecutor. Salary is $36,000 to $46,000 DOE. Please send resume to : Kim Welch, Chief Financial Officer, 710 E. 20th St., Farmington, NM 87401. Equal Opportunity Employer.

**Associate**

Established civil law firm seeking associate to support litigation and commercial transaction practices (experience preferred). Applicant must possess strong research and writing skills and be able to build good interpersonal relationships. Please submit a cover letter, resume and writing sample to PO Box 25127, Abq., NM 87125-5127.

**Associate Attorney**

Commercial litigation firm representing both creditors and debtors in a range of debtor/creditor matters as well as full service business litigation seeks associate attorney with up to five years experience. Requires desire to undertake motion and discovery matters on a self-motivated basis and act as second chair counsel in major litigation matters in state and federal courts. Submit resume in confidence with cover letter to heatherm@swcp.com <mailto:heatherm@swcp.com> , fax 505-242-7066 or mail to PO Box 7070, Albuquerque, NM 87194-7070 attn office mg. Behles Law Firm PC. Please include salary request.

**Attorney - Santa Fe**

Seeking an intelligent, motivated individual with excellent research and writing skills, to work primarily in the areas of business, real estate, and insurance defense litigation. Candidate must be able to perform under pressure and to work as a positive team member. Experience preferred, but not required. Santa Fe area resident preferred. Please reply via email to freyes@simonsfirm.com or by fax to (505) 982-0185. All responses will be kept in confidence.
Taos - Solo General Practice for Sale
Well established solo practice with an 8 year track record for sale. Practice has included real estate, commercial work, civil litigation, minor criminal matters, probate and estate planning.
The sale includes: excellent advertising in Names & Numbers and US West, telephone numbers, client files and list, office equipment, forms files, and great lease on office location right on main street. If interested please call (505) 737-5468 or send inquiries to D. Todd Lazar, Attorney-At-Law, P.C., P.O. Box 3228, Taos, New Mexico 87571.

Los Alamos County
Assistant County Attorney
County Attorney’s Office
Announcement #05-116
Annual salary: $63,490 to $95,236. Closing date July 18, 2005 at 5:00 p.m. Minimum Qualifications: A Juris Doctorate or LLB from an accredited law school and active membership in the State Bar of New Mexico or ability to obtain admission to the New Mexico Bar within one year; Three (3) years experience in the practice of law, one year of which must have been directly associated with State and local government operations. Preferred Qualifications: Prior experience representing state or local governments(s); General knowledge of law relating to land use, utilities, real estate and public finance; General knowledge of legislative drafting. County Application Is Required: The information from your resume will not be used to determine if minimum qualifications are met. All qualifying information must appear on the application. Apply to the Human Resources Division, 2300 Trinity Drive, Los Alamos, NM 87544 or call for an application at 505-662-8040. Los Alamos County website address is www.lac-nm.us and the job line is 505-662-8039.

Attorney Wanted
Small AV-rated firm seeks experienced attorney interested in civil litigation, including insurance defense, employment, real estate, plaintiff cases. Must do high-quality work, use good judgment, possess strong work ethic, work efficiently, and take initiative. Send resume to Nathan H. Mann, Gallagher, Casados & Mann, P.C., 317 Commercial NE, Second Floor, Albuquerque, New Mexico 87102.

Supervising Attorney
Law office seeking experienced general practicing attorney to supervise law firm division. Must have 5 plus years practice experience, be current and in good standing with the NM Bar, have no record of public discipline and have excellent Customer Service and organizational skills. Excellent benefits. Email resume to jaffelawfirm@qwest.net or mail to Administrator, The Jaffe Law Firm, P.O. Box 809, Albuquerque, NM 87103-0809.

Notice of Visiting Faculty Position
Low Income Taxpayer Clinic
University of New Mexico
School of Law
The University of New Mexico School of Law is seeking to hire a qualified tax expert to assist in teaching in the Clinical Law Program as part of a Low Income Taxpayer grant. This will be a non-tenure track visiting faculty position for the Fall semester of 2005-06 with the possibility of an extension through the Fall of 2006, depending on funding. The successful candidate will work with the clinic faculty in supervising students in contested tax cases with the IRS. In addition, the applicant will conduct training sessions for students and lawyers interested in taking pro bono low income tax cases in exchange for the training. Minimum qualifications are a J.D. degree or equivalent legal degree, a license to practice in tax court, and federal income tax training. Preferred qualifications are an LL.M. in tax; experience in state and federal tax disputes; experience and/or training in teaching, especially clinical teaching; and interest and potential in producing scholarship. To apply, send a signed letter of interest that addresses your qualifications, a curriculum vitae, and names, addresses and phone numbers of three references to: Gloria Gomez, UNM School of Law, MSC11 6070, 1 University of New Mexico, Albuquerque, NM 87131-0001. For best consideration, please submit application by July 22, 2005. Recruitment will continue until opening is filled. The University of New Mexico is an Equal Opportunity/Affirmative Action employer and educator.

National Nuclear Security Administration, Service Center, Albuquerque
Is accepting applications for a General Attorney generalist, GS-9 level, located in Albuquerque, New Mexico. Work involves broad range of legal problems associated with nuclear weapons development, production, waste management, and energy programs. Applicants must have five years or less of professional legal experience or equivalent to the next lower grade level in the federal service. Selected individual will undergo security background investigation. Interested individuals should submit Federal Application form (SF-171) or resume and law school transcripts, and must address ranking factors identified in announcement. For vacancy announcement, go to http://www.usajobs.opm.gov. Applications need to be post-marked no later than July 18 and submitted to Cheryl Torres, Personnel Management Specialist, USDOE, National Nuclear Security Administration, P.OBox 5400, Albuquerque, NM 87185-5400. Phone 505/845-5657. Equal Opportunity Employer.

Vacancy Notice - N.M. Supreme Court
Assistant Staff Attorney
The Supreme Court is recruiting for the position of Assistant Staff Attorney. Annual Salary is $58,500, not negotiable. Medical, dental, life ins., legal, and other benefits available (value = approx. 33% of salary). Hours are 8:00 a.m. - 5:00 p.m. Start date to be negotiated. The successful candidate must possess above-average attention to detail & organizational skills, have criminal law experience, including knowledge and application of habeas corpus law, be able to manage multiple projects and produce statistics concerning workload, and develop pro se forms to be used for filing in the Supreme Court. Do you meet these qualifications? Possess a Juris Doctor degree from an ABA accredited law school; A member of the New Mexico bar in good standing; 1+ years of experience practicing law or as a judicial law clerk; Demonstrated ability to effectively communicate both orally and in writing; Thorough knowledge of New Mexico case law, constitution & statutes, Rules of Court Procedures, applicable federal law; Code of Judicial Conduct, Code of Professional Responsibility, and court structure and operations; Demonstrated ability to perform manual and electronic legal research; Ability to use initiative and judgment in working independently with supervision, while recognizing matters that should be referred to others; Maintain standards of courtesy, confidentiality, accuracy, and completeness during periods of frequent interruption; Experience with WordPerfect 8.0 and automated docketing system (FACTS); Experience interacting with elected officials and their staff. A Judicial Branch Employment Application, Letters of Interest, and Resumes should be sent to Kathleen Jo Gibson, Chief Clerk of Court, P.O. Box 848, Santa Fe, New Mexico 87504-0848. Deadline for submission is July 27, 2005, at 5:00 p.m. The Judicial Branch of Government is an Equal Opportunity Employer.

Associate Attorney
The Albuquerque office of Lewis and Roca LLP, a southwest regional law firm, is seeking one or more associates with at least one year of commercial litigation and/or transactional experience. Compensation will be commensurate with experience as well as the regional market. Please send cover letter, resume, transcript, and representative writing sample to: Ro Saavedra, Lewis and Roca Jointz Dawe LLP, 201 Third Street NW, 19th Floor, Albuquerque, NM 87102, rsaavedra@dlaw.com or Fax to 505-764-5483.

www.nmbar.org
Indian Law Attorney
Law Office of Craig J. Dorsay seeks attorney with Indian law experience. Knowledge of employment law, business law and real estate transactions a plus. Office specializes in representing tribal governments and some individuals on a wide variety of issues, including gaming, treaty rights, natural resources, government affairs, ICWA; must have or be willing to obtain appropriate bar admissions. Appearance in a variety of federal, tribal and state courts. Substantial travel required. Small office, friendly working conditions, partnership potential. Contact Craig Dorsay at (505) 790-9060, 2121 SW Broadway, Suite 100, Portland, OR 97201, e-mail: cdorsay@involved.com.

Associate Attorneys
We are seeking associate attorneys with three to five years of experience in civil litigation who want to broaden their litigation skills while working in a collegial, growing, mid sized, AV rated firm. Initially, tasks will include researching the law, developing facts, writing briefs, arguing motions, and taking depositions. We are looking for attorneys with a sincere interest in the defense of employment, health, commercial, or professional liability litigation. Please send a resume and succinct writing sample to Bannerman & Williams, P.A., 2201 San Pedro NE, Building 2 Suite 207, Albuquerque, NM 87199-4750, e-mail: cdorsay@involved.com.

Certified Paralegal Position
Insurance defense firm seeks reliable, experienced Certified Paralegal. Must be hard working, a self-starter, able to work independently and efficiently with all personnel. Please send resume with references to PO Box 92860, Abq., NM 87199-4750.

OFFICE SPACE

Professional Office Suites
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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.

Three Offices Available
Best location in town, one block or less from the new federal, state, metropolitan courts. Includes secretarial space, phones and service, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

New Listing!
4,893sf ground level & 6,041sf basement level office building in good condition and is centrally located close to I-25/I-40. List: $595K Mike Contreras 888-1500 Sentinel Real Estate & Investment.

Downtown
Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $350 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

Certified Paralegal Position
Paralegal Position - Litigation Division: This is a para-professional position requiring considerable knowledge of legal terminology and Federal and State court procedures. The position requires the ability to perform legal research, assist with trial preparation, draft memoranda, correspondence, briefs, opinions and discovery. Must have Associate of Applied Science in Paralegal Studies plus (5) years experience as a Paralegal OR National certification in Paralegal Studies plus (5) years experience as a legal secretary. Entry level salary: $32,905.60. Please apply online at www.cabq.gov. Application deadline is July 15, 2005.

Legal Assistant
Busy insurance defense firm seeks full-time legal assistant. Seeking individual with minimum of four years experience in insurance defense. Excellent work environment, salary and benefits. Send resume and references to Office Administrator at Riley, Shane & Hale, P.A., 4101 Indian School Road NE, Suite 420, Albuquerque, NM 87110 or fax to (505) 883-4362.

Legal Assistant
Hatch, Allen & Shepherd, P.A. a busy general civil litigation firm is seeking an experienced full time legal assistant to join our team. Applicant must have experience in Microsoft Word, heavy tape transcription and the ability to draft legal documents required. A minimum of 5 years in medical malpractice, and/or insurance defense experience preferred. We offer a great work environment and competitive salary. Generous insurance and 401k benefits. Please fax resume to Rohda Brown at (505) 341-3434 or mail to PO Box 94750, Albuquerque, NM 87199-4750.

For Rent: North Valley Offices or Entire Building
Newly renovated office suites, shared conference room, reception area, kitchen, waiting area, security system. 5 minutes from Courthouses. Rent all or part (2500’). 1901 Candelaria NW (near Rio Grande Blvd., NW) Kathleen or Adam: 459-4528.

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Painting Show
James Rawley invites you to a show of his paintings in his gallery at 1014 Central SW on August 5, 2005 at 5:00 p.m. Please come!
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