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2006 State Bar of New Mexico Budget Disclosure is available online at www.nmbar.org. In an effort to save money this year, printed copies will be available upon request. See special notice on page 14.

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Clerk Certificates
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2005-NMCA-120: State of New Mexico v. Valerie A. Duhon
2005-NMCA-121: State of New Mexico v. Shawna Michelle Brenn
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The Basics of Real Estate Transactions from Negotiation to Closing

Tuesday, November 15 - 9 a.m. - 3 p.m.
State Bar Center
5.6 General and 1.0 Ethics CLE Credits

Who better to address fundamental real estate issues in New Mexico than two well-recognized New Mexico attorneys with extensive real estate experience. John F. McCarthy of White, Koch Kelly & McCarthy PA and John Patterson of Scheuer, Yost & Patterson will take you through a real estate transaction in New Mexico from contract to closing. This extensive program will cover such issues as merchantable title, liens, easements, encroachments, boundary disputes, surveys, water and mineral rights, environmental compliance, financing, title commitments and policies, and title conveyance.

$179

Effective Law Office Advertising, Technology Applications and Business Planning

Tuesday, November 15, 2005 - 9 a.m. - 3:30 p.m.
State Bar Center
3.9 General, 2.0 Professionalism and 1.3 Ethics CLE Credits

In order to be successful in private practice, an attorney must create and maintain effective and meaningful client relations. In this full-day seminar, Roy S. Ginsburg shares his twenty plus years of experience in fostering client relationships in private practice and in corporate legal departments by focusing upon professional and ethical considerations that can be used to effectively create and maintain these relations through legal advertising, entertainment, referral fees, etc. Also included are sessions on practical office applications of electronic technology and business planning tips for the sage practitioner.

$189

Expanding Equal Access to Credit Through Civil Rights and Consumer Protection Laws

Tuesday, November 15, 2005 - 9 a.m. - 12:30 p.m.
State Bar Center
4.2 General CLE Credits

This workshop provides tools for expanding equal access to credit through civil rights and consumer protection laws. Topics include recent case law, emerging issues in debt servicing, testing programs, community reinvestment act, and regulatory challenges to include development of effective partnerships and an overview of the New Mexico foreclosure process as it relates to predatory lending.

$119
Meetings

November

7
Public Legal Education Committee
noon, State Bar Center

9
Consumer Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces

11
International and Immigration Law
Section Board of Directors
1:30 p.m., via teleconference

14
Taxation Section Board of Directors
noon, via teleconference

State Bar Workshops

November

9
Landlord/Tenant Workshop
6:00 p.m., State Bar Center

December

1
Consumer Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces

7
Consumer Debt/Bankruptcy Workshop
6:00 p.m., State Bar Center

7
Family Law Workshop
5:30 p.m., Branigan Library
Las Cruces

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

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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Cite officially as Bar Bulletin (ISSN 1062-6611).
Vol. 44, No. 44, November 7, 2005. Subscription price $80 per year. Subscriptions are nonrefundable once purchased. Published weekly by the State Bar, 5121 Masthead NE, Albuq., NM 87109 (505) 797-6000 (800) 876-6227 Fax: (505) 828-3765 E-mail: bb@nmbar.org www.nmbar.org

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**COURT NEWS**

**NM Supreme Court Law Library**

**November Hours**
The New Mexico Supreme Court Law Library will be closed on the following days:
- November 11 and 12
- November 24, 25 and 26

**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 at Supvm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848.

Information may be e-mailed to the State Bar at address@nmbar.org; faxed to (505) 828-3775; or mailed to PO Box 92860, Albuquerque, NM 87199-2860. The State Bar keeps both mailing and directory addresses. Contact the State Bar for more information.

**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., Nov. 18, at the State Bar Center. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

**First Judicial District Court**

**Criminal Bench and Bar Brownbag**
The First Judicial District Court Criminal Bench and Bar Brownbag meeting will have a brownbag meeting at noon, Nov. 15, 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.

**Destruction of Exhibits**

**Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1979 to 1987**
Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the First Judicial District Court will destroy exhibits filed with the court in criminal, civil, children’s court, domestic, incompetency/mental health, adoption and probate cases for years 1979 to 1987 included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved through Dec. 2.

Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

**Second Judicial District Court**

**Destruction of Exhibits**
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 civil cases for years 1991 to 1992, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning Oct. 20 to Dec. 22. Verify exhibit information with the Special Services Division, (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 by Order of the Court.

**Family Court Open Meetings**
The Second Judicial District Court will hold open meetings to discuss ongoing concerns and projects at noon, Nov. 7, in the Conference Center located on the third floor of the Bernalillo County Courthouse. Contact Sandra Partida, (505) 841-7531, for more information or to have an item placed on the agenda.

**Bernalillo County Metropolitan Court Nominees**
The Metro Court Judges Nominating Commission convened Oct. 24 in Albuquerque and completed its evaluation of the fifteen applicants for the vacancy in the Bernalillo County Metropolitan Court. The commission recommends the following four applicants (in alphabetical order) to Governor Bill Richardson:

- Julie N. Altweis
- Sandra K. Engel
- Linda S. Rogers
- Chris Sturgess

**STATE BAR NEWS**

**Attorney Support Group**
The next Attorney Support Group meeting will be held at 5:30 p.m., Nov. 7, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

**Bar Bulletin**
In anticipation of the upcoming Thanksgiving Holidays, all submissions for the Nov. 28 issue of the Bar Bulletin must be received by 5 p.m., Nov. 17.

**Board of Bar Commissioners**

**Center for Civic Values IOLTA Grant Committee**
The Board of Bar Commissioners will appoint two representatives, one-lawyer member and one public non-lawyer member, to the Center for Civic Values IOLTA Grant Committee for three-year terms. Anyone wishing to serve on the committee should send a letter of interest and brief resume by Nov. 23 to Executive Director Joe Conte, State Bar of New Mexico, P.O. Box 92860, Albuquerque, NM 87199-2860; or fax to 828-3765.

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6 Bar Bulletin - November 7, 2005 - Volume 44, No. 44
Election of Commissioners

The 2005 election of commissioners for the State Bar of New Mexico Board of Bar Commissioners will be held on Nov. 30. The Third Bar Commissioner District will have a contested election. Positions in the first, second, fifth and sixth districts are uncontested. Ballots for the contested election were mailed Nov. 4 and are due by noon, Nov. 30. See biographies and candidates’ statements on pages 10 and 11.

No candidates filed for the vacancy in the seventh district, which includes Catron, Doña Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties. The Board of Bar Commissioners will make an appointment for that vacancy at the Dec. 9 meeting. Active State Bar members who practice in the district and are interested in serving on the Board of Bar Commissioners should send a letter by Dec. 2 to Executive Director Joe Conte, PO Box 92860, Albuquerque, NM 87199, or jconte@nmbar.org.

Meeting Summary

The Board of Bar Commissioners met on Oct. 28 at the Supreme Court Building in Santa Fe. Action taken at the meeting follows:
- Approved the Sept. 22 meeting minutes as submitted;
- Accepted the Sept. 2005 financials and executive summary;
- Reviewed the accounts receivable aging report as well as the executive director’s travel reimbursements and credit card file;
- Approved the 2006 Budget Disclosure document;
- Approved the 2006 dues form, which will be mailed to the membership on Dec. 6;
- Accepted the Finance Committee report;
- Received a report from the Bylaws/Policies Committee and provided 30 days’ notice of a bylaw amendment to Article IV, Section 4.5f, Quorum, to enable agenda items to be voted upon after a quorum has been lost; tabled a new proposed reserve policy for staff to research further with the Bar’s auditors and tabled a new proposed whistle-blower policy;
- Approved a recommendation to pay one claim made to the Client Protection Fund;
- Received a report from the subcommittee formed to review and renegotiate the existing contracts with the Supreme Court entities and the New Mexico Defense Lawyers Association; the subcommittee will pursue the recommendations with the Supreme Court entities;
- Received a report from the subcommittee formed to review the proposals from Casemaker and Fastcase online legal research and approved the recommendation to proceed with Casemaker as a membership service; once the contract has been signed, it will take approximately nine months to implement;
- Received a report on the Committee on Diversity in the Legal Profession;
- Received the 2006 Board of Bar Commissioners’ meeting schedule as follows: Feb. 24, April 21, July 20, Sept. 15, Nov. 2, and Dec. 15;
- Discussed judicial notifications published in the Bar Bulletin and that the notices don’t always specify the judge and effective dates when civil and criminal judicial reassignments take place; a letter will be sent to the Supreme Court requesting that the civil and criminal rules committees address; and
- Reported that no nomination petitions were received for the Seventh Bar Commissioner District; the Board of Bar Commissioners will solicit interest and make an appointment at the Dec. 9 meeting.

Note: The minutes in their entirety will be available on the Bar’s Web site following approval by the board at the Dec. 9 meeting.

Rocky Mountain Mineral Law Foundation Board

The Board of Bar Commissioners will make one appointment to the Rocky Mountain Mineral Law Foundation Board for a three-year term. Members wishing to serve on the board should send a letter of interest and brief resume by Nov. 23 to Executive Director Joe Conte, State Bar of New Mexico, P.O. Box 92860, Albuquerque, NM 87199-2860; or fax to 828-3765.

Board of Editors

Vacancies

Two attorney and one non-attorney terms on the State Bar Board of Editors will expire at the end of 2005. As the editorial board for the Bar Bulletin, the Board of Editors reviews and approves articles submitted for publication. All vacancies are two-year terms, beginning Jan. 1, 2006 and ending Dec. 31, 2007, and may be renewed for one additional two-year term.

Interested attorneys should have previous publishing/editing experience and be available to review articles regularly, as well as be able to attend quarterly board meetings in person or by teleconference. Resumes should be sent by Nov. 30 to Dorma Seago, PO Box 92860, Albuquerque, NM 87199; or by e-mail, dseago@nmbar.org.

Business Law Section

Annual Meeting and Business Lawyer of the Year Award

The Business Law Section will hold its annual meeting at 5 p.m., Nov. 10, at the Albuquerque Country Club. The fourth annual Business Lawyer of the Year Award will be presented to Charles L. Moore.

All section members are invited to attend the meeting, which includes a reception from 4:30 to 7 p.m. Hors d’oeuvres will be served.

Agenda items should be sent to Chair Brad Tepper, btepper@mstlaw.com.

Children’s Law Section

Poster and Writing Contest Reception

A reception and awards ceremony for the Children’s Law Section’s third annual poster and writing contest will take place from 3 to 5 p.m., Nov. 18, at the Juvenile Justice Center, 5100 2nd St. NW, Albuquerque. All members of the State Bar are invited to attend. Contestants have been asked to create a work based on the theme, “My Hero, My Heroine.” The contest is for children who are either currently detained or involved in such programs as the Youth Reporting Center, Drug Court and anti-domestic violence programs. This event is a great way for attorneys and their firms or organizations to assist in changing the lives of New Mexico’s troubled youths by supporting children’s artistic talent. The event will also provide an opportunity to mentor children in the delinquency system. Dates for receptions to be held in Sandoval, Valencia and Santa Fe counties will be determined in the near future.

The section thanks the following sponsors for their generous donations: Sandy Barnhart Y Chavez, Sarah Bennett, Beth Collard, Jean Conner, Robert Cooper, Robert Desiderio, A.J. Ferrara, Fine Law Firm, Judy Flynn-O’Brien, Whitney Johnson, Joan Kozon, Susan Page, Dan Pedrick, Janet Schoeppner and Kathleen Wright.

Donations are still being accepted and may be sent to the Children’s Law Section, PO Box 92860, Albuquerque, NM 87199; or by e-mail, dseago@nmbar.org.
State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860. Call Linda Yen, (505) 841-5164, or Lorette Enoch, (505) 841-5001, for more information.

Indian Law Section
Annual Meeting
The State Bar Indian Law Section will hold its annual membership meeting in conjunction with the next meeting of the board. The board will meet from 10 to 11:30 a.m. and the section will meet from 11:30 a.m. to 1 p.m., Nov. 18, at the State Bar Center. Section members are invited to attend both meetings. Lunch will be provided free of charge during the section meeting and reservations are required. Contact membership@nmbar.org or call (505) 797-6033 by Nov. 16 to make reservations or to place an item on the agenda.

Paralegal Division
Brownbag CLE
The Paralegal Division invites members of the legal profession to bring a lunch and join their monthly CLE from noon to 1 p.m., Nov. 9, 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 this month is Collaborative Divorce, presented by Gretchen Walther, attorney at law. For more information, contact Cheryl Passalaqua, (505) 890-6089, or Amy Paul, (505) 883-8181.

Real Property, Probate and Trust Section
Annual Meeting
The Real Property, Probate and Trust Section will hold its annual membership meeting at 1 p.m., Dec. 9, in conjunction with the 2005 Real Property Institute: Hot Topics in Real Estate at the State Bar Center. All section members are encouraged to attend the meeting. Contact Chair James Widland, jwidland@mstlaw.com, to place an item on the agenda.

Senior Lawyers Division
2005 Election
I. Procedure:

The Senior Lawyers Division is governed by a board of directors whose eighteen at-large members are elected by the membership of the division. The terms are three years, with one-third of the members elected each year. The bylaws require the division chair to appoint a nominating committee of at least three members of the division and to provide notice of the election so that any division member may indicate to the committee his or her interest in serving on the board of directors.

All members of the State Bar of New Mexico in good standing who are 55 years of age or older and who have practiced law for 25 years or more are members of the Senior Lawyers Division and eligible for office. Any division member who wishes to be considered for nomination to the division board of directors should contact a member of the nominating committee before Nov. 11.

The report of the nominating committee will be published in the Bar Bulletin. After publication, additional nominations may be made in the form of a petition signed by at least 30 members of the division. The petition must identify the position sought and state that the individual nominated has agreed to the nomination. The deadline for submission of nominating petitions to the State Bar office is Dec. 9.

If additional nominations are made, a notice of the contested election will be published and ballots will be mailed to all division members by Dec. 16. If no additional nominations are made, the nominees identified by the nominating committee are elected by acclamation.

II. Positions to be filled:

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<tr>
<th>Position</th>
<th>Term</th>
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<td>2006-2008</td>
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III. Nominating Committee:

Daniel J. Behles, Chair
226 Cynthia Loop NW #A
Albuquerque, NM 87114-2417
Tel: 217-3606
Fax: 217-3625
E-mail: dan@behles.com

Ms. Linda S. Bloom
PO Box 218
817 Gold SW #3800 87102
Albuquerque, NM 87103-0218
Tel: 764-9600
Fax: 243-2332
E-mail: lbloom@spinn.net

Ms. Elizabeth E. Whitefield
PO Box AA
201 Third St. NW, 12th Floor 87102
Albuquerque, NM 87103-1626
Tel: 346-4646
Fax: 346-1370
E-mail: eew@keleher-law.com

OTHER BARS
Albuquerque Bar Association
Board of Directors
Vacancies
The Albuquerque Bar Board of Directors has two openings due to the upcoming expired terms of Thomas F. Bluheer and Charles P. Price, III. Bluheer and Gretchen Walther have been nominated for three-year terms. Other interested persons may be placed on the ballot with the submission of a petition containing signatures of 10 association members in good standing and a short biography to be published to the membership. Submit petitions by 5 p.m., Nov. 8.

Outstanding Attorney and Judge Nominations
The Albuquerque Bar Association is entertaining nominations for the annual outstanding attorney and outstanding judge of 2005. Criteria the association will consider are as follows:

• personal integrity;
• legal skills and professional competence;
• contributions to the Bar;
• contributions outside the profession, such as service to the community or a civic organization;
• a legal achievement particularly noteworthy or courageous; and
• any other accomplishment that improves the image of the legal profession.

Submit nominations with supporting information to abqbar@abqbar.com or lortega@rodey.com. The presentation will be made Dec. 6 at the membership luncheon. Nominations close Nov. 8.

First Judicial District Bar Association
Individuals who are interested in becoming members of the First Judicial District Bar Association or renewing memberships for 2006 should submit their dues to the State Bar along with their general annual dues. The association will not collect dues through a separate mailing in January as it has done previously.
The New Mexico Hispanic Bar Association will hold its Fifth Annual Holiday Scholarship Fundraiser Dec. 8 at The Hotel Albuquerque at Old Town, 800 Rio Grande Blvd., NW, Albuquerque. The “reverse drawing” event begins at 6 p.m. with hors d’oeuvres, entertainment and a cash bar. The following prizes will be awarded in a reverse drawing:

- Last ticket drawn: $5,000
- 2nd to last ticket drawn: $2,000
- 3rd to last ticket drawn: $1,000

Participants do not need to be present to win. The ticket price is $100, which will admit two people. To purchase a ticket or for more details, contact Rosalie Fragoso, (505) 883-1772 or rfragoso@nixlawfirm.com.

The New Mexico Women’s Bar Association Monthly Networking Luncheon

The New Mexico Women’s Bar Association will hold its next networking lunch from noon to 1:30 p.m., Nov. 9, at Scalo’s in Albuquerque. The guest speaker will be Jane Wishner, founder and president of the Southwest Women’s Law Center, a nonprofit organization established in April 2005 and based in Albuquerque. The Center is currently focusing on research, policy advocacy and impact litigation in a number of areas, including reproductive health, gender equity and family leave policies. The Center is in its start-up phase and anticipates various volunteer opportunities for attorneys in private practice and expects to offer internships and contract work for law students and young attorneys once funding is established. Members and visitors are welcome. Advance reservations are required. Lunch prices range from $6 to $11 with payment made directly to the restaurant. Anyone interested in attending this meeting should RSVP by Nov. 9 to Rendie R. Moore, womensbarnm_admnasst@msn.com.

The New Mexico Medicaid Program Free Insurance Coverage for Working Disabled Clients

Medicaid category 043 for the working disabled individual provides full Medicaid benefits for qualified individuals. Coverage includes prescriptions, rehabilitation, doctor visits, lab work etc. Brochures, applications, and more information are available by contacting the phone number below.

To locate the nearest support division office (ISD), phone (888) 997-1583 or go to http://www.state.nm.us/hsd/offices.html. For more information or assistance, contact Janet Murray, outreach coordinator for The Working Disabled Individuals Medicaid Division of Vocational Rehabilitation at (800) 318-1469 or (505) 954-8573. For technical information, such as problems with the application process/denial at ISD, phone (888) 997-2583.

UNM School of Law

Law Library

Fall Hours

Mon. – Thurs. 8 a.m. to 11 p.m.
Fri. 8 a.m. to 6 p.m.

Sat. 9 a.m. to 6 p.m.

Sun. noon to 11 p.m.

OTHER NEWS

Construction Dispute Resolution Services

Arbitration Training Course

Construction Dispute Resolution Services, LLC (CDRS), is pleased to announce that they will offer four arbitration training courses each year instead of the twice-a-year schedule offered in the past. The last course in September was full several weeks before the program was held at the State Bar Center. The arbitration training course offers the following MCLE credits: 14.4 general, 1.2 ethics and 2.4 professionalism. Although the course is conducted by CDRS, it is a basic arbitration training course for anyone interested in becoming an arbitrator or in learning the arbitration process. The next arbitration training course is being offered on Dec. 2 and 3 at the State Bar Center. Details of the course and registration information can be found on the CDRS Web site: www.constructiondisputes-cdrs.com, or call (505) 466-7011.

NM Guardianship Association Panel Discussion

A panel on rural guardianship and conservatorship in New Mexico will be presented by the New Mexico Guardianship Association (NMGA) from 9:30 a.m. to 4:30 p.m., Nov. 11, at Ruidoso Downs. The day-long program also includes basic to intermediate training for guardians and conservators, the relationship to power of attorney and a membership meeting during lunch. Admission is free for NMGA members, $15 for non-members. For more information, contact Susan Bennett, (505) 232-7631, or sbennett@swcp.com.

Holiday Food Drive - Oct. 14 - Nov. 29th

It is estimated that 20 percent of New Mexico’s population (29 percent of children) live in poverty, and thousands of people are at risk of being hungry every single day. The legal community can help those in hunger by donating food at the State Bar Center at 5121 Masthead NE, Albuquerque. The Holiday Food Drive is being held from Oct. 14 to Nov. 29th. Please bring nonperishable food items to the State Bar Center. The food will be distributed through Roadrunner Food Bank. Your generous contributions to this effort will help hungry people in our community.

Thank you for joining us in the cause.
State Bar Staff

The Bar Bulletin is now accepting Letters to the Editor. Submit letters to notices@nmbar.org.

The editorial policy of the State Bar of New Mexico may be found on the Web at www.nmbar.org under Publications/Media, Bar Bulletin.
Board of Bar Commissioners Election
Candidate Biographies and Statements

First Bar Commissioner District (uncontested)

Craig A. Orraj is the managing attorney for the Law Offices of Craig A. Orraj and staff counsel for Farmers Insurance Exchange and Affiliates. Orraj obtained a B.S. degree in justice studies from Arizona State University in 1985 and a J.D. from the University of Arizona in 1988. He is licensed in New Mexico and Texas. Orraj was elected as a Bar Commissioner in 2002 and is a former president of the New Mexico Young Lawyers Division. Orraj is also active in the American Bar Association/Tort Trial and Insurance Practice Section, where he serves as chair of the Task Force on Outreach to State and Local Bars, as well as vice-chair of the Staff Counsel Committee.

Thank you for the privilege of serving on the Board of Bar Commissioners (BBC) during the past three years. I look forward to validating your trust and support during the next three years.

As a Commissioner, I have worked hard to better our State Bar. I have solicited suggestions and concerns from our membership, while acting on these issues at BBC meetings. I have strived to keep you informed through periodic e-blasts, while also working with State Bar staff to enhance communications to you on services being provided. I have also focused on eliminating negative perceptions within our State Bar and building on the positive role of our profession in the community. During my next term, I will continue this important focus on outreach, communication and promotion within our State Bar.

As the secretary-treasurer of the BBC this past year, I have remained dedicated to making your State Bar fiscally sound. I have chaired the Finance Committee, which has actively reviewed and decided financial expenditures in a conservative yet equitable manner to ensure that your dues are utilized appropriately. As an officer, I will do my best to continue the financial stability of our organization in the upcoming years.

Once again, thank you for your support and trust. If there are any questions or issues that you would like to discuss, please contact me directly at 505-242-8654 or craigorraj@msn.com.

—Craig Orraj

Second Bar Commissioner District (uncontested)

Sandra E. Németh

is a native New Mexican, born in Farmington. She graduated from the UNM School of Law in 1996. Prior to law school she was a union organizer and rehabilitation counselor and worked in various labor, feminist and progressive organizations. She received her masters in industrial and labor relations from the University of Oregon. She has worked for DNA-People’s Legal Services, Community and Indian Legal Services, the State of New Mexico, Children, Youth and Families Department, and as a domestic violence shelter staff attorney. She has been in private practice as a sole practitioner for seven years, based in the Eleventh Judicial District (McKinley and San Juan Counties) and in the Thirteenth Judicial District (Valencia and Cibola Counties). Németh is married and has two grandchildren. She lives in Grants, New Mexico, “where the pace is slow and the people are friendly.”

I am interested in serving on the Board of Bar Commissioners for a variety of reasons. I would like to bring the voice of rural attorneys to the table and address the particular issues that arise in our far-flung small towns and communities.

I am very interested in the problem of substance abuse within the legal community. The Bar should take a leadership role on this issue, and I applaud the programs that have been undertaken so far. However, I believe that we need to go further in addressing lawyer impairment.

Sometimes it seems that the State Bar is an organization of the Rio Grande Valley—for people who live in Santa Fe, Albuquerque or Las Cruces. Other than paying our yearly dues, those of us in small towns can have little contact with the Bar. It is my goal to see the “face” of the Bar in all corners of our state.

The Second District includes all of the beauty, diversity and challenges that are a part of living in northwest New Mexico. My goal is to provide all members of our wonderful district a voice in the State Bar Board of Bar Commissioners.

—Sandra E. Németh
Third Bar Commissioner District (contested)

Monica M. Ontiveros is a senior litigation attorney in the Risk Management Division, General Services Department. Her practice primarily involves employment litigation and supervising contract lawyers. She received her J.D. from the University of New Mexico in 1988 and an LL.M. in taxation from Washington University in 1989. She has practiced in the First Judicial District for approximately 14 years. Prior to working in Santa Fe, she worked as the Doña Ana County attorney and served as counsel to former New Mexico Attorney General Tom Udall, special assistant A.G. for the Taxation and Revenue Department and assistant Santa Fe County attorney. Ontiveros has served on the boards of the Hispanic Bar Association, the Women’s Bar Association and the Equal Access to Justice Board. She currently serves on the Women’s Bar Foundation Board. Ontiveros is married to Bill Brancard and is the proud mother of two wonderful children, Pilar and Robert.

Thank you for the privilege of serving the Third Bar Commissioner District. I am asking for your support once again in the upcoming election.

My continued interest in serving on the Board of Bar Commissioners is to ensure that the needs of our district are represented on the Board. I have practiced in this district for over 14 years and have gotten to know the needs of both government and private sector lawyers. Most lawyers have expressed the need that the State Bar remain fiscally sound and that it uses its financial resources in a judicious manner. The State Bar has become fiscally sound in the last three years. I have worked hard on the Finance Committee to set the budget for the State Bar to meet these goals.

My other priorities are to assist the Board of Bar Commissioners to continue to promote the profession of law in our community and to continue to assist those in our community who cannot afford legal representation by supporting the different programs subsidized by the board.

—Monica Ontiveros

Philip Saltz received his B.S. in business administration from UCLA and his J.D. from USC. He practices law in California and New Mexico, primarily in the fields of tax, probate, wills, trusts and preventative law. He served as a judge pro tempore with the Los Angeles Municipal Court and an arbitrator for the National Association for Securities Dealers. He is a lobbyist before the New Mexico legislature and has been a lobbyist before the California legislature where he wrote legislation pertaining to general aviation that is part of the California Public Utilities Code. Saltz was a candidate for magistrate judge in Santa Fe County to create an awareness of the low educational standards for the position and to advocate legislation to raise those standards. He conceived of and founded The U.D. Registry, Inc., the first business of its kind, which created a database of eviction actions and a tenant screening service. He was a tax accountant with Arthur Young and has had his own tax practice since admission to the California Bar. He served as president of the Santa Fe Life Underwriters Association, the New Mexico School For The Deaf Foundation and the Santa Fe Northwest Advisory Council.

I am running for the vacancy on the Board of Bar Commissioners in the Third Bar Commissioner District because I have become aware of an apparent disconnect between the State Bar and local bar associations, as well as the individual lawyers that the State Bar should be serving.

I am informed that local bar associations, that should be the voice of its individual members, have no direct liaisons between themselves and the State Bar. In my opinion, this is an obstacle to the State Bar’s ability to be more effective in serving the individual members and the ability to be more proactive in advancing the image of the legal profession in the eyes of the public we all serve.

The status quo is unacceptable to me, and I want to be an advocate for constructive change. I want to be the voice of my constituency who have urged me to run for this position so that they can feel more relevant.

I have expressed myself more fully in a mailing to all of the lawyers in the Third Bar Commissioner District. I urge you to read it, ponder on it, call me with any questions you may have and, most of all, VOTE.

—Philip Saltz
The mission of the Institute is to identify and train lawyers for future opportunities in leadership roles. Participants will learn what it means to be a leader and how to communicate, motivate, inspire and succeed.

The institute takes place over four sessions, March 3-4 (Fri. afternoon and Sat.), April 6-7 (Thurs. afternoon and Fri.), May 12-13 (Fri. afternoon and Sat.) and June 1-2 (Thurs. afternoon and Fri.), with all but one session being held at the State Bar Center in Albuquerque. Class size is limited through a competitive selection process. Topics covered include:

- team building
- leadership principles and tools
- communications and media skills
- New Mexico Judiciary
- emotional intelligence
- strategic planning
- quality of life
- time management
- public service
- fundraising

All active New Mexico licensed lawyers are welcome to apply, deadline is Jan. 20. Tuition is $350. Limited financial assistance and scholarships are available. For a complete Leadership Training Institute brochure and to apply, visit www.nmbar.org. For more information, contact Executive Director Joe Conte, (505) 797-6099 or jconte@nmbar.org.
State Bar of New Mexico
2006 Leadership Training Institute

- Application Form -

Please complete the entire application form and return to the State Bar of New Mexico, Attn: Leadership Training Institute, P. O. Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765. Applicants may submit two additional pages of information for the selection committee to consider. Applications must be received no later than 5 p.m., on Jan. 20, 2006. You will be notified the week of Feb. 6 regarding your participation in the Institute. Please print or type your responses.

Name: _____________________________________________________________________________________

Employer and Mailing Address: _________________________________________________________________
___________________________________________________________________________________________

Phone: __________________________ Fax: ______________________ E-mail: _______________________

Years in Practice: ________ Practice Area: _______________________________________________________

From what law school did you graduate: ______________________________________ Year: ____________

1) List your involvement or membership in any Bar-related activity (e.g., committee, section, newsletter editor, Supreme Court committee, pro bono volunteer, referral program participant, local or voluntary bar, etc.) _______________________________________________________________________________
_______________________________________________________________________________________
_______________________________________________________________________________________
_______________________________________________________________________________________

2) List your involvement in any community or service activities or organizations: _____________________
_______________________________________________________________________________________
_______________________________________________________________________________________

3) Are there additional accomplishments, honors, training, or educational experiences that you wish to share with the Selection Committee? Please list below or attach a brief description or resume.
_______________________________________________________________________________________
_______________________________________________________________________________________

4) Are you able to commit to attending ALL of the Leadership Training Institute sessions? 
   Yes ___ No ____

5) Why do you wish to participate in the State Bar's Leadership Training Institute and what training and skills do you hope to obtain? ______________________________________________________________
_______________________________________________________________________________________

6) Do you need financial assistance?  Yes ___ No ___
   If yes, please indicate:  Full scholarship ___ Partial scholarship ___

7) How did you hear about the Institute? ______________________________________________________

8) Have you previously applied for the LTI? Yes ___ No ___ If yes, what year? 2001 ___ 2002 ___ 2004 ___

9) Please submit two references and at least one letter of recommendation which addresses characteristics that would make you a good candidate for this Institute.

This application is available as a Word document on the State Bar Web site, www.nmbar.org

This application is available as a Word document on the State Bar Web site, www.nmbar.org
Dear Members:

The Board of Bar Commissioners has approved the following budget for calendar year 2006. The budget is presented in its entirety for the benefit of State Bar members, and to provide an opportunity for members to object to any proposed expenditure in the budget that is not related to the State Bar’s purposes of regulating the profession or improving the quality of legal services. **Members wishing to receive a printed copy of the budget disclosure may do so by calling (505) 797-6035 or 1-800-87nmbar (876-6881).** Instructions for challenging expenditures you believe to be non-germane are set forth on page two of this document. The first pages of the budget provide the total expenditures by categories, while the remaining pages provide explanations and further breakouts of the expenditures by category. The total expenditures for the State Bar in 2006 will be approximately $1,972,930. Of this amount, approximately $592,930 is expected to be supported by non-dues revenue and approximately $1,380,000 will be funded by dues. The following pie chart illustrates the total dues supported budget broken into four main categories.

- **Governance** 30.41% - ($419,718)
- **Membership** 37.21% - ($513,513)
- **Public Service** 25.16% - ($347,269)
- **Administration** 7.21% - ($99,500)

There were several non-budgeted items for 2004 which are outlined in this budget disclosure. These items were funded without a dues increase.

The financial condition of the State Bar is sound and the Board of Bar Commissioners is proud of the many programs and services the State Bar provides to the membership and the public.

Sincerely,

Craig A. Orraj
Secretary-Treasurer
November

7-8 New Mexico Association of Drug Court Professionals Annual Statewide Conference Albuquerque 9.9 G (505) 827-4834

7 Protecting Business Assets Through Effective Lawyering Teleconference TRT, Inc. 2.4 G (800) 672-6253 www.trtcle.com

7 Safeguarding Services for Disabled Clients Using Special Needs Trusts in New Mexico Albuquerque National Business Institute 3.6 G (715) 835-8525 www.nbi-sems.com

8 The Annual Review of Civil Procedure VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF 7.5 G, 1.2 E (505) 797-6020 www.nmbar.org

8 Cashing Out: Six Ways Business Owner Clients Can Sell Their Businesses VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF 1.8 G (505) 797-6020 www.nmbar.org

8 Copyrights and Your Clients: Not Just for Artists Albuquerque Parks Law Office 2.7 G (505) 842-1919

8 Current Legalities and Realities of the End-of-Life Debate VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF 3.5 G, 1.0 E (505) 797-6020 www.nmbar.org

8 DUI in New Mexico VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF 5.3 G (505) 797-6020 www.nmbar.org

8 Family Law in New Mexico Albuquerque National Business Institute 6.7 G, .5 E (715) 835-8525 www.nbi-sems.com

8 Major Issues in Mediation Teleconference TRT, Inc. 2.4 G (800) 672-6253 www.trtcle.com

8 Recent Changes in the UCC in New Mexico VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF 1.2 G (505) 797-6020 www.nmbar.org

8 2005 Professionalism: Lawyers Concerned for Lawyers State Bar Center Center for Legal Education of NMSBF 2.0 P (505) 797-6020 www.nmbar.org

9 The Changing Dynamics of Estate Planning Satellite Broadcast Edward Jones 3.4 G (314) 515-5791

9 Collaborative Divorce Albuquerque Paralegal Division of NM 1.0 G (505) 883-8181

9 Estate Planning for Qualified Plan and IRA Proceeds Teleseminar Center for Legal Education of NMSBF 1.2 G (505) 797-6020 www.nmbar.org

9 Ethics: Now What Are You Gonna Do? State Bar Center, Albuquerque Center for Legal Education of NMSBF 1.2 E (505) 797-6020 www.nmbar.org

9 Gifting Techniques That Meet the Needs of the Donee Without Sacrificing the Donor Security Teleconference Cannon Financial Institute 1.8 G (800) 775-7654 www.cannonfinancial.com

10 Construction Delay Claims Albuquerque Lorman Education Services 8.0 G (715)833-3940 www.lorman.com

10 Employment Law from A to Z Albuquerque Lorman Education Services 8.0 G (715)833-3940 www.lorman.com

G = General E = Ethics P = Professionalism VR = Video Replay Programs have various sponsors; contact appropriate sponsor for more information.
10 Legal Citation
Roswell
Paralegal Division of NM
1.0 G
(505) 622-6510

10 Natural Resources Development in Indian Country
Albuquerque
Rocky Mountain Mineral Law Foundation
14.5 G
(303) 321-8100
www.rmmlf.org

10 Take a Killer! Adverse Deposition the 25 Credibility Attack
State Bar Center, Albuquerque Center for Legal Education of NMSBF
NM Defense Lawyers Association
7.8 G
(505) 797-6020
www.nmbar.org

11 DaVinci Code of Scientific Evidence
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtcle.com

12 Legal Office Management; Ethics
Las Cruces
Paralegal Division of New Mexico
3.0 G, 1.2 E
(505) 522-2338

14 Sanctions and the Goldilocks Test - Too Soft, Too Hard, or Just Right?
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trtcle.com

15 The Basics of Real Estate Transactions from Negotiation to Closing
VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF
5.6 G, 1.0 E
(505) 797-6020
www.nmbar.org

15 Effective Law Office Advertising, Technology Applications and Business Planning
VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF
3.9 G, 2.0 P, 1.3 E
(505) 797-6020
www.nmbar.org

15 Expanding Equal Access to Credit Through Civil Rights and Consumer Protection Laws
VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF
4.2 G
(505) 797-6020
www.nmbar.org

15 Lawyering with Emotional Intelligence
VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF
2.0 P, 1.2 E
(505) 797-6020
www.nmbar.org

15 Personal Injury Case Evaluation and Intake - Make Your Accountant and Malpractice Insurer Happy
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtcle.com

15 Fundamentals of Arbitration
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtcle.com

15 Nursing Home Negligence
Lorman Education Services
7.2 G
(715) 833-3940
www.lorman.com

15 Workers’ Compensation in New Mexico
Lorman Education Services
6.0 G, 1.2 E
(715) 833-3940
www.lorman.com

16 Adoption Law: The Basics and Beyond
VR – Branigan Library, Law Cruces Center for Legal Education of NMSBF
7.2 G, 1.2 E
(505) 797-6020
www.nmbar.org

16 Electronic Discovery Needn’t Be Shocking
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtcle.com

16 1040 Tax Update
Albuquerque
Professional Education Systems, Inc.
9.0 G
(715) 833-5216
www.pesi.com

16 2005 Professionalism: Lawyers Concerned for Lawyers
VR – Branigan Library, Law Cruces Center for Legal Education of NMSBF
2.0 P
(505) 797-6020
www.nmbar.org

16 Cashing Out: Six Ways Business Owner Clients Can Sell Their Businesses
VR – Branigan Library, Albuquerque
NMDLA
6.4 G, 1.0 E
(505) 797-6021 or www.nmbar.org

16 Coping with Sexual Predators Within the Profession
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trtcle.com
## 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 NOVEMBER 4, 2005**

### Petitions for Writ of Certiorari Filed and Pending:

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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 NOVEMBER 4, 2005**

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<th>Address</th>
<th>City, State Zip</th>
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<tr>
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<tr>
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From the New Mexico Supreme Court

Opinion Number: 2005-NMSC-035

Topic Index:
Appeal And Error: Appealable Order; Appellate Review; Interlocutory Appeal; Judicial Review; Standard of Review; and State's Right to Appeal
Constitutional Law: Constitutional Right to Appeal; and Suppression of Evidence
Criminal Procedure: Dismissal of Charges; and Motion to Suppress Evidence: Suppression of Evidence
Judgment: Final Judgment
Jurisdiction: Appellate Jurisdiction; Courts of Limited Jurisdiction; District Court; Magistrate Court; and Subject Matter Jurisdiction

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
versus
DANIELLE HEINSEN,
Defendant-Respondent.
No. 28,820 (filed September 9, 2005)
Consolidated with:
STATE OF NEW MEXICO,
Plaintiff-Petitioner,
versus
RENE MAESE,
Defendant-Respondent.
No. 28,821 (filed September 9, 2005)

ORIGINAL PROCEEDINGS ON CERTIORARI
STEPHEN BRIDGFORTH, District Judge

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OPINION
PAMELA B. MINZNER, JUSTICE

{1} This consolidated appeal challenges a ruling by the Court of Appeals that the State has no right to appeal from a suppression order of a magistrate court and that the district court has no subject matter jurisdiction to hear such an appeal. State v. Heinsen, 2004-NMCA-110, ¶¶ 1, 27, 136 N.M. 295, 97 P.3d 627. We granted certiorari because the State’s appeals present issues of substantial public interest concerning the jurisdiction of the district court over such appeals under the doctrine of practical finality and the impact of the ruling on judicial resources. See Rule 12-502(C)(4)(d) NMRA 2005. We hold that there is no constitutional or statutory basis for an appeal by the State from a suppression order of a magistrate court. We also hold the practical finality exception to the final judgment rule is not applicable, because the State may obtain judicial review of such a suppression order by filing a nolle prosequi to dismiss some or all of the charges in the magistrate court after the suppression order is entered and refiling in the district court for a trial de novo. Finally, we conclude that the State’s purpose of preserving a right to challenge an order suppressing evidence that is material to the proceeding is a legitimate reason for filing a nolle prosequi and subsequently refiling. Therefore, we hold that the six-month rule, see Rule 5-604 NMRA 2005, ordinarily would run from the date of arraignment or the waiver of arraignment on the new indictment or information. See Rule 5-604(B) (listing the events from which the six-month period for trial is calculated). Accordingly, we affirm the Court of Appeals.

{2} Defendant Heinsen was charged on March 13, 2002 by amended complaint with aggravated driving while under the influence, contrary to NMSA 1978, § 66-8-102(D)(1) (1999, prior to subsequent amendment), and two traffic offenses in the Dona Ana County Magistrate Court. Heinsen, 2004-NMCA-110, ¶ 2. On June 27, she filed a motion to exclude evidence of the breath test taken on the night of her arrest. The magistrate entered an order suppressing the breath test results on July 16. The State appealed the order to the district court, which set the matter for trial de novo pursuant to Rule 6-703(J) NMRA 2005. Under Rule 6-703, the district court must try a de novo appeal within six months. Rule 6-703(L). That time period may be extended “one time for a period not exceeding ninety (90) days.” Rule 6-703(M). If not timely tried, the appeal must be dismissed. Rule 6-703(L). Heinsen filed a motion to quash the appeal on the ground that a suppression order is not a final, appealable order as required by Rule 6-703(A). The district court granted the motion on November 20 and remanded the case for a trial on the merits in magistrate court. The State appealed that ruling to the Court of Appeals.

{3} On November 21, 2000, Defendant Maese was charged in the Dona Ana
had not presented a compelling reason to recognize an exception to the final judgment rule. Id. ¶ 26.

{5} On appeal to this Court, the State contends that the Court of Appeals erred in dismissing both cases for lack of jurisdiction, because the opinion deprives the State of its constitutional right to one appeal. The State appears to argue that it is entitled to appeal the magistrate court orders because there are two distinct exceptions to the final judgment rule. One would arise from the State’s constitutional right to appeal and the other would be an exception for an order that is, as a practical matter, final. The State argues that, as a party aggrieved by a ruling contrary to law, it has a right to appeal a magistrate court’s suppression order under Article VI, Section 2 of the New Mexico Constitution and NMSA 1978, Section 35-13-1 (1975). The State also argues that these appeals involve issues that otherwise evade review and should be viewed as final in fact, even if they are not final in form. According to the State, the correct procedure for these appeals is by trial de novo in the district court pursuant to Rule 6-703(J), although the State appears to favor the procedure followed by the district court in ruling on Maese’s motion to suppress: a de novo suppression hearing and remand for trial. For the following reasons, we believe the Court of Appeals correctly rejected the State’s argument. We recognize the State’s concerns about unnecessary delay and the effect of delay on resources, but we are persuaded our current court rules address those concerns appropriately.

{6} This Court has authority to review the subject matter jurisdiction of the district court, and we have jurisdiction over these appeals, notwithstanding the fact that the jurisdictional issue was not raised by Maese or the State in district court. Wilson v. Denver, 1998-NMSC-016, ¶ 8, 125 N.M. 308, 961 P.2d 153. We review jurisdictional issues and the legal issues raised in this appeal under a de novo standard of review. See Tri-State Generation & Transmission Ass’n v. King, 2003-NMSC-029, ¶ 4, 134 N.M. 467, 78 P.3d 1226. Since it appears to us that the heart of the State’s argument is that it has a right of appeal pursuant to Article VI, Section 2 of the New Mexico Constitution and Section 35-13-1, which the Court of Appeals’ opinion fails to recognize, we address that issue first. We then discuss whether the doctrine of practical finality gives the State the right to appeal a magistrate court’s suppression order. Because we conclude that it does not, in the last section of this opinion we address how the State may obtain judicial review of the orders without offending the six-month rule. See Rule 5-604.

A

{7} The State’s right to appeal an adverse ruling in a criminal proceeding exists only by constitutional provision, statute, or rule. State v. Giraudo, 99 N.M. 634, 636, 661 P.2d 1333, 1335 (Ct. App. 1983). Article VI, Section 27 of the New Mexico Constitution limits the district court’s appellate jurisdiction over courts of limited jurisdiction to appeals from final orders. Smith v. Love, 101 N.M. 355, 356, 683 P.2d 37, 38 (1984). Section 35-13-1 authorizes appeals from a final order issued by the magistrate court. All such appeals are on the merits by trial de novo except as otherwise provided by law. See art. VI, ¶ 27; NMSA 1978, ¶ 39-3-1 (1955); Rule 6-703(J).

{8} Section 39-3-3(B) recognizes the State’s right to appeal from final orders of the district court and provides a right to appeal a district court’s suppression order. State v. Alvarez, 113 N.M. 82, 84, 823 P.2d 324, 326 (Ct. App. 1991). There is no constitutional provision, statute, or rule that explicitly gives the State the right to immediately appeal a suppression order by the magistrate court. Cf. Giraudo, 99 N.M. at 636, 661 P.2d at 1335. “[T]o allow an interlocutory appeal of an order of suppression from the magistrate court would impermissibly expand the appellate jurisdiction of the district court to hear matters beyond those currently allowed by the statutes and rules.” Heinsen, 2004-NMCA-110, ¶ 14. Thus, the district court has jurisdiction over such appeals only if an exception to the final judgment rule applies. One exception might arise by implication from the New Mexico Constitution or from statutes implementing the constitution.

I

We recognize, however, that an appeal from the metropolitan court to the district court is not always de novo. NMSA 1978, § 34-8A-6(C) (1993) provides “[t]he metropolitan court is a court of record for criminal actions involving driving while under the influence of intoxicating liquors or drugs or involving domestic violence.” Rule 7-703(J) NMRA 2005 provides that “[e]xcept as otherwise provided by law for appeals involving driving while under the influence and domestic violence offenses, trials upon appeals from the metropolitan court to the district court shall be de novo.” Therefore, when the criminal action in metropolitan court involves driving while intoxicated or domestic violence charges, aggrieved parties “may only take an on record appeal to the district court.” State v. Krause, 1998-NMCA-013, ¶ 5, 124 N.M. 415, 951 P.2d 1076.
Article VI, Section 2 of the New Mexico Constitution provides “that an aggrieved party shall have an absolute right to one appeal.” This provision gives the State an absolute, constitutional right to appeal a ruling that is contrary to law. See State v. Doe, 95 N.M. 90, 92, 619 P.2d 194, 196 (Ct. App. 1980), superseded on other grounds by statute as recognized in State v. Michael R., 107 N.M. 794, 765 P.2d 767 (Ct. App. 1988). While the State does not have an absolute right to appeal every adverse ruling immediately, appellate courts have jurisdiction to review a ruling pursuant to this provision when the ruling affects a particularly important state interest. See State v. Aguilar, 95 N.M. 578, 579, 624 P.2d 520, 521 (1981); State v. Ahasteen, 1998-NMCA-158, ¶ 19, 126 N.M. 238, 968 P.2d 328; State v. Armijo, 118 N.M. 802, 805-06, 887 P.2d 1269, 1272-73 (Ct. App. 1994). The Court of Appeals concluded that preserving the right to present evidence is not a compelling reason to recognize a constitutional right to appeal on these facts. Heinsen, 2004-NMCA-110, ¶ 26. We disagree with this assessment of the State’s interest, but we agree that the State has no right to appeal in these circumstances.

The suppression orders in these appeals do interfere with the State’s strong interest in enforcing its statutes. See Aguilar, 95 N.M. at 579, 624 P.2d at 521. They also interfere with the wide latitude afforded the State in exercising its good-faith charging discretion. Ahasteen, 1998-NMCA-158, ¶ 20. Nevertheless, we conclude that Article VI, Section 2 does not support the State’s argument in this consolidated appeal. The constitutional provision on which the State relies is not a compelling right to appeal to the district court rather than from courts of limited jurisdiction. See Giraudo, 99 N.M. at 636, 661 P.2d at 1335.

Section 35-13-1 provides that “any party aggrieved by any judgment rendered or final order issued by the magistrate court in any civil action or special statutory provision, or the defendant aggrieved by any judgment rendered or final order issued by the magistrate court in any criminal action, may appeal to the district court within fifteen days after judgment is rendered or the final order is issued in the magistrate court.” (Emphasis added.) The right of appeal conferred by this statute in a criminal action is limited to the defendant who is aggrieved by a judgment or final order of the magistrate court. Cf. Giraudo, 99 N.M. at 636, 661 P.2d at 1335 (holding the state is not a “person” for purposes of NMSA 1978, Section 34-8A-6(C) (1981), which entitled “any person” to appeal a judgment by the metropolitan court in a criminal action). In light of the foregoing, we conclude that Article VI, Section 2 and Section 35-13-1 do not give the State the right to appeal a magistrate court’s suppression order, because such an order is not a final judgment or order.

As the Court of Appeals observed, Heinsen, 2004-NMCA-110, ¶ 19, New Mexico has traditionally viewed suppression orders as interlocutory rulings on evidentiary matters, rather than final, appealable orders. Alvarez, 113 N.M. at 83-84, 823 P.2d at 325-26; Giraudo, 99 N.M. at 636, 661 P.2d at 1335; State v. Garcia, 91 N.M. 131, 571 P.2d 123 (Ct. App. 1977). A suppression order is “purely and simply a ruling on the legality of defendant’s arrest and the consequent admissibility of evidence at the prosecution’s evidence.” County of Los Alamos v. Tapia, 109 N.M. 736, 739, 790 P.2d 1017, 1020 (1990). For this reason, an appeal of a suppression order has been held to be a statutory right, rather than a constitutional right. Alvarez, 113 N.M. at 85, 823 P.2d at 327. The only statute authorizing an appeal of a suppression order is Section 39-3-3(B)(2), which authorizes appeals from district court rulings. Thus, we agree with the Court of Appeals that there is no constitutional provision, statute, or rule that gives the State the right to appeal an order suppressing evidence by a magistrate court. Heinsen, 2004-NMCA-110, ¶ 19.

The State observes that Alvarez, Giraudo, and Garcia did not consider the practical effect of the suppression orders that were at issue in those appeals. We recognize that a magistrate court order suppressing evidence may not conclude all proceedings but as a practical matter may resolve some portion of a case. Cf. Alvarez, 113 N.M. at 84, 823 P.2d at 326 (acknowledging that in many cases the State will have the option to continue prosecution even after a ruling suppressing evidence because the evidence suppressed may relate to one or more but not all of the charges). If the doctrine of practical finality applies, the suppression appeal would be elevated to constitutional status, not as an interlocutory appeal, but as an appeal from a final judgment, and an appeal to the district court for a trial de novo would be required. We are unaware of any case, however, in which the practical finality exception has been applied to rulings rendered by a court of limited jurisdiction. Thus, the threshold issue for us, which the ruling of the Court of Appeals did not resolve, is whether practical finality ought to apply to a suppression order issued by the magistrate court.

As a general rule, an order or judgment is not considered final unless it resolves all of the factual and legal issues before the court and completely disposes of the case. Kelly Inn, No. 102, Inc. v. Kappison, 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992); Ahasteen, 1998-NMCA-158, ¶ 10. The purpose of finality is to prevent piecemeal appeals or appeals of issues that may be moot after further proceedings in the lower court. See High Ridge Hinkle Joint Venture v. City of Albuquerque, 119 N.M. 29, 34, 888 P.2d 475, 480 (Ct. App. 1994), rev’d on other grounds, High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, 126 N.M. 413, 970 P.2d 599; In re Larry K., 1999-NMCA-078, ¶ 4, 127 N.M. 461, 982 P.2d 1060. The practical finality exception recognizes that the rule of finality is not an “absolute, inflexible rule,” but a term that is to be given a “practical, rather than a technical, construction.” Ahasteen, 1998-NMCA-158, ¶ 10 (quoting Kelly Inn, 113 N.M. at 236, 824 P.2d at 1038). To determine if the doctrine applies, we “look to the substance and effect of an order and not to its form.” Ahasteen, 1998-NMCA-158, ¶ 10.

In considering whether the doctrine applies to magistrate suppression orders, however, we are mindful that practical finality is the exception, rather than the rule. To justify this exception, we have applied it cautiously, in limited circumstances. See State v. Griego, 2004-NMCA-107, ¶¶ 9, 18, 136 N.M. 272, 96 P.3d 1192; In re Larry K., 1999-NMCA-078, ¶ 11. We will review a court’s decision when an order effectively disposes of the issues in a case, even though supplementary proceedings are necessary to enforce the order. Kelly Inn, 113 N.M. at 236, 824 P.2d at 1038. The doctrine also has been extended to cases where, “as a practical matter,” the issue raised on appeal will not be available for review if the state is deprived of an immediate appeal. Ahasteen, 1998-NMCA-158, ¶ 12 (quoting High Ridge, 119 N.M. at 34, 888 P.2d at 480).

The State argues that the prosecution of Maese effectively ended when the magistrate court suppressed all of the evidence arising from the traffic stop. The Court of Appeals held the case did not fall under the
doctrine of practical finality, because the charge had not yet been dismissed. Heinsen, 2004-NMCA-110, ¶ 24. In the prosecution of Heinsen, the State argues it had no means to prove aggravated DWI without the blood test evidence that was suppressed and that the suppression order should be treated as a dismissal of the charge of aggravated DWI. The Court of Appeals held the order was not final in the practical sense, in part because the State could still proceed on a lesser DWI charge. Id. ¶ 21. Although the State concedes that it could have pursued a lesser DWI charge and the other traffic offenses, it contends that it ought not be forced to abandon a valid, serious charge without judicial review of the decision that made that necessary.

{17} The State’s argument has force. See Ahasteen, 1998-NMCA-158, ¶ 13. If on remand the State simply dismisses the charges against Maese, there will be nothing left to appeal. Id.2 Double jeopardy will bar review of the suppression order if Heinsen is acquitted on remand, or the issue will become moot on appeal to the district court if he is convicted.3 Id.; cf. Krause, 1998-NMCA-013, ¶ 7 (“We believe that the statute and rules intend the appeal [from metropolitan court to district court] to be governed by the crime of which defendants are convicted rather than the type of trial in metropolitan court.”). Nevertheless, we are not persuaded that the doctrine of practical finality ought to be expanded to include evidentiary orders issued by courts of limited jurisdiction.

{18} First, the State has not provided authority for us to do so. Our review indicates that the doctrine has had limited application in appeals from the district court. For example, in Ahasteen, the State charged the defendant with DWI in magistrate court. 1998-NMCA-158, ¶ 2. After the defendant moved to suppress evidence gathered as a result of an allegedly illegal roadblock, the State dismissed the case without prejudice and refiled the same charge in the district court. Id. The defendant filed a motion for remand to the magistrate court on grounds that the dismissal in magistrate court and refiling in district court was forum shopping. Id. ¶¶ 3-6. The district court granted the motion, without explanation, and the State appealed. Id. ¶ 6. While the Court of Appeals acknowledged that remand orders are not usually considered final appealable orders, it found jurisdiction to review that particular order under the doctrine of practical finality. Id. ¶¶ 11-13. The court reasoned that the issue on appeal might evade review if remand were to result in a judgment of acquittal or be deemed moot or harmless on appeal, even if the defendant were convicted. Id. ¶ 13. In addition, “once the nolle prosequi was filed,” the magistrate court’s jurisdiction ended, and the remand order “operated as a dismissal of the district court charges.” Id. ¶ 17.

{19} More recently, the doctrine was applied to a consolidated appeal from petitions for writs of mandamus. Collado v. N.M. Motor Veh. Div., 2005-NMCA-056, 137 N.M. 442, 112 P.3d 303. In Collado, MVD challenged the district court’s jurisdiction to withdraw the defendants’ pleas and remand the cases to metropolitan court since the mandamus petitions were not verified or properly served. Id. ¶ 8. The court held the district court’s order was sufficiently final to hear the appeal because defendants might be acquitted, enter a conditional plea, or receive a deferred sentence on remand, which would prevent MVD from appealing the procedural issues. Id. ¶ 6.

{20} Although the issues the State wants to raise in challenging the suppression orders might evade review if the State were to proceed with the prosecution in magistrate court, the cases on which the State relies are distinguishable. In Heinsen, original jurisdiction was in the district court after the State dismissed the metropolitan court case and refiled it in the district court; therefore on appeal the State was challenging a district court order. The State had an absolute right to appeal that court’s order by virtue of Article VI, Section 2, because the remand order acted as a dismissal of the case; the magistrate court’s jurisdiction had terminated when the nolle prosequi was filed. In Collado, defendants filed a mandamus petition to invoke the district court’s jurisdiction, which the law expressly permits, and the State challenged the district court’s jurisdiction due to certain procedural inadequacies in the writ. In contrast, it is significant that in these appeals the magistrate court had retained its jurisdiction. The State is attempting to invoke the district court’s jurisdiction to review the magistrate court’s order, and there is no comparable constitutional provision, statute, or rule that gives the district court jurisdiction over the appeals. Although the cases on which the State relies illustrate application of the doctrine of practical finality on particular facts, they do not support expansion of the doctrine to magistrate court suppression orders.

{21} Application of the doctrine of practical finality in the context of district court orders that evade review makes sense in light of the State’s constitutional right to appeal a district court ruling that affects a significant state interest, as provided by Article VI, Section 2, as well as its statutory right to appeal a district court order suppressing material evidence that would result in a dismissal of one or more charges under Section 39-3-3(B)(2). The legislature in effect has codified the doctrine of practical finality for suppression orders in recognition of the constitutional right to appeal a district court order affecting an important state right. See Alvarez, 113 N.M at 84, 823 P.2d at 326 (indicating an interlocutory appeal is not a codification of a constitutional right to one appeal, but rather a statutory right which the legislature provided in recognition of the right of appeal under Article VI, Section 2). There is no comparable constitutional or statutory authority that justifies the doctrine of practical finality in the context of magistrate court orders. Absent a firm basis in the law, this Court ought not enlarge the State’s substantive right of appeal. See State v. Arnold, 51 N.M. 311, 314, 183 P.2d 845, 846 (1947) (recognizing that the right to appeal is “outside the province of this court’s rule making power”). Our magistrate court rules reflect this principle. See Rule 6-101(C) NMRA2005 (providing that the magistrate court rules “shall not be construed to extend or limit the jurisdiction of any court, or to

21F Maese had moved to dismiss the charges when the district court granted her motion suppressing all of the evidence, there would have been a final, appealable order, and it does not appear that the State would be barred from a second prosecution. See County of Los Alamos, 109 N.M. at 743-44, 790 P.2d at 1024-25 (holding that a remand does not violate double jeopardy when the State appeals from a district court order suppressing all evidence in a defendant’s favor, the State is not responsible for the error, and does not seek a dismissal of the charges, because the defendant’s interests against retrial carry less weight than society’s interest in the correct application of the law).

3The suppression issue would be moot because the defendant would be appealing a conviction on the lesser included offense on the basis of the remaining evidence.
abridge, enlarge or modify the substantive rights of any litigant").

{22} We conclude that our state constitution and our court rules as well as the policy underlying the finality rule counsel against expanding the doctrine of practical finality to permit an immediate appeal of a magistrate court ruling suppressing evidence. Expanding the doctrine to permit appeal of such orders seems neither supported by our cases nor necessary to protect the State’s interests. We cannot create a right of appeal. The State’s concerns about delay and limited resources, however, are genuine, and we address those concerns in the section that follows.

C

{23} At any time prior to trial, the State may dismiss a case without prejudice by filing a nolle prosequi. Rule 6-506A(A) NMRA 2005. Because the district court has concurrent original jurisdiction over misdemeanor cases, see N.M. Const., Art. VI, § 13, and the defendant has no right to have the case heard in magistrate court, the State has broad discretion to reinstate charges in the district court by filing an indictment or information. See generally Ahasteen, 1998-NMCA-158 (indicating that the district court has jurisdiction over a misdemeanor case when the state has a legitimate reason for filing a nolle prosequi to dismiss the case in magistrate court and refiling the same charges in the district court). Once jurisdiction lies in the district court, the State can obtain full judicial review of a suppression order. See § 39-3-3(B)(2).

{24} The State has expressed a concern that dismissal in magistrate court and a subsequent refiling of the same charges in district court is not an adequate solution because, for example, a defendant might claim the six-month rule did not begin to run from the date the charges were refiled. In the absence of a right to appeal these orders, the State predicts it will be forced to file an increasingly large number of misdemeanor and petty misdemeanor charges in district court. We appreciate the State’s concern, but we disagree with its assessment.

{25} The district court’s concurrent jurisdiction facilitates the State’s ability to obtain relief in district court in a manner consistent with the constitution, the statutes, and our rules. New Mexico has long recognized that the State has wide discretion to dismiss a criminal case in magistrate court by filing a nolle prosequi and reinstating charges in district court. See State ex rel. Naramore v. Hensley, 53 N.M. 308, 310-11, 207 P.2d 529, 530-31 (1949); State v. Gardea, 1999-NMCA-116, ¶ 5, 128 N.M. 64, 989 P.2d 439; State v. Bolton, 1997-NMCA-007, ¶¶ 8, 11, 122 N.M. 831, 932 P.2d 1075; State v. Ware, 115 N.M. 339, 341, 850 P.2d 1042, 1044 (Ct. App. 1993). The trial court supervises that discretion by inquiring into the reasons for dismissal to ensure that the six-month rule and the defendant’s due process rights are not unduly infringed. See Gardea, 1999-NMCA-116, ¶¶ 6, 7. The trial court will not prevent the State from filing a nolle prosequi when the State has a good and sufficient reason for doing so. See Ware, 115 N.M. at 341, 850 P.2d at 1044. The court will intervene to prevent the State from using the dismissal for purposes of delay or to circumvent the rules. Bolton, 1997-NMCA-007, ¶ 11.

{26} The State is understandably concerned about the six-month rule, because we have suggested that a nolle prosequi may not result, when the case is refiled, in a new six-month period. Cf. Ware, 115 N.M. at 343, 850 P.2d at 1046 (holding that defendant could exercise his right to disqualify trial court judge in second proceeding after first proceeding was terminated by nolle prosequi). Rule 5-604(B)(1) provides that ordinarily a criminal trial must begin within six months of “the date of arraignment, or waiver of arraignment, in the district court of any defendant,” but the rule is silent on the effect of a dismissal in magistrate court and refiling in the district court. That is because New Mexico courts have been reluctant to hold that filing a nolle prosequi always results in a new six-month period. See Ware, 115 N.M. at 341-42, 850 P.2d at 1044-45. The district court may inquire into the reasons for the dismissal to resolve the conflict between the policies underlying the six-month rule and the prosecutor’s discretion to decide where to prosecute criminal charges and otherwise manage the prosecution. See Bolton, 1997-NMCA-007, ¶¶ 8-10. Ordinarily, however, filing a nolle prosequi ends the previous proceeding and allows a new six-month period to run provided there was a reasonable basis to file the nolle prosequi. When the State has such a basis, the trial court should grant the dismissal and permit a new six-month rule to run. See id. ¶ 11 (“Prosecutors may ordinarily do what they wish – unless there is a bad reason for what they do . . . .”).

{27} In light of the State’s strong interest in enforcing its statutes and managing criminal prosecutions, we hold that a new six-month rule period should begin to run when the State files a nolle prosequi following a suppression order by a magistrate court and refiles in district court. If the State can establish that it has acted in order to preserve its right to appeal an order suppressing evidence, which is substantial proof of a material fact in the proceeding, and that it is not doing so for the purpose of delay, cf. 39-3-3(B)(2) (providing for the district attorney to certify an interlocutory appeal from a district court order suppressing evidence), the six-month rule should commence six months after the date of arraignment, or waiver of arraignment, on the indictment or information or under any other applicable provision of Rule 5-604.

{28} While this procedure may be less convenient than a direct appeal, it is consistent with our constitution, statutes, and rules. This procedure should encourage the initial filing of appropriate cases in district court. This procedure should serve as well the important purpose of preserving the right of the State to challenge an order suppressing material evidence in a case initially filed in magistrate court. This procedure should prove consistent with the policies underlying the six-month rule and the rule of practical finality. Although we cannot create a right of appeal, we can expedite review by construing Rule 5-604 to facilitate the State’s challenge of a suppression order. Alternatively, the Legislature may provide a different appellate procedure. Cf. § 34-8A-6(C) (making the metropolitan court “a court of record for criminal actions involving driving under the influence of intoxicating liquors or drugs or involving domestic violence” and providing a right to appeal to district court for “[a]ny party aggrieved by a judgment” in cases heard on the record).

{29} Our ruling on the six-month rule is not determinative of any speedy trial issues in these appeals because speedy trial issues are not before the Court. See State v. Manzanares, 121 N.M. 798, 800, 918 P.2d 714, 716 (1996) (indicating that a motion to protect speedy trial rights is a fact-based analysis that must be presented to the trial court before it can be considered on appeal). We therefore decline to address the issue at this time.

III Conclusion

{30} We affirm the Court of Appeals’ determination that the orders are not final. The State has no constitutional or statutory right to appeal an order suppressing evidence from a magistrate court, and the State does not have a right to appeal these orders under the doctrine of practical finality. When the
Defendant appeals her conviction for child abuse (resulting in death) of her boyfriend’s eighteen-month-old child (Victim). On appeal, Defendant argues that (1) the trial court improperly communicated with a juror during jury deliberations, (2) there was insufficient evidence to conclude that Defendant inflicted the injuries that led to Victim’s death, (3) prosecutorial misconduct deprived Defendant of a fair trial, (4) the trial court allowed witnesses to render improper opinions, (5) erroneous jury instructions were submitted to the jury, (6) Defendant was denied due process due to the trial court’s aggravating Defendant’s sentence and finding that child abuse resulting in death is a serious violent offense, and (7) cumulative error.

Due to our conclusion that the trial court’s improper communication with a juror, as well as the State’s failure to rebut the presumption of prejudice that arose from the communication, warrants reversal of Defendant’s convictions, we are not required to address the majority of issues raised by Defendant. However, because Defendant would be entitled to a dismissal of the charges on remand if the evidence adduced at trial was insufficient to support her conviction, we are required to address Defendant’s argument that there was not sufficient evidence to conclude that Defendant inflicted the injuries that led to Victim’s death. See State v. Ortiz-Burciaga, 1999-NMCA-146, ¶ 1, 128 N.M. 382, 993 P.2d 96. We conclude that there was sufficient evidence to support Defendant’s conviction, but based on the trial court’s improper communication with a juror, we reverse Defendant’s conviction.

FACTS AND BACKGROUND

On April 9, 2001, Defendant contacted 911 and reported that Victim had fallen from a bed and was not moving. When the paramedics arrived, they found Victim breathing but unconscious and observed marks and abrasions on Victim’s forehead. Defendant, who was the sole caretaker of Victim when she discovered Victim’s injuries, told paramedics that she had not seen what had happened to Victim but that Victim may have fallen from the lower bunk bed that was located in the room in which Victim was found injured. Defendant emphasized, however, that Victim could not have fallen off the top bunk bed because he could not climb the ladder.

The paramedics transported Victim to an emergency room by ambulance. At the emergency room, the treating physician noted that Victim had bruises on his head and that one of Victim’s pupils was bigger than the other. The physician, suspecting Victim had suffered a brain injury, ordered a CT scan of Victim. Dr. Hart, the physician who interpreted the CT scan, reported that Victim had a skull fracture and a broad subdural hematoma. Victim was transferred for surgery to remove the subdural hematoma; however, in the evening of April 9, 2001, Victim died during surgery. A later autopsy indicated that Victim died due to the head injury.

In the early morning hours of April 10, 2001, Defendant was questioned by a detective from the Albuquerque Police Department (APD). Defendant stated that the only thing she saw Victim do was to start to climb into the lower bunk bed. The detective told Defendant that Victim could not have sustained the injuries that led to Victim’s death from a fall from the lower bunk bed, which was later determined to be 18 inches off the floor. However, once again, Defendant continued to state that Victim could not climb to the top bunk bed.

Defendant was indicted on April 20, 2001, for intentional child abuse resulting in death or in the alternative negligent child abuse resulting in death. At trial, Defendant attempted to argue that Victim’s biological parents had access to Victim and may have inflicted the injuries that caused Victim’s death. At trial, Defendant testified to the following facts:

1. Victim’s mother (Mother) assumed care for Victim at 6:00 p.m. on April 6, 2001, and returned Victim to Defendant’s care at approximately 7:00 p.m. on April...
8, 2001. After Mother returned Victim to Defendant, Defendant put Victim to bed between 8:00 p.m. and 9:30 p.m. Defendant’s stomach began to hurt between 1:00 a.m. and 1:30 a.m. on April 9, 2001. Victim’s father (Father) took Defendant and Victim to the emergency room at approximately 2:00 a.m. on April 9, 2001, so that Defendant could receive treatment for her stomach. Father woke Victim up and got Victim dressed in order to accompany Defendant and Father to the hospital. Defendant was not released from the emergency room until approximately 8:00 a.m. on April 9, 2001. Father cared for Victim in the emergency room’s waiting area until Defendant was released at approximately 7:30 a.m. to 8:00 a.m. on April 9, 2001.

{8} Victim was sleeping on the way back from the emergency room and upon arriving home, Defendant took Victim from the car and placed him in his bed. Defendant fell asleep in the master bedroom and Father slept in the room that contained the bunk bed. Defendant awoke at 4:10 p.m. and proceeded to wake up Father. Father left for work at 4:45 p.m.

{9} Defendant woke Victim up shortly after Father had gone to work and Victim seemed “wobbly” when Defendant woke him up. Defendant placed Victim in his highchair and attempted to feed Victim pizza but Victim was not hungry. Victim was in his highchair for approximately 20 to 25 minutes, after which Defendant got Victim down and watched Victim walk over to the bed and crawl up onto the bed. Defendant heard a noise and saw Victim lying on his left side, at which time Defendant called 911.

{10} Father testified at the trial that when he and Victim were in the emergency room’s waiting room while Defendant was receiving care for the upset stomach in the early morning hours of April 9, 2001, Victim was “hyper and running around,” and he ate chips and candy and drank some Coke. Father also testified that although Victim slept on the way back from the hospital, Victim became playful when he returned home and began to climb all over. Consequently, Defendant had to take Victim from the room in which he was playing with Father and put Victim to bed in another room. Additionally, a detective from APD testified that Defendant told him that Victim was doing fine when Victim, Father, and Defendant returned from that visit to the emergency room.

{11} In attempting to prove that Defendant inflicted the injuries that led to Victim’s death, the State introduced the testimony of Dr. Hart, who testified as an expert in neuroradiology and pediatric radiology. Dr. Hart gave his opinion that the broad subdural hematoma that Victim suffered could not have been caused from a short fall such as one that might occur if a person were to fall 18 inches from a bed to the floor. Dr. Hart further testified that a person with the type of injuries that Victim suffered would not want to eat or play. Additionally, Dr. Hart testified that the injury Victim suffered occurred in a matter of minutes to less than a few hours before it was discovered.

{12} The State also presented the testimony of Dr. Skirboll, who was the surgeon who operated on Victim on the evening Victim died. He testified as an expert in neurosurgery. Dr. Skirboll testified that the injury Victim suffered was an acute injury and therefore could have occurred between seconds to two days prior to being diagnosed. Dr. Skirboll then said, “Acute maybe is one day, two days, something like that.” Dr. Skirboll also testified that he would not expect a person with this type of injury to be eating or walking. Furthermore, Dr. Skirboll testified that an injury such as the one inflicted upon Victim would be unusual in a case where a person fell only 18 inches to the floor.

{13} Dr. Nashelsky testified for the State as an expert in forensic pathology and was the pathologist who performed Victim’s autopsy. Dr. Nashelsky stated that Victim’s injuries appeared to occur very soon before death. Also, Dr. Nashelsky testified that after receiving the type of injuries that Victim suffered, any person would seem abnormal and it would be highly unlikely for Victim to climb onto a bed. Dr. Nashelsky testified that Victim’s injuries were consistent with an adult taking Victim and shaking him and throwing him against a wall or a floor. Furthermore, Dr. Nashelsky testified that an injury such as the one inflicted upon Victim would be unusual in a case where a person fell only 18 inches to the floor.

{14} Defendant presented the testimony of Dr. Dragovic, who testified as an expert in pathology, forensic pathology, and neuropathology. Dr. Dragovic, who reviewed reports of Victim’s autopsy, stated that the bleeding in Victim’s brain occurred over a period of time and would not have occurred instantaneously. However, Dr. Dragovic testified that after receiving an injury of this type, Victim would not have acted like a normal child.

{15} Approximately five hours after the jury had begun deliberating, the following exchange took place outside the presence of the jury:

THE COURT: I just need to report there is a juror, and I believe she is the foreperson, I’m not sure, but a juror whom I believe to be the foreperson came to my office and she was complaining that one juror had committed [perjury] that she was the juror that had had a disagreement with that police officer about some ticket and that this juror --

THE STATE: What police officer about a ticket?

THE COURT: That she doesn’t believe the expert and that she is not going to change her mind and that they could be there for two months and she was not going to change her mind. She reported that to me and I told her, well, just report -- you know, just report that you are hung and I told her I’ll take it from there. So I guess --

THE STATE: Which juror approached you, Judge?

THE COURT: I believe she’s --

DEFENSE COUNSEL: I guess it wouldn’t matter if we know, does it?

THE COURT: I think for the record we need to know. I think she is the foreperson, Rochelle Smith or I think she is Rochelle Smith, yeah. She is sitting right here.

THE STATE: Kind of the brown mousey kind of --

THE COURT: Short hair.

THE STATE: I thought the last note was from Mr. Anthony.

THE COURT: What she said was kind of in relation to what the last -- what the note said so it’s a continuation of that and I’m trying to summarize what she told me. But I told her to continue and do whatever she had to do and just report -- just report to me and I could handle it from there.

THE STATE: Is she going to send a note out?

THE COURT: She said, well, I’ll just indicate to you that we’re hung.

{16} Immediately after this exchange between the trial court and counsel, the bailiff informed the trial court that the juror had said to disregard the previous information. Furthermore, at the same time, the jury sent a note stating that it would need additional time after 5:00 p.m. to continue to deliberate. Soon afterwards, the jury found Defendant guilty of the four alternative ways of committing child abuse that were submitted to it.
DISCUSSION

1. There was sufficient evidence that Defendant inflicted the injuries that led to Victim’s death.

{17} Defendant argues that there was insufficient evidence to support her conviction because there was no evidence that Defendant was present when Victim received his injuries. Defendant contends that medical testimony simply could not establish the time at which Victim’s injuries were inflicted. While there was ample evidence and conflict in the evidence upon which Defendant could argue, and did argue, that the injury occurred while Victim was in the care of Father at the hospital, we disagree with Defendant that there was insufficient evidence that the injuries occurred during her custodial care.

{18} Recently, in State v. Garcia, 2005-NMSC-017, ___, N.M. ___, 116 P.3d 72, our Supreme Court held:

When determining the sufficiency of the evidence, the court views the evidence in a light most favorable to the verdict, considering that the State has the burden of proof beyond a reasonable doubt. The court should not re-weigh the evidence to determine if there was another hypothesis that would support innocence or replace the fact-finder’s view of the evidence with the appellate court’s own view of the evidence.

Id. ¶ 12 (internal citations omitted). The Court also noted that our role is to determine whether a rational fact-finder could determine beyond a reasonable doubt the essential facts necessary to convict the accused. Id. Reasonable doubt is defined as “a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.” UJI 14-5060 NMRA.

{19} In this case, according to the jury instructions, an essential element of each of the alternative crimes with which Defendant was charged was that Defendant had either intentionally or negligently caused the injuries that led to Victim’s death. Also, the instructions informed the jury that the State bore the burden of proving this element, as well as each and every element of the crimes, beyond a reasonable doubt.

Our review indicates that although much of the evidence the State used to prove that Defendant had caused Victim’s injuries was based on circumstantial evidence and expert testimony, the State presented sufficient evidence to prove beyond a reason-
view of the case when the communicating juror stated that the other juror did not believe the expert and that the other juror was not going to change her mind. The trial court then instructed the juror to “just report that you are hung.” Additionally, the trial court instructed the juror to “continue and do whatever” the juror had to do and to “just report - - just report to me.” The juror then stated, “[W]ell, I’ll just indicate to you that we’re hung.” Thus, the record clearly indicates that this communication between the juror and the trial court was related to the subject matter of the case as the communication concerned the inner workings of the jury room and the jurors’ view of the evidence. Therefore, the conversation was an improper communication between the trial court and the jury. We must now determine if the State rebutted the presumption of prejudice that arose from the improper communication.

{25} On appeal, the State does not argue that it rebutted the presumption of prejudice at the trial level after counsel had been informed of the communication. The State argues that there was no improper communication; therefore, no presumption of prejudice arose, and thus the State did not need to rebut any prejudice. Having already found that the trial court’s communication with the juror was improper, we conclude that a presumption of prejudice did arise and the State’s failure to rebut that prejudice warrants reversal.

{26} Indeed, the facts of this case indicate that the State would be hard pressed to rebut the presumption. The trial court informed counsel of the communication with the juror at 4:20 p.m., at which time the communicating juror indicated that the jury was hung and that the other juror would not change her mind even if the jury deliberated for two months. Yet, shortly after 5:00 p.m. on the same day that the communication between the juror and the trial court took place, the jury returned a verdict on all four alternatives of the crime with which Defendant was charged. At a motion hearing held approximately three weeks after the verdict was announced, Defendant asserted, and the State did not disagree, that when the jury filed out to announce its verdict, one juror appeared extremely distraught and seemed ostracized by all the other jurors. Therefore, the presumption of prejudice appears particularly appropriate in this case. Furthermore, the State’s complete failure to rebut the presumption of prejudice appears quite similar to what occurred in another leading case.

{27} In State v. Orona, 92 N.M. 450, 455, 589 P.2d 1041, 1046 (1979), the trial court answered two notes from the jury outside the presence of the defendant and his counsel. The jury’s first note asked how the case got before the grand jury. Id. The trial court answered the question through a note by informing the jury that grand jury proceedings are initiated by the district attorney and that it “really does not matter how a case gets started—the important thing is that you, the jury, hear and decide the entire case on your own.” Id. The jury sent out a second note, which simply read, “Four not guilty, eight—guilty—both counts.” Id. The trial court’s answer was that “Your verdict must be unanimous. You have not been deliberating all that long, and I request that you continue to see if you can arrive at a unanimous verdict.” Id. The Supreme Court noted that although the trial court’s answer may not have affected the jury’s verdict, the court’s communication with the jury violated proper trial procedure. Id. at 456, 589 P.2d at 1047. The Court also noted that the state made no attempt to rebut the presumption of prejudice that arose from the communications. Id. Therefore, the Court held that “[t]his Court has long recognized that any communication by a trial court with the jury must be in open court in the presence of counsel and the defendant. See State v. McCarter, 93 N.M. 708, 711, 604 P.2d 1242, 1245 (1980) (stating that ‘[t]his Court has long recognized that any communication by a trial court with the jury must be in open court in the presence of the accused and his counsel,’ and ‘[i]t is highly improper for the trial court to have any communication with the jury except in open court and in the presence of the accused and his counsel’ (internal quotation marks and citations omitted)). Here, when the juror first told the court that she had a complaint about another juror, the trial judge should have stopped the juror and properly convened the proceedings. The judge having not done so and the State having not rebutted the presumption of prejudice, we are compelled to reverse.

CONCLUSION

{29} Defendant’s conviction is reversed, and we remand for a new trial.

{30} IT IS SO ORDERED.
LYNN PICKARD, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge
CELIA FOY CASTILLO, Judge
From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-120

STATE OF NEW MEXICO
Plaintiff-Appellee, versus
VALERIE A. DUHON,
Defendant-Appellant.
No. 24,222 (filed August 22, 2005)

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
ROBERT C. BRACK, JR., District Judge

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OPINION

MICHAEL E. VIGIL, JUDGE

{1} Defendant appeals the district court’s refusal to grant her presentence confinement credit for the full period of time that she spent under house arrest pursuant to an electronic monitoring program. We reverse Defendant’s sentence and remand with instructions to grant her presentence credit for the full period of time that she spent under house arrest.

BACKGROUND

{2} Defendant was charged with committing forgery on February 28, 2001. On May 9, 2001, she was charged in a homicide/burglary case with being an accessory to second degree murder, burglary, tampering with evidence, and harboring a felon. The cases were subsequently consolidated.

{3} On July 11, 2001, Defendant and the State agreed to a “Stipulated Order on Appearance Bond and Conditions of Release” (Stipulated Order) which was approved and adopted as an order of the district court. It directed that Defendant be released on a $20,000 appearance bond with the following conditions: (1) that she be placed on “strict house arrest”; (2) that she “wear an ankle bracelet provided and monitored twenty-four (24) hours a day”; (3) that she submit to random urinalysis by the adult probation office; (4) that she check in daily with the adult probation office; and (5) that she be allowed to travel while accompanied by her parents only to meet with her attorney, for medical emergencies, to church, and to mental health counseling. {Id.}

{4} Defendant and the State also negotiated a guilty plea agreement which they filed on July 11, 2001. The plea agreement required Defendant to cooperate fully with law enforcement in the investigation and subsequent prosecution of all individuals involved in the homicide/burglary. The guilty plea agreement was subsequently approved by the district court on September 13, 2001. Disposition of Defendant’s case was then deferred pending disposition of the homicide/burglary case, and Defendant’s house arrest continued under the conditions of release set forth in the Stipulated Order.

{5} Defendant remained under house arrest pursuant to the electronic monitoring program as specified in the Stipulated Order from July 12, 2001, until she appeared for final sentencing on May 23, 2003, after the homicide/burglary case was concluded. Defendant complied with all the conditions of the Stipulated Order and requested presentence confinement credit for the entire time she was under house arrest. The State objected and a subsequent hearing was held, in which the parties addressed the credit issue. The district court ultimately granted Defendant credit for 340 days, which was only one-half of the time that she spent under house arrest. Defendant appeals.

DISCUSSION

A. Entitlement to Presentence Confinement Credit

{6} Defendant is entitled to presentence confinement credit if her house arrest pursuant to the electronic monitoring program constituted “official confinement.” NMSA 1978, § 31-20-12 (“A person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent in confinement against any sentence finally imposed for that offense.”). A two-part test applies, requiring that:

1. a court has entered an order releasing the defendant from a facility but has imposed limitations on the defendant’s freedom of movement, OR the defendant is in the actual or constructive custody or state or local law enforcement or correctional officers; and
2. the defendant is punishable for a crime of escape if there is an unauthorized departure from the place of confinement or other noncompliance with the court’s order.

State v. Fellhauer, 1997-NMCA-064, ¶ 17, 123 N.M. 476, 943 P.2d 123.

{7} The State concedes that the Stipulated Order setting the conditions of Defendant’s release meets the first part of the Fellhauer test. We agree. The conditions that she be on “strict house arrest,” that she check in daily with the adult probation office, and that she be allowed to travel only to meet with her attorney, for medical emergencies, to church, and to mental health counseling, and then only while accompanied by her parents clearly constitute limitations on her freedom of movement to satisfy the first part of Fellhauer.

State v. Guillen, 2001-NMCA-079, ¶ 11, 130 N.M. 803, 32 P.3d 812 (holding that any defendant charged with a felony who is released “under conditions of house arrest that require the defendant to remain at home except to attend specified events such as treatment, work, or school” places sufficient limitations on that defendant’s freedom of movement to satisfy first part of Fellhauer test).

{8} The issue presented here is whether Defendant was subject to punishment for a crime of escape under the second part of the Fellhauer test. Guillen holds that release of a defendant under conditions of house arrest pursuant to a community custody release program that holds the defendant liable to a charge of escape under NMSA 1978, § 30-22-8.1 (1999) satisfies the second prong of Fellhauer.

Section 30-22-8.1(A).

The district court focused on whether Defendant’s house arrest was pursuant to a “judicially approved community custody release program.” The district court stated it was unaware of a “judicially approved community custody release program” in the Ninth Judicial District, and in its letter decision to counsel, the district court stated that the county had not authorized the establishment of a community-release program, citing NMSA 1978, § 33-3-24(1981) (“The sheriff of any county or the jail administrator of any jail with the approval of the board of county commissioners and the governing body of the municipality, as applicable, may establish a prisoner-release program.”). The district court apparently concluded that since Defendant’s house arrest was not pursuant to a formally adopted, county-wide, pre-existing uniform system of release, her release was not pursuant to a “judicially approved community custody release program,” and Defendant was therefore not subject to liability under Section 30-22-8.1. Accordingly, Defendant’s request for full presentence confinement credit was denied.

The parties dispute the scope of the district court’s authority on remand. The State contends that the appropriate procedure is an order of “remand for an entirely new sentencing hearing, at which the length of Defendant’s sentence would be decided de novo, restricted only by the terms of her plea agreement.” Defendant contends that the inquiry should be limited to recalculation of her presentence confinement credit and application of that credit to her existing sentence. We agree with Defendant.

The district court sentenced Defendant to a total prison term of twelve years and six months but suspended four years and six months, resulting in an eight-year prison sentence, to be followed by supervised probation, then parole. There is no dispute that Defendant’s underlying eight-year sentence is valid and within statutory limitations. However, the State contends that the miscalculation of Defendant’s presentence confinement credit rendered her entire sentence illegal, such that the sentence as a whole may be reconsidered on remand. Therefore, the State contends, Defendant’s underlying eight-year sentence is subject to being increased to twelve years. This argument overlooks the nature of presentence confinement credit.

**B. The Mandate on Remand**

The parties dispute the scope of the district court’s authority on remand. The State contends that the appropriate procedure is an order of “remand for an entirely new sentencing hearing, at which the length of Defendant’s sentence would be decided de novo, restricted only by the terms of her plea agreement.” Defendant contends that the inquiry should be limited to recalculation of her presentence confinement credit and application of that credit to her existing sentence. We agree with Defendant.

Finally, we consider policy. It seems reasonably clear that Section 30-22-8.1 was designed to create incentives for complying with the conditions of restrictive house arrest, just as the more general escape statutes were designed to create incentives for inmates to remain in jail or the penitentiary. The societal interest in obtaining criminal defendants’ compliance with custodial re-
Section 31-20-12 is mandatory, modified on other grounds as recognized by State v. Romero, 2002-NMCA-106, ¶¶ 7-13, 132 N.M. 745, 55 P.3d 441. The judgment and sentence is therefore subject to correction for inclusion of the mandatory period of presentence confinement credit. See State v. Abril, 2003-NMCA-111, ¶ 20, 134 N.M. 326, 76 P.3d 644 (“Where a sentence lacks a statutorily mandated provision, the trial court retains jurisdiction to correct the sentence by adding the omitted term.”) (Emphasis added.)); see, e.g., State v. Aragon, 109 N.M. 632, 638, 788 P.2d 932, 938 (Ct. App. 1990) (holding that the judgment and sentence could properly be amended to add a statutorily mandated restitution requirement); State v. Acuna, 103 N.M. 279, 280, 705 P.2d 685, 686 (Ct. App. 1985) (holding that a sentence could properly be amended to include a mandatory parole period). Correcting the judgment and sentence to accurately state the amount of presentence confinement credit Defendant is entitled to receive has no effect on the valid, underlying eight-year sentence. We are aware of no New Mexico case law suggesting that a sentence which fails to include a mandatory provision, as in this case, is subject to wholesale revision in the manner sought by the State. See Abril, 2003-NMCA-111, ¶ 20; cf. State v. Charlton, 115 N.M. 35, 38, 846 P.2d 341, 344 (Ct. App. 1992) (“When a trial court imposes one valid and one invalid sentence, this court will sever the sentences if possible in order to give effect to the valid sentence.”). We therefore reject the State’s argument that the sentence, as a whole, is illegal and subject to reconsideration.

Furthermore, the constitutional protection against double jeopardy prohibits increasing Defendant’s sentence. N.M. Const. art. II, § 15. “It is a well-established principle of New Mexico law that a trial court generally cannot increase a valid sentence once a defendant begins serving that sentence.” State v. Porras, 1999-NMCA-016, ¶ 7, 126 N.M. 628, 973 P.2d 880. Since Defendant has started to serve her sentence, it can now be increased only if the underlying eight-year sentence itself is invalid. Id. Again, the underlying sentence itself is not invalid. While the failure to include the total amount of statutory presentence confinement credit that Defendant is entitled to receive requires correction, this does not render the underlying eight-year sentence itself invalid. See State v. McDonald, 113 N.M. 305, 307, 825 P.2d 238, 240 (Ct. App. 1991) (stating that a district court’s allegedly improper denial of presentence confinement credit did not present a situation in which the sentence imposed was illegal). Given that the underlying eight-year sentence, which Defendant has begun to serve, is not illegal, it cannot now be increased. See Porras, 1999-NMCA-016, ¶ 7.

The State contends that because Defendant has challenged her sentence, she could not have developed a “reasonable expectation of finality” in her sentence, and resentencing is permissible. See State v. Villalobos, 1998-NMSC-036, ¶ 5, 126 N.M. 255, 968 P.2d 766 (noting the holding of United States v. DiFrancesco, 449 U.S. 117 (1980) that “no reasonable expectation of finality exists in a sentence [for double jeopardy purposes] when Congress has enacted a statute allowing for the possibility the prosecutor could still successfully appeal the sentence”). However, Defendant has never sought to overturn her underlying eight-year sentence. Her challenge has always been limited to the presence confinement credit issue. We have already concluded that this limited challenge does not undermine the validity of the underlying sentence.

Finally, the State argues that resentencing should be permitted so that the original intent of the sentencing court can be effectuated. In this regard, the district court stated that it “never contemplated, nor approved, the notion that the time [Defendant] spent under house arrest would count as time of incarceration.” To the extent that the State relies on the sentencing package doctrine as explained in cases such as United States v. Hicks, 146 F.3d 1198, 1202-03 (10th Cir. 1998), we point out that, by its terms, the doctrine applies to multiple count cases in which one or more counts are reversed. Here, no count was reversed, and the possibility of this Court’s requiring full credit was apparent to the district court at the time it made its ruling. Indeed, if the district court truly intended to require Defendant to serve a particular amount of time, it could have granted the requested presentence confinement credit and lessened the number of years that would be suspended.

CONCLUSION

We reverse Defendant’s sentence and remand with instructions to grant Defendant the total presentence confinement credit to which she is entitled.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Chief Judge
LYNN PICKARD, Judge
Defendant Shawna Brenn appeals her conviction for attempted trafficking in methamphetamine by manufacture, arguing that the evidence was insufficient to support her conviction because it did not indicate that she took any act to manufacture methamphetamine. Defendant had rented a hotel room in which she and another had large quantities of materials necessary to manufacture methamphetamine, some of which was unpackaged. We conclude that the evidence was sufficient to support the conclusion that Defendant had not merely engaged in preparation, but had taken a substantial step toward the manufacture of methamphetamine. As a result, we affirm Defendant’s conviction for attempted manufacturing.

**Background**

Two New Mexico State Police Officers, Christina Madrigal and Eric Mendez, narcotics agents, had learned that an unidentified male had purchased seven gallons of iodine from a local feed store in Clovis, New Mexico. The officers tracked the vehicle used by the purchaser of the iodine to a local motel where Defendant had rented a room. The vehicle, which was also rented to Defendant, was in the parking lot, and the officers saw a large amount of iodine in the back of the vehicle. The officers knocked on the motel room door and Defendant answered. The room was filled with smoke and contained two methamphetamine pipes. Defendant informed the officers that she and the other person in the room, a male named Rodriguez, were smoking methamphetamine when the officers arrived. After obtaining Defendant’s consent to search the room, the officers found numerous items that testimony established to be essential ingredients in manufacturing methamphetamine.

Defendant was charged with one count of attempted trafficking of methamphetamine by manufacture, one count of possession of methamphetamine, and one count of possession of drug paraphernalia. The possession of methamphetamine charge was dismissed before trial, and Defendant was tried and convicted on the other two charges. Defendant now appeals those convictions.

**Standard of Review**

When reviewing a claim of insufficiency of the evidence, we determine whether substantial evidence, either direct or circumstantial, exists to support a verdict of guilt beyond a reasonable doubt for every essential element of the crime at issue. State v. Apodaca, 118 N.M. 762, 766, 887 P.2d 756, 760 (1994). A sufficiency of the evidence review involves a two-step process. Id. at 766, 887 P.2d at 760. Initially, we view the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all reasonable inferences in favor of the verdict. Id. “[T]hen we make a legal determination of whether the evidence viewed in this manner could justify a finding by a rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt.” Id. (internal quotation marks and citation omitted); cf. State v. Stettheimer, 94 N.M. 149, 153-54, 607 P.2d 1167, 1171-72 (Ct. App. 1980) (observing that although the defendant alleged insufficient evidence to constitute attempt, his allegation that there was no overt act in furtherance of the crime but instead merely preparation raises a legal issue). We do not reweigh the evidence or substitute our judgment for that of the factfinder. State v. Mora, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789.

**Sufficiency of the Evidence**

The felony of trafficking by manufacturing consists of “manufacture of any controlled substance enumerated in Schedules I through V or any controlled substance analog as defined in Subsection W of Section 30-31-2.” NMSA 1978, § 30-31-20(A)(1) (1990). Methamphetamine is a Schedule II controlled substance. See NMSA 1978, § 30-31-7(A)(3)(c) (1979). “‘[M]anufacture’ means the production, preparation, compounding, conversion or processing of a controlled substance . . . .” NMSA 1978, § 30-31-2(M) (2002). The jury was instructed that, to convict Defendant of attempt to manufacture methamphetamine, it had to find beyond a reasonable doubt that Defendant intended to commit the crime of manufacturing methamphetamine and that she began to do an act which constituted a substantial part of the manufacturing but failed to commit the act of manufacturing. See UJI 14-2801 NMRA. The jury was also instructed that it could convict Defendant of attempt to manufacture under the theory of accessory liability if it found, beyond a reasonable doubt, that Defendant intended that the crime of manufacturing be committed, an attempt to commit the crime was committed, and Defendant helped, encouraged, or caused the attempt to commit the crime. See UJI 14-2820 NMRA.

Defendant contends that her conviction for attempted manufacture of a controlled substance must be reversed because the State failed to show that Defendant did any actions in furtherance of the crime of manufacturing methamphetamine. She claims that the State failed to prove that she took even “one single step toward manufacturing methamphetamine, let alone an act that constituted a substantial part of manufacturing.” She notes that the testimony at trial
only indicated that Rodriguez purchased the iodine and that there was nothing to prove that Defendant “had anything to do with the various meth ingredients found in the motel room.” We disagree.

{7} At trial, the officers testified in support of Defendant’s conviction. Their testimony established that an unidentified male purchased nine gallons of iodine and drove away with seven gallons in a bright yellow Ford Escape. Madrigal testified that the purchase of such a large amount of iodine was suspicious and, based upon her training and experience, the purchaser of such a large quantity usually intended to use it to cook methamphetamine. Mendoza testified that he knew of no common use for that quantity of iodine. Both officers stated that iodine was a key ingredient in manufacturing methamphetamine.

{8} Madrigal testified that, after tracking the vehicle used by the purchaser of the iodine to the Motel 6 on Mabry Drive, she saw the yellow Ford Escape, which had been rented to Defendant, with a large amount of iodine stored in the back. The officers knocked on the door of the motel room registered to Defendant and Defendant answered. The room was filled with smoke and contained two methamphetamine pipes. Defendant admitted that she and Rodriguez were smoking methamphetamine when the officers arrived.

{9} The search of the motel room revealed over 5000 pseudoephedrine pills, a quart of acetone, scales, and an air purifier. Most of the pseudoephedrine pill boxes had been opened and the pills removed from their blister packs. The loose pills were stored in a box on the floor of the motel room while the boxes of pills were found in a backpack.

{10} Mendoza testified that Defendant had told him that she had been using methamphetamine since the age of fourteen. She said that she and Rodriguez traveled to Clovis to purchase iodine because the price there, $25 per gallon, was much less than the price in Albuquerque, where iodine is sold for $125 per gallon. Defendant told Mendoza that she understood that iodine was to be used to manufacture methamphetamine and that she could make good money trading the iodine “to cooks or manufacturers of methamphetamine in Albuquerque.”

{11} Testimony established that pseudoephedrine pills are cold and allergy pills which contain ephedrine, an essential ingredient in manufacturing methamphetamine. After testifying to his specialized training in methamphetamine labs, Mendoza testified that the acetone, iodine, and pseudoephedrine pills are the basis for manufacturing methamphetamine. He stated that ephedrine is a precursor to methamphetamine and explained that the types of chemicals found in the motel room are associated with the “red phosphorus” method of manufacturing, which requires combining ephedrine, iodine, and red phosphorus, which are then heated.

{12} Defendant testified. However, her testimony was neither internally consistent nor consistent with her earlier statements to the investigating officers. At trial, Defendant claimed that she did not know that the backpack contained pseudoephedrine pills, and she denied telling Mendoza that he would find pills in the room. She later admitted seeing the packaged pills in their boxes and admitted telling the officers that she knew about the blister packs of pseudoephedrine. She admitted telling the officers that she knew iodine and ephedrine are key ingredients in manufacturing methamphetamine. However, she also claimed that she knew nothing about the technicalities for manufacturing methamphetamine.

{13} Defendant first denied knowing that Rodriguez was buying iodine and denied ever telling the officers that Rodriguez intended to buy iodine or that she intended to resell iodine in Albuquerque. She then admitted that she told Mendoza that iodine could be sold for $125 per gallon in Albuquerque and admitted that she had told Mendoza that she was in Clovis to purchase iodine because it is cheaper. She explained the inconsistencies in her statements by claiming that she had only told Mendoza about the cheaper iodine because she assumed Rodriguez would resell the iodine once she saw the receipt for the iodine after Rodriguez returned to the room. She admitted telling the officers that she started using methamphetamine at age fourteen, but claimed that this was a lie and that she had only been regularly using methamphetamine for about a year. She claimed that she had no idea that she was going to Clovis when she left Albuquerque with Rodriguez and denied renting the vehicle.

{14} We now consider whether the evidence reviewed above is sufficient to support Defendant’s conviction for attempt to manufacture methamphetamine. In order to be guilty of the crime of attempt to manufacture methamphetamine, Defendant must commit an overt act in furtherance of the crime of manufacturing and that act must be “more than mere preparation.” State v. Green, 116 N.M. 273, 280, 861 P.2d 954, 961 (1993); see NMSA 1978, § 30-28-1 (1963) (defining the crime of attempt as “an overt act in furtherance of and with intent to commit [the] felony and tending but failing to effect its commission”). However, even “slight acts in furtherance [of the crime] will constitute an attempt.” Stettheimer, 94 N.M. at 153-54, 607 P.2d at 1171-72 (internal quotation marks and citation omitted).

{15} Defendant’s actions in possessing over 5000 pseudoephedrine pills, most of which were unpackaged, together with acetone and iodine, are sufficient to establish the requisite overt act for attempt. The jury could infer that Defendant was attempting to manufacture methamphetamine because there is no legal purpose for Defendant to possess such a large amount of pseudoephedrine and iodine. See United States v. Haynes, 372 F.3d 1164, 1169 (10th Cir. 2004) (holding that the defendant’s possession of “P2P,” known to be useful in the manufacture of methamphetamine and also known to have no purpose other than to aid in manufacture, together with the possession of other items that can be used for manufacture, “was ample evidence for a reasonable jury to conclude beyond a reasonable doubt that [the] [d]efendant had taken a substantial step in the manufacture of methamphetamine”); cf. Model Penal Code § 5.01(2)(f) (1985) (specifying actions that are not insufficient as a matter of law to establish a substantial step toward commission of the underlying offense and including “possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances”).

{16} In light of Defendant’s failure to adequately explain the large amount of unpackaged pseudoephedrine, the jury could disbelieve Defendant’s explanation that the iodine was purchased for resale. See United States v. Becker, 230 F.3d 1224, 1234 (10th Cir. 2000) (holding that the defendant’s possession of a recipe and some ingredients for the “hot” method of manufacturing methamphetamine, some ingredients for the “cold” method of manufacturing, and materials that were inconsistent with the defendant’s explanation was sufficient to convict the defendant of attempt to manufacture methamphetamine). It would be reasonable for the jury to doubt Defendant’s explanation about the iodine because her stated intention to
The jury was free to reject Defendant’s explanation for her statement to Mendoza. See United States v. Smith, 264 F.3d 1012, 1017 (10th Cir. 2001) (holding that it was reasonable for the district court to reject the defendant’s contention that he was making pure pseudoephedrine to sell to another manufacturer of methamphetamine and noting that the receipt for fuel, which is used at the end of the manufacturing process, cast doubt on the defendant’s claim).

{17} Defendant also contends that there was no evidence from which the jury could reasonably infer that Defendant participated in obtaining the unpackaged pseudoephedrine pills and the iodine. We disagree. Based upon circumstantial evidence, the jury could infer that Defendant, despite her claims to the contrary, had knowledge of the presence of, and possessed control over, the unpackaged drugs and the iodine. See State v. Phillips, 2000-NMCA-028, ¶ 8, 128 N.M. 777, 999 P.2d 477 (holding that the jury could have seen the defendant’s denials to be contrived and concluded that she knew more than she acknowledged about the contraband seized from the room she shared with her boyfriend based upon her earlier statements admitting that she knew of the contraband, her concession that she had used drugs in the past, and her statement to police that she “thought that in order to be charged with possession [of drugs], you actually had to have it on you.”) (alteration in original).

{19} Based upon the foregoing, there was sufficient circumstantial evidence to allow the jury to find that Defendant knew of, and possessed, the pseudoephedrine pills, acetone, and iodine. See State v. Chandler, 119 N.M. 727, 731, 895 P.2d 249, 253 (Ct. App. 1995) (holding that jury members are free to “use their common sense to look through testimony and draw inferences from all the surrounding circumstances”) (internal quotation marks and citation omitted). Defendant’s claim that the pseudoephedrine, acetone, and iodine belonged to Rodriguez to divest herself of possession and control over the materials “may have some force as an abstract proposition; but the jury [was] free to find to the contrary on the evidence here.” Id. at 731, 895 P.2d at 253 (internal quotation marks and citation omitted).

{20} Defendant also claims that, even if the jury could conclude that she unpackaged the pills, this action does not constitute a substantial part of manufacturing as required for the crime of attempt. She references Mendoza’s explanation of the steps necessary to manufacture methamphetamine as support for her argument that unpackaging is not a substantial step. She also relies on the distinction between pseudoephedrine and ephedrine and notes that only the latter is an immediate precursor for methamphetamine. She argues that, given Mendoza’s testimony as to the steps in manufacturing, even if the jury was allowed to infer that Defendant had removed the pseudoephedrine pills from the blister packs, such unpackaging is only a preparatory step which is not the requisite substantial step necessary for an attempt conviction. We disagree.

{21} Mendoza’s testimony shows that the very first essential step in manufacturing methamphetamine is to separate the ephedrine from its base in the pseudoephedrine pills. “This act is more than mere preparation” and stands as the first step “in a direct movement toward the commission of the offense after the preparation . . . is made.” Green, 116 N.M. at 283, 861 P.2d at 964 (internal quotation marks and citation omitted). Therefore, the unpackaging, coupled with Defendant’s actions in helping to obtain the iodine and acetone and renting the motel room and car, is sufficient evidence of a substantial step toward the manufacturing of methamphetamine.

{22} We are also unpersuaded by Defendant’s contention that her actions cannot constitute a substantial step because the search did not uncover all of the materials necessary to initiate manufacturing and because methamphetamine could not be manufactured with the materials present in the motel room. Defendant is correct that all of the materials necessary to manufacture methamphetamine were not present in the motel room; the officers failed to find any heat source, beakers, or burners. However, we are unpersuaded that this lack of materials warrants reversal. Instead, we agree with the holding of the Court in Smith that a defendant need not have “a full ‘working lab’” to be convicted of attempt to manufacture methamphetamine. Smith, 264 F.3d at 1016.

{23} We recognize that the dividing line between attempt and preparation is not always clear and is heavily dependent upon the surrounding factual circumstances. Stetheimer, 94 N.M. at 154, 607 P.2d at 1172; see also Smith, 264 F.3d at 1016. However, the circumstantial evidence in this case is more than sufficient for the jury to draw reasonable inferences that Defendant committed an overt act in furtherance of the crime of manufacturing methamphetamine. See Becker, 230 F.3d at 1234. In addition to obtaining and possessing suspiciously large amounts of pseudoephedrine and iodine, Defendant’s overt acts include renting a car to travel to Clovis to obtain inexpensive iodine, renting a motel room where unpackaged pseudoephedrine was stored, and admittedly smoking methamphetamine in a room containing over 5000 pseudoephedrine pills, scales, and acetone—materials necessary to manufacture methamphetamine. These actions are sufficient to constitute an overt act in furtherance of the manufacture of methamphetamine. See United States v. Jessup, 305 F.3d 300, 303
(5th Cir. 2002) (rejecting the defendant’s challenge to the sufficiency of the evidence and holding that “[t]he affirmative act of collecting a substantial part of the equipment and ingredients for manufacturing methamphetamine can constitute action beyond ‘mere preparation’ sufficient to constitute a substantial step”); State v. Sheikh, 41 P.3d 290, 291-93 (Kan. Ct. App. 2001) (reversing the dismissal of the attempt to manufacture charge based on the defendant’s overt actions in removing approximately 672 pseudoephedrine tablets from their blister packs and putting the pills, along with other items used in manufacturing methamphetamine and a handgun, in the defendant’s vehicle and the defendant’s admission that he was intending to drive to another location to cook methamphetamine).

{24} Furthermore, we disagree with Defendant’s contention that the evidence is insufficient to establish the requisite intent to manufacture methamphetamine. Intent is usually established by circumstantial evidence. See State v. Gallegos, 109 N.M. 55, 66, 781 P.2d 783, 794 (Ct. App. 1989) (stating that intent is usually inferred from the facts of the case, not direct evidence); State v. Gregg, 83 N.M. 397, 399, 492 P.2d 1260, 1262 (Ct. App. 1972) (holding that there was substantial evidence of the defendant’s fraudulent intent even though the evidence was circumstantial). Defendant’s actions in renting a car to travel to Clovis to obtain relatively inexpensive iodine, renting a motel room where unpackaged pseudoephedrine was stored, admittedly smoking methamphetamine in a room containing over 5000 pseudoephedrine pills, scales, and acetone, and providing inconsistent statements to the investigating officers are sufficient circumstantial evidence of her intent to manufacture methamphetamine.

{25} Finally, even in the absence of any evidence directly connecting Defendant to the opening of the pseudoephedrine blister packs, or directly connecting her to the purchase of the iodine, there is sufficient evidence to convict Defendant under a theory of accomplice liability. See State v. Carrasco, 1997-NMSC-047, ¶ 6, 124 N.M. 64, 946 P.2d 1075 (noting that accessory liability is equal to that of the principal); see also State v. Bankert, 117 N.M. 614, 619-20, 875 P.2d 370, 375-76 (1994) (affirming the defendant’s conviction for trafficking cocaine by possession with intent to distribute based upon evidence showing that the defendant’s accomplice engaged in the possession with intent to distribute because, even though the defendant “never touched the cocaine and was often not in the same room where the drug deal took place,” because the defendant’s actions as “financier of the endeavor” and transporter by way of his personal vehicle sufficiently demonstrated accomplice status). The jury could infer from Defendant’s behavior in smoking methamphetamine, furnishing the car and the room, and providing inconsistent statements about her knowledge of the iodine and the amount of the pseudoephedrine tablets, that she was helping, encouraging, or causing the attempt to manufacture.

{26} Moreover, this same evidence is sufficient to establish that Defendant had the requisite intent to commit trafficking by manufacturing, which is necessary to convict Defendant as an accessory. See Carrasco, 1997-NMSC-047, ¶ 7 (observing that an accessory’s intent may be established by inference from the surrounding facts and circumstances and stating that “intent can be inferred from behavior which encourages the act”); cf. Bankert, 117 N.M. at 619, 875 P.2d at 375 (indicating that intent may be proven “by inference from the surrounding facts and circumstances”) (internal quotation marks and citation omitted). The evidence “is not so thin that we can say as a matter of law that no rational jury could find the required facts to support [a] conviction.” Carrasco, 1997-NMSC-047, ¶ 14.

Conclusion

{27} Having reviewed the evidence in the light most favorable to the verdict, we conclude there was sufficient evidence to support Defendant’s conviction for attempted trafficking in methamphetamine by manufacture beyond a reasonable doubt. We affirm Defendant’s convictions.

{28} IT IS SO ORDERED.

JAMES J. WECHSLER,
Judge

WE CONCUR:
LYNN PICKARD, Judge
CELIA FOY CASTILLO, Judge
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The New Mexico Public Education Department (NMPED) has amended Request for Proposals (RFP) number 06-001 (Special Education Hearing Officers and Administrative Appeal Officers) and number 06-002 (Special Education Mediators). To download the amended RFPs, please refer to the NMPED website at www.ped.state.nm.us. For further information regarding this Amendment, you may contact Steve Oldroyd at (505) 827-1457 or by email at steve.oldroyd@state.nm.us.

Amendment Notice - RFP # 06-001
The New Mexico Public Education Department (NMPED) has amended Request for Proposals (RFP) number 06-001 (Special Education Hearing Officers and Administrative Appeal Officers) and number 06-002 (Special Education Mediators). To download the amended RFPs, please refer to the NMPED website at www.ped.state.nm.us. For further information regarding this Amendment, you may contact Steve Oldroyd at (505) 827-1457 or by email at steve.oldroyd@state.nm.us.

TITLE: Special Education Hearing Officers and Administrative Appeal Officers
RFP # 06-001
PURPOSE: The New Mexico Public Education Department is issuing this Request for Proposals (RFP) to licensed New Mexico attorneys to serve as due process hearing officers and administrative appeal officers for disputes between parents and public education agencies in the public school special education system under the federal Individuals with Disabilities Education Act (IDEA). CONTACT PERSON: Leah Erickson, New Mexico Public Education Department, 120 S. Federal Place, Room 206, Santa Fe, NM 87501; (505) 827-1457; FAX (505) 954-0001; leah.erickson@state.nm.us. ISSUANCE: The Request for Proposals will be issued on October 19, 2005 via the Public Education Department web site at www.ped.state.nm.us. Firms unable to obtain a copy from the PED web site should contact Leah Erickson at the above address and phone number. If you reach voicemail, please very clearly provide and spell your name, company name, address and telephone number. Firms are encouraged to check the PED web site frequently as updates and other associated notices may be posted. PROPOSAL DUE DATE AND TIME: All offer or proposals must be received by the Procurement Manager, Steve Oldroyd, at the address specified in the RFP, no later than 5:00 p.m. on Friday, November 18, 2005. Proposals received after this deadline will not be accepted.

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TITLE: Special Education Hearing Officers and Administrative Appeal Officers
RFP # 06-001
PURPOSE: The State of New Mexico’s Public Education Department is issuing this Request for Proposals (RFP) to qualified individuals to serve as mediators for disputes between parents and public education agencies in the public school special education system under the federal Individuals with Disabilities Education Act (IDEA). CONTACT PERSON: Leah Erickson, New Mexico Public Education Department, 120 S. Federal Place, Room 206, Santa Fe, NM 87501; (505) 827-1457; FAX (505) 954-0001; leah.erickson@state.nm.us. ISSUANCE: The Request for Proposals will be issued on October 19, 2005 via the Public Education Department web site at www.ped.state.nm.us. Firms unable to obtain a copy from the PED web site should contact Leah Erickson at the above address and phone number. If you reach voicemail, please very clearly provide and spell your name, company name, address and telephone number. Firms are encouraged to check the PED web site frequently as updates and other associated notices may be posted. PROPOSAL DUE DATE AND TIME: All offer or proposals must be received by the Procurement Manager, Steve Oldroyd, at the address specified in the RFP, no later than 5:00 p.m. on Friday, November 18, 2005. Proposals received after this deadline will not be accepted.

Amendment Notice - RFP # 06-002
The New Mexico Public Education Department (NMPED) has amended Request for Proposals (RFP) number 06-001 (Special Education Hearing Officers and Administrative Appeal Officers) and number 06-002 (Special Education Mediators). To download the amended RFPs, please refer to the NMPED website at www.ped.state.nm.us. For further information regarding this Amendment, you may contact Steve Oldroyd at (505) 827-1457 or by email at steve.oldroyd@state.nm.us.

TITLE: Special Education Mediators
RFP # 06-002
PURPOSE: The State of New Mexico’s Public Education Department is issuing this Request for Proposals (RFP) to qualified individuals to serve as mediators for disputes between parents and public education agencies in the public school special education system under the federal Individuals with Disabilities Education Act (IDEA). CONTACT PERSON: Leah Erickson, New Mexico Public Education Department, 120 S. Federal Place, Room 206, Santa Fe, NM 87501; (505) 827-1457; FAX (505) 954-0001; leah.erickson@state.nm.us. ISSUANCE: The Request for Proposals will be issued on October 19, 2005 via the Public Education Department web site at www.ped.state.nm.us. Firms unable to obtain a copy from the PED web site should contact Leah Erickson at the above address and phone number. If you reach voicemail, please very clearly provide and spell your name, company name, address and telephone number. Firms are encouraged to check the PED web site frequently as updates and other associated notices may be posted. PROPOSAL DUE DATE AND TIME: All offer or proposals must be received by the Procurement Manager, Steve Oldroyd, at the address specified in the RFP, no later than 5:00 p.m. on Friday, November 18, 2005. Proposals received after this deadline will not be accepted.
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The 2005 Real Property Institute will address a variety of the hot topics for New Mexico real estate lawyers, including transferring, conveying and securing water rights; doing green development; resolving and avoiding access problems; and closing transactions in Indian Country, including BIA guaranteed loans. This year’s title insurance update will focus on the new policy endorsements, RESPA and captive insurer issues. Professor Mike Norwood’s presentation will focus on legal ethics in Cyberspace: Security, Privacy and Beyond. The institute is designed for intermediate to advanced New Mexico real estate practitioners.

8:30 a.m. Registration
9:00 a.m. Annual Title Insurance Update
Stephen Rhoades, Esq., Stewart Title Guaranty Company
10:15 a.m. Break
10:30 a.m. Special Issues Relating to Doing Business in Indian Country
Nancy Appleby, Esq., Bracewell & Giuliani
The Role of the BIA in Lending and Economic Development
Jerry Ryburn, BIA
Noon Lunch (Provided at State Bar Center)
1:00 p.m. Annual Section Meeting
1:15 p.m. Transferring, Conveying and Securing Interests in Water Rights
Jimmy J. Craig, Ill, Esq.
Marion J. Craig, Ill, P.C.
2:15 p.m. Green Developments in New Mexico
Karen E. Wootton, Esq., Miller Stratvert P.A.
3:00 p.m. Access Issues in New Mexico
John N. Patterson, Esq., Scheuer, Yost & Patterson, P.C.
4:00 p.m. Security Issues and Ethical Responsibility
Professor Michael J. Norwood,
UNM School of Law
5:00 Adjourn
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