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2005-NMCA-141: State v. Raymundo Rodarte
2005-NMCA-142: State v. Leonardo Gallegos
2005-NMCA-143: State v. Stanley Bryant Hill

The 2006 License and Dues Forms have been mailed.
See page 8

Special Insert

Web Resources
CLE Programs – University of New Mexico School of Law

The UNM School of Law Alumni/ae Association, in conjunction with the John Field Simms Memorial Lecture Series, cordially invites the New Mexico legal community to “International Law and the United States Supreme Court,” presented by Harold Hongju Koh, Dean of Yale Law School.

Friday, January 27, 2006, 5:30-6:30 p.m. - Reception following UNM School of Law, 1117 Stanford NE, Albuquerque 1.0 General CLE Credit - $20 in advance or $25 at the door The lecture is free if not attended for CLE credit.

Dean Harold Hongju Koh has been on the faculty of the Yale Law School since 1985 and became the school’s 15th dean in July 2004. He continues to serve as the Gerard C. and Bernice Latrobe Smith Professor of International Law.

Koh graduated from Harvard College, Magdalen College at Oxford University and Harvard Law School. He clerked for Judge Malcolm Richard Wilkey of the D.C. Circuit and Justice Harry Blackmun of the U.S. Supreme Court. After practicing with a Washington, D.C. firm, Koh began teaching at George Washington University National Law Center, and then joined the faculty at Yale. He teaches international law, the law of U.S. foreign relations, international human rights, international organizations and international regimes, international business transactions, international trade and civil procedure. He is co-author of Foundations of International Law and Relations, published in 2004.

Is the United States Supreme Court is ready for the age of globalization? Dean Koh will discuss recent Supreme Court cases that involve global issues, and whether they demonstrate a consistent philosophy about how such issues ought to be addressed. Dean Koh also will explore the change in philosophy that may result from the recent appointment of Chief Justice John Roberts and the possible appointment of nominee Judge Samuel Alito.

The Simms lecture was established in 1954 by a gift from Albert Simms in memory of his brother, John, who was a trial lawyer and a justice of the New Mexico Supreme Court.

Free parking for this event is available in the Law School “L” lot.

CLE Registration: Fax or mail this completed form, or call to register by phone.

Name ____________________________________  NM Bar #_____________
Street ____________________________________  City/State/Zip_______________________
VISA ___ MC ___  Card # ________________________________Exp. Date ________ Total: $_______
Signature ____________________________________ Check enclosed ___ (payable to UNM School of Law)

Attn: Claire Conrad, UNM School of Law, MSC11-6070, 1 University of New Mexico, Albuquerque, NM, 87131-0001 Phone: 505-277-0080 Fax: 505-277-4165
2006 New Mexico Rules are now available!

This official set contains all of the official rules of the State of New Mexico as well as official annotations, forms and official commentary.

New MexicoCompilation Commission
Marketed to the Private Bar by Conway Greene Company

Contact us at 1-866-240-6550
www.conwaygreene.com

State agency and local public body subscribers to the New Mexico Rules Annotated™ will automatically receive new sets. If you have any questions regarding your subscription, please contact the New Mexico Compilation Commission at 505 827-4821

Also Available:

• 2005 New Mexico Advance Legislative Service
• New Mexico One Source of Law™
• 2005 New Mexico Criminal and Traffic Law Manual
• 2005 Updates to New Mexico Statutes Annotated 1978™
SEMINAR REGISTRATION FORM
CLE PROGRAMS - State Bar Center

JANUARY

17

Workplace Privacy
Tuesday, January 17, 9 a.m. - 12:15 p.m.
Video Replay - 3.0 General CLE Credits
$89

Medicare’s New Drug Coverage:
The Impact on Your Clients
Tuesday, January 17, 10 a.m. - Noon
Video Replay - 1.7 General CLE Credits
$59

Identity Theft
Tuesday, January 17, 1 p.m. - 4:15 p.m.
Video Replay - 3.0 General CLE Credits
$59

21

Seven Deadly Sins of Employment Law and HIPAA Security:
Double Secret Probation
Saturday, January 21, 9 a.m. - 4:45 p.m.
5.7 General CLE Credits

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

Name ____________________________
NM Bar # _________________________
Street ____________________________
City/State/Zip _____________________
Phone ___________________________ Fax _________________
E-mail ____________________________

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

Co-Sponsor: Paralegal Division

Seven Deadly Sins: An employer’s best defense in avoiding employment lawsuits and minimizing costs of defending lawsuits is the competence of the employer’s managers. Unfortunately, managers often are significantly more concerned with operational issues and the bottom line than they are with focusing on the morass of employment laws and regulations that have developed recently. This presentation by two of UNM’s Sr. Associate University Counsel members, Jean Bannan and Lee Fefel, is intended to serve as a reminder that if employers could avoid these mistakes, they might decrease their lawsuits and increase their ability to defend those that are filed. Each “sin” in this seminar will be illustrated by a recent case that will be discussed from both the plaintiff’s and defendant’s point of view.

HIPAA Security: Will Rogers once said, “The minute you read something and you can’t understand it you can almost be sure that it was drawn up by a lawyer. Then if you give it to another lawyer to read and he don’t know just what it means, why then you can be sure it was drawn up by a lawyer. If it’s in a few words and is plain and understandable only one way, it was written by a non-lawyer.” Remember, HIPAA was written by lawyers! While HIPAA privacy has received much attention over the past few years, HIPAA security is the new kid on the block. Come join UNM Interim General Counsel Scot Sauer for this informative seminar.

☐ Standard Fee $169
☐ Government, Paralegal, and Section Members $159
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Professionalism Tip

With respect to my clients:
I will work to achieve lawful objectives in all other matters as expeditiously and economically as possible.

Meetings

January

9
Taxation Section Board of Directors noon, via teleconference

9
Attorney Support Group 5:30 p.m., First United Methodist Church, Albuquerque

11
Law Office Management Committee noon, via teleconference

11
Membership Services Committee noon, via teleconference

12
Public Law Section Board of Directors noon, RMD Legal Bureau, Santa Fe

13
Natural Resources, Energy and Environmental Law Section Board of Directors noon, State Bar Center

State Bar Workshops

January

18
Lawyer Referral for the Elderly Workshop 10 a.m., Ena Mitchell Senior Center Lordsburg

19
Lawyer Referral for the Elderly Workshop 10 a.m., Silver City Senior Center Silver City

19
Lawyer Referral for the Elderly Workshop 1 p.m., San Felipe Pueblo

26
Lawyer Referral for the Elderly Workshop Credit/Debt Issues; New Bankruptcy Law 1:15 p.m., Meadowlark Senior Center Rio Rancho

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

COURT NEWS

NM SUPREME COURT

Judicial Performance Evaluation Commission
Improving The Performance of Judges

The Judicial Performance Evaluation Commission (JPEC), created by the New Mexico Supreme Court, evaluates the performance of appellate, district and metropolitan court judges standing for retention in New Mexico.

The commission’s work in 2005 focuses on conducting final evaluations of the 14 Bernalillo County Metropolitan Court judges standing for retention: Sandra Clinton, Kevin Fitzwater, Frank Gentry, Theresa Gomez, Victoria Grant, J. Wayne Griego, Cristina Jaramillo, Loretta Lopez, Anna Martinez, Judith Nakamura, Daniel Ramczyk, Frank Sedillo, Sharon Walton and Victor Valdez. At least 45 days before the November 2006 general election, JPEC will release the results of the evaluation to the media and the public.

Lawyers who have had direct experience with the above Bernalillo County Metropolitan Court judges between Aug. 1, 2004 and Sept. 26, 2005 will receive a questionnaire to complete in the beginning of January 2006. It is important to the project to get such feedback. The JPEC would like to see an increase in the response rates from attorneys with direct experience with the judges. Please take the time to complete and return the questionnaire.

The questionnaires are returned to Research and Polling, Inc., consultant to JPEC. Research and Polling puts together aggregate results by population group (lawyers, jurors, court staff and resource staff). The JPEC does not see individual results. Comments are retyped and submitted to JPEC for review and not provided to the judges. Research and Polling destroys the individual responses; thus, JPEC does not know who completed the survey.

For additional information, contact Felix Briones, Jr., JPEC chair, (505) 325-0258.

Law Library Closings

The New Mexico Supreme Court Law Library will be closed Jan. 14 and Jan. 16 in observance of Martin Luther King, Jr. Day.

First Judicial District Court

Criminal Bench and Bar Brownbag

The 1st Judicial District Court Criminal Bench and Bar will have a brownbag meeting at noon, Jan. 17, in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to Sally or Kim, (505) 827-5047.

Destruction of Exhibits

Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1978 to 1987

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st 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 1978 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 Jan. 13, 2006.

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.

Fourth Judicial District

Nominating Commission

Four applications have been received in the Judicial Selection Office as of 5 p.m., Dec. 22, 2005, for the judicial vacancy on the 4th Judicial District Court due to the retirement of the Honorable Jay Harris. The District Judges Nominating Commission will meet at 9 a.m., Jan. 24, in Las Vegas, New Mexico to evaluate the applicants for this judicial position. The commission meeting is open to the public. Those wishing to make public comment are requested to be present at the opening of the meeting. The names of the applicants in alphabetical order are:

Abigail Paulette Aragon
Gerald E. Baca
Arthur Lee Bustos
Matthew J. Sandoval

Fifth Judicial District

Nominating Commission

Nine applications have been received in the Judicial Selection Office as of 5 p.m., Dec. 22, 2005, for the judicial vacancy on the 5th Judicial District Court due to the retirement of the Honorable James Shuler. The District Judges Nominating Commission will meet at 9 a.m., Jan. 19, in Carlsbad, New Mexico to evaluate the applicants for this judicial position. The commission meeting is open to the public. Those wishing to make public comment are requested to be present at the opening of the meeting. The names of the applicants in alphabetical order are:

Daniel C. Banks
Denise A. Madrid Boyea
J. Richard Brown
Matthew T. Byers
Jane Shuler Gray
D’Ann Read
Raymond Lewis Romero
Walter R. Parr
William G. W. Shoobridge

U.S. District Court for the District of New Mexico

Proposed Amendment to Local Civil Rules

A proposed amendment to the Local Civil Rules of the United States District Court for the District of New Mexico is being considered. The proposed amendment is to D.N.M.LR-Civ. 73.1 Direct Assignment of Civil Cases. A “red-lined” version (with proposed additions underlined and proposed deletions stricken out) is posted on the court’s Web site, www.nmcourt.fed.us.

Members of the Bar may submit comments no later than Jan. 31. E-mail lrciv@nmcourt.fed.us; or mail to U.S. District Court, Clerk’s Office, Pete V. Dominici U.S. Courthouse, 333 Lomas Blvd, NW, Suite 270, Albuquerque, NM 87102, Attn: LRCiv.

STATE BAR NEWS

ATTORNEY SUPPORT GROUP

Change in Meeting Date

The next Attorney Support Group meeting will be held at 5:30 p.m., Feb. 6, 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.

**Birthday Celebration**

Members and their guests are invited to attend a celebration of the 120th birthday of the State Bar at 4:30 p.m., Jan 19, at the State Bar Center. The oldest and youngest active members will be honored as well as the longest practicing male and female lawyers. R.S.V.P. at (505) 797-6000.

**Mandatory Disclosure of Malpractice Insurance**

Rule No. 05-8500, In the Matter of Mandatory Disclosure of Professional Liability Insurance Coverage states that lawyers are exempt from the provisions of the order when “the attorney's entire compensation [is] derived from the practice of law ... in the attorney's capacity as an employee handling legal matters of a corporation or organization, or any agency of the federal, state, local government, or a member of the judiciary who is prohibited by statute or ordinance from practicing law.”

**Paralegal Division Annual Meeting and Luncheon**

The Paralegal Division’s annual meeting and luncheon, in conjunction with a CLE co-sponsored by the Paralegal Division, will be held at noon, Jan. 21, at the State Bar Center in Albuquerque.

The CLE will feature the Seven Deadly Sins of Employment Law presented by Scot Bannon and Lee Peifer, and HIPAA Security: Double Secret Probation presented by Scot Sauder, all of UNM’s University Counsel. Jeffrey Wiggins, UNM’s HSC compliance director, will assist Sauder with the HIPPA presentation.

Registration for the annual meeting and luncheon will be separate from the CLE seminars. For additional information, see the Bar Bulletin Legal Education Calendar or check the division's Web page at www.nmbar.org.

**Monthly 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., Jan. 11, at the State Bar Center. Briggs Cheney will present Substance Abuse in the Office: The First To Know ... Then What? Attendees will earn 1.0 ethics CLE credit. The cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. Registration begins at 11:30 a.m. For more information, contact Cheryl Passalaqua, (505) 872-7470, or Amy Paul, (505) 883-8181.

**Public Law Section Board Meeting**

The next Public Law Section board meeting will be held at noon, Jan. 12, in the Risk Management Division Legal Bureau conference room on the first floor of the Montoya Building, 1100 St. Francis Dr., Santa Fe. All section members are invited to attend. Contact Deborah Moll, (505) 827-2000, for more information.

**Other Bars**

**Albuquerque Bar Association**

**Legal Resource Seminar and Fair**

Legal and social service providers will hold a seminar and fair Jan. 10 at the UNM School of Law, Room 2401 (free parking in “L” lot). The fair will begin at 2:30 p.m. when providers will be available to network and distribute literature. A seminar to discuss services will begin at 3 p.m. This is an excellent opportunity for those on the front lines of law offices and other agencies (those answering telephones and handling walk-ins) to get a broader knowledge of the types of legal services in the Albuquerque area and appropriate places to refer community members in need of legal assistance.

Contact the Albuquerque Bar Association, (505) 842-1151 or abqbar@abqbar.com, for further information. Canned food donations will be gathered.

**American Bar Association Midyear Meeting**

The American Bar Association’s midyear meeting will be held Feb. 8–13 in Chicago. The ABA House of Delegates is meeting on Feb. 13. The agenda was printed in the Dec. 26, Vol. 44, No. 51 Bar Bulletin and is also available on the ABA’s Web site at www.abanet.org/leadership/2006/midyear/previewagenda.doc. ABA members are asked to review the agenda and direct questions or comments to State of New Mexico Delegate Mary Torres, (505) 848-1800, or mtorres@modrall.com.

**Nominations Solicited**

Karen Mathis, the president-elect of the American Bar Association, is privileged to fill vacancies on the American Bar Association (ABA) standing and special committees, commissions, working groups, task forces and other ABA entities for the 2006-2007 association year. A list of those committees was printed in the Jan. 2, Vol. 45, No. 1 Bar Bulletin and is also available on the ABA Web site, www.abanet.org/appointments. To assist President-Elect Mathis and the appointments committee with this important process, President-Elect Mathis has asked members of the ABA House of Delegates to make recommendations for candidates for appointment to these entities. Anyone interested in serving on any of the committees should contact ABA State Delegate Mary T. Torres, (505) 848-1800, or mtorres@modrall.com. ABA members may also nominate themselves for committees, commissions, task forces, or working groups. Note that all nominations or applications must be made using the ABA’s on-line nomination form, which can be found at http://www.abanet.org/appointments. Direct questions regarding the on-line form to Megan Potter in the Office of the President, (312) 988-5103.

The deadline for submitting recommendations or nominations is Mar 1. All recommendations must be received by that date to ensure inclusion in the decision-making process. There are a limited number of vacancies to fill, and while all suggested candidates cannot be appointed, each nomination will be given serious consideration.

**First Judicial District Bar Association**

**Nominations for Treasurer**

The First Judicial District Bar Association is seeking nominations for treasurer. The individual who is selected will serve a four-year term on the board of directors, rotating through the various officer positions. Contact Dana Hardy, dana.hardy@gmail.com, to submit a nomination. The election will be held at the association’s January meeting.
UNM SCHOOL OF LAW

LAW LIBRARY

Exam and Holiday Hours
Jan. 9–10 8 a.m. to 6 p.m.
Jan. 11 Library resumes regular hours, 8 a.m. to 11 p.m.
Jan. 14 and 16 Closed MLK Day

2006 Children’s Law Institute

The annual New Mexico Children’s Law Institute will be held Jan. 11–13 at the Marriott Pyramid North in Albuquerque. The conference, co-sponsored by the UNM Institute of Public Law, the Supreme Court’s Court Improvement Project, CYFD and the New Mexico CASA Network, is intended for judges, attorneys, volunteer advocates, social workers, juvenile probation officers and others who work with children and families. Attorneys can earn 13.2 total CLE credits (1.0 E and 1.0 P optional).

The conference brochure and registration form can be downloaded from http://ipl.unm.edu/childlaw or obtained from Andrea Poole, (505) 474-8800 or alpoole@cybermesa.com. Registrations should be mailed to the Institute of Public Law at the address listed on the form.

OTHER NEWS

2006 PARALEGAL OF THE YEAR NOMINATIONS

Gain national exposure, earn recognition for the paralegal profession and bring prestige to a respected colleague. Nominate a peer for the Legal Assistant Today’s (LAT) 2006 Paralegal of the Year Award.

Since 1998, LAT has honored a paralegal who demonstrates a profound commitment to his or her career and strives to shape the future of the paralegal field. The winner will be chosen by the LAT Editorial Advisory Board and be featured in the September/October 2006 issue. The winner will receive a $1,000 cash prize, an award plaque and a complimentary one-year subscription to LAT. His or her division will also receive $100. Two runners-up will each receive an award plaque and a one-year subscription to LAT, as well as be featured in the September/October issue.

Sponsored by Image Capture Engineering, the Paralegal of the Year contest is open to all paralegals who meet the contest’s requirements:

- Nominees must have a minimum of three years’ experience as a paralegal/legal assistant.
- Self-nominations are not allowed.
- Nominees must submit a statement on the nomination form providing information on the nominee’s significant activities in four categories—from career accomplishments to civic contributions.

Nominations are due May 5. For complete contest requirements and to fill out a nomination form, go to www.legalassistant-today.com and click on the Paralegal of the Year Award logo.

Center for Civic Values (CVC)
ATTORNEY NEEDED

Lordsburg High School in Lordsburg, New Mexico needs an attorney coach for its two mock trial teams. In-person assistance is preferred, but the team could also benefit from access to an attorney upon whom they could call for guidance via telephone or e-mail. Contact the CVC mock trial program, (505) 764-9417 ext. 13, or (800) 451-1941 ext. 13 (outside Albuquerque).

2006 LICENSE AND DUES

- The 2006 license and dues forms have been mailed.
- License and dues are due on or before Feb. 1, 2006.
- Members who have not received the form by the end of December should notify the State Bar office, (505) 797-6092 or (505) 797-6035.
- For members’ convenience, dues may be paid online through secured eCommerce at www.nmbar.org.
- License and disciplinary fees are mandatory and must be paid to maintain license status.
- Without exception, dues and license fees are due regardless of whether you received your form.

Late fees may be assessed if payment is not postmarked by Feb. 1, 2006.
State Bar of New Mexico

Leadership and learning are indispensable to each other.
John F. Kennedy (1917 - 1963)

Speech prepared for delivery in Dallas the day of his assassination, November 22, 1963.

2006 Leadership Training Institute

(Friday afternoon and Saturday) March 3-4, 2006
Team Building; Motivating Others; Creative Problem Solving

(Thursday afternoon and Friday) April 6-7, 2006
Communication and Media Skills;
Leadership Principles, Tools and Concepts;
Cultural Competency

(Friday afternoon and Saturday) May 12-13, 2006
Quality of Life; Time Management; Public Service

(Thursday afternoon and Friday) June 1-2, 2006
Leadership Opportunities; Fundraising;
Emotional Intelligence; New Mexico Judiciary

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
What is the Leadership Training Institute?
The mission of the Leadership Training Institute is to identify and train lawyers for future opportunities in leadership roles. The State Bar of New Mexico’s fast-track Leadership Training Institute can help you make the most of your innate talents and develop your leadership skills.

Attend this program and you will learn what it means to be a leader and how to communicate, motivate, inspire and succeed not only in your law career, but also in service to professional, political, judicial, civic and community organizations.

How Does it Work?
The Institute consists of four sessions over four months in March, April, May and June. Each of the sessions is one and one-half days—two are held Thursday afternoon and Friday and two are held Friday afternoon and Saturday. All of the sessions are held at the State Bar Center, except for the first Friday session. Participation in all of the sessions is mandatory.

Who Is Eligible?
Any State Bar member may apply. Class size is limited through a competitive selection process, based on the number of applications received.

Why Should I Apply?
You will benefit personally and professionally and will be better prepared for leadership opportunities and challenges. You will have a chance to meet and interact with prominent legal and community leaders, develop leadership skills, and explore opportunities for leadership.

What is the Cost?
Tuition is $350 and is due prior to or on the first class date. The fee covers speakers, materials, and meals. Limited scholarships are available—indicate your need when you apply for the program.

How Do I Apply?
An application form is provided on the back page and on the State Bar Web site, www.nmbar.org. Applications may be mailed or faxed, but must be received by the State Bar no later than 5 p.m., Jan. 20, 2006.

A selection committee will review applications, and all applicants will be notified the week of Feb. 6. The selection committee will make every effort to select a diverse representation of State Bar members. Applications submitted should include:
- Application form
- Two references and one letter of recommendation (see #3 on application)
- One additional page of information if necessary (see #9 on application)

---

March 3-4, 2006
Session 1:  
Team Building; Motivating Others; Creative Problem Solving

FRIDAY, MARCH 3
12 noon - 4:30 pm
- Team Building Exercises at Desert Hills Ropes Course
- State Bar Overview
- Growing Better Every Day

SATURDAY, MARCH 4
8:30 am - 2 pm
- Understanding Opportunities for Growth
- Creating a Vision for the Future/Strategic Planning
- Motivating Others: Changing Attitudes Without Giving Offense or Arousing Resentment
- Creative Problem Solving
- Who Are Your Heroes? Group Exercise

April 6-7, 2006
Session 2:  
Communication and Media Skills; Leadership Principles, Tools and Concepts; Cultural Competency

THURSDAY, APRIL 6
1 - 4:30 pm
- Overview of Communication Opportunities, Methods, and Skills
- Public Speaking and Presentations
- Effective Development and Use of Messages
- Working with the Media
Applications submitted should include:

• Leadership Principles, Tools & Concepts
• Leadership & Decision-Making Styles
• Understanding & Relating to Others
• Cultural Competency

May 12-13, 2006
Session 3: Quality of Life; Time Management; Public Service

FRIDAY, MAY 12
1 - 4:30 pm

• Quality of Life - A Must for Leaders
• Losing Control - Addiction/Abuse Issues
• What is Success?

SATURDAY, MAY 13
8:30 am - 4 pm

• Order from Chaos
• Public Service Project
 (to be determined by class)

THURSDAY, JUNE 1
1 - 4:30 pm

• Leadership Opportunities
• Effective Fundraising
• Emotional Intelligence

FRIDAY, JUNE 2
8:30 am - 3:30 pm

• The Third Branch of Government: The Work of Judging and the Importance of Judges
• The Judicial Selection Process
• Judicial Performance Evaluation
• Conscientious Judging
• A Day in the Life
• Judicial Education and Training
• Judicial Campaigns
• Graduation Banquet at Albuquerque Petroleum Club

June 1-2, 2006
Session 4: Leadership Opportunities; Fundraising; Emotional Intelligence; New Mexico Judiciary

Institute faculty and panel members include professional trainers, judges, politicians, bar leaders, community and civic leaders, and business leaders.
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
LEGAL EDUCATION

JANUARY

10 Drafting Legal Opinions
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbar.org

11–13 Children’s Law Institute
Marriott Pyramid North, Albuquerque
UNM Institute of Public Law
13.2 Total Credits, (1.0 E and 1.0 P optional)
(505) 277-1051

12 Identity Theft
Branigan Library, Las Cruces
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbar.org

12 Workplace Privacy
Branigan Library, Las Cruces
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbar.org

13 Bridge the Gap 2005: Developing a Winning Courtroom Strategy
Branigan Library, Las Cruces
Center for Legal Education of NMSBF
5.2 G, 1.6 P, 1.0 E
(505) 797-6020
www.nmbar.org

17 Ethics: Now What are You Gonna Do?
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
1.0 E
(505) 797-6020
www.nmbar.org

17 Estate Planning for Transfers of Real Property
Teleseminar
Center for Legal Education of NMSBF
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17 Identity Theft
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www.nmbar.org

17 Medicare’s New Drug Coverage: The Impact on Your Clients
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
1.7 G
(505) 797-6020
www.nmbar.org

17 Workplace Privacy
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
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(505) 797-6020
www.nmbar.org

17 2005 Professionalism: Lawyers Concerned for Lawyers
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
1.6 P
(505) 797-6020
www.nmbar.org

19 Workers’ Compensation in NM
State Bar Center, Albuquerque
Lorman Education Services
6.0 G
(715) 833-3940
www.lorman.com

20 Discovery Skills for Legal Staff
State Bar Center, Albuquerque
Lorman Education Services
6.0 G
(715) 833-3940
www.lorman.com

21 Seven Deadly Sins of Employment Law and HIPAA Security: Double Secret Probation
State Bar Center, Albuquerque
Paralegal Division and Center for Legal Education of NMSBF
5.7 G
(505) 797-6020
www.nmbar.org

24 Bridge the Gap 2005: Developing a Winning Courtroom Strategy
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
5.2 G, 1.6 P, 1.0 E
(505) 797-6020
www.nmbar.org

24 The Changing Law Regarding Church-State Issues
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
4.0 G
(505) 797-6020
www.nmbar.org

24 Lawyering with Emotional Intelligence
VR–State Bar Center, Albuquerque
Center for Legal Education of NMSBF
1.6 P, 1.0 E
(505) 797-6020
www.nmbar.org

G = General
E = Ethics
P = Professionalism
VR = Video Replay
Programs have various sponsors; contact appropriate sponsor for more information.
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<td>31</td>
<td>Environmental Justice &amp; the Public Welfare: Evolving Concepts of the Public Interest</td>
<td>VR–State Bar Center, Albuquerque&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;4.1 G, 1.6 P&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbar.org</td>
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**February**

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<td>State Bar Center, Albuquerque&lt;br&gt;National Business Institute&lt;br&gt;5.0 G, 1.0 E&lt;br&gt;(800) 835-8525&lt;br&gt;www.nbi-sems.com</td>
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<td>9</td>
<td>Employee Discharge and Documentation</td>
<td>State Bar Center, Albuquerque&lt;br&gt;Lorman Education Services&lt;br&gt;6.6 G&lt;br&gt;(715) 833-3940&lt;br&gt;www.lorman.com</td>
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<td>Council on Education in Management</td>
<td>State Bar Center, Albuquerque&lt;br&gt;Public Sector Employment Law Update&lt;br&gt;11.0 G&lt;br&gt;(800) 942-4494&lt;br&gt;www.counciloned.com</td>
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<td>Property Taking Through Eminent Domain</td>
<td>State Bar Center, Albuquerque&lt;br&gt;National Business Institute&lt;br&gt;6.0 G&lt;br&gt;(800) 835-8525&lt;br&gt;www.nbi-sems.com</td>
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<td>Document Retention and Destruction</td>
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<td>Commercial and Real Estate Loan Documents</td>
<td>State Bar Center, Albuquerque&lt;br&gt;Lorman Education Services&lt;br&gt;6.1 G&lt;br&gt;(715) 833-3940&lt;br&gt;www.lorman.com</td>
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<td>Special Districts in NM</td>
<td>State Bar Center, Albuquerque&lt;br&gt;Lorman Education Services&lt;br&gt;5.8 G, 0.7 E&lt;br&gt;(715) 833-3940&lt;br&gt;www.lorman.com</td>
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<td>State Bar Center, Albuquerque&lt;br&gt;Lorman Education Services&lt;br&gt;6.0 G&lt;br&gt;(715) 833-3940&lt;br&gt;www.lorman.com</td>
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What’s on the Web that has value to you or your law practice?

The one Web site that provides the resources and information you need...

www.nmbar.org
What’s Important To You?

We strive to develop and expand the services and features of NMBAR so your visit is always productive, enjoyable and beneficial. Our goal is to provide resources, services and information that you deem relevant. It’s important to us to deliver what’s important to you.

Primary Navigation

Eight primary categories contain comprehensive information on: Membership, Attorney Services/Resources, Public Services/Resources, Divisions/Sections/Committees, CLE, Publications/Media, Discussion Groups and Other Bars/Legal Groups. Each category delves deeper into the resources that you need to build your law practice, keep informed about educational programs, benefit from the membership services that are available to you, and, of course, provide timely news and information about the State Bar and law-related activities or resources.

Resources

Legal Forms Center

Accessible to State Bar members including Paralegal Division members, the Legal Forms Center is a database of over 62,000 forms used in New Mexico and across the nation. A login is required to access this database, and it can be directly accessed from the homepage.

Discussion Groups

Communicate to your colleagues; Ask questions. Express opinions on important law issues of the day. Discussion Groups provides a means of networking, sharing resources, and communicating in an open environment that promotes a healthy exchange of ideas and facilitates valuable communication in the legal profession.
Membership

Attorney/Firm Finder

As a benefit of membership, every member of the State Bar has a directory listing on the Web site. This basic listing includes: name, address, city, state, zip, phone, fax, e-mail and Web address. This directory is available to everyone by clicking on Attorney/Firm Finder, then entering the information requested.

Premium listings are also available and include all the basic information plus a photo, biographical information, and e-mail and Web site addresses. Searchable by areas of practice, these listings appear first in alphabetical order.

For more information regarding Premium Listings, contact Marcia Ulibarri, (505) 797-6058 or mulibarri@nmbar.org.

Links

NMBAR provides a host of links to relevant sites and resources, including:
- Center for Civic Values
- City/County Government
- Courts
- Equal Access to Justice
- Law Office Management
- Legal Specialization
- MCLE
- NM Statutes
- National Associations
- Professionalism
- State & Federal Government
- UNM School of Law
- and many more!

Convenience

Online Registration/Payments

Register and pay online for programs or services. Convenient and secure registration is available for CLE programs or for paying your annual dues or section membership fees. You can quickly evaluate your specific needs and pay immediately. There are no added fees for online payments, and you can even track your online purchases.

Publications/Media

Read the weekly Bar Bulletin online. You can also peruse law office management resources, section publications, survey reports, task force reports, and valuable publications on law topics geared for the public. Click on Publications/Media to see a complete listing of available titles.

Accessibility

When registering or accessing restricted information, you will be prompted for a login. Enter: Username = Bar ID Number Password = last name.
Products & Services Directory

Add value to your law practice by using products or services listed in the Products and Services Directory. Some category listings include: Accounting, Case Management, Courier Services, Court Reporters, Expert Witnesses, Insurance Providers, and the list goes on! Alliance Program listings offer the added benefit of providing discounts to State Bar members.

Do you offer a product or service of benefit to other members of the Bar? Contact Marcia Ulibarri, (505) 797-6058 or mulibarri@nmbar.org, for pricing information.

Public Services

NMBAR is designed to provide the public with information and resources to help resolve client complaints and fee disputes, to announce upcoming consumer and public legal workshops, and to provide legal advice and referrals. In addition, law topics and publications are published on the site. Click on Public Services/Resources for additional resources.

Research

Coming This Year ... Legal Research

As a State Bar member, you will have access to FREE LEGAL RESEARCH.

Look for more information in the months to come. Until then, use the resources now available on the Web site by selecting Legal Research and look for something even more spectacular and relevant to your law practice coming this year!

Visit www.nmbar.org today!

Contact Veronica Cordova, (505) 797-6039 or vcordova@nmbar.org if you would like additional information on the Web features and services mentioned.

And More . . .

There are so many features and resources to list them all. Visit www.nmbar.org to see what’s available.

Web Corner

Read the “Web Corner” the first week of each month in the Bar Bulletin for features, resources and helpful tips.

State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199
(505) 797-6000
sbnm@nmbar.org
www.nmbar.org
### WRITS OF CERTIORARI

**Effective January 6, 2006**

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

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<th>Petition</th>
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<td>29,609</td>
<td>State v. Fritz (COA 24,358)</td>
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<td>29,608</td>
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#### RESPONSE DUE:

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# CERTIORARI GRANTED BUT NOT YET SUBMITTED TO THE COURT:

(Respondents preparing briefs)

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# BAR BULLETIN - JANUARY 9, 2006 - VOLUME 45, NO. 2 15
## WRITS OF CERTIORARI

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

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court

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

**Effective January 6, 2006**

### EFFECTIVE JANUARY 6, 2006

**WRIT OF CERTIORARI**

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

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### CERTIORARI GRANTED AND SUBMITTED TO THE COURT:

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OPINIONS

AS UPDATED BY THE CLERK OF THE NEW MEXICO COURT OF APPEALS
Patricia C. Rivera Wallace, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fé, NM 87504-2008 • (505) 827-4925

EFFECTIVE DECEMBER 30, 2006

PUBLISHED OPINIONS

There were no published opinions updated on December 30, 2006.

UNPUBLISHED OPINIONS

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Slip Opinions for Published Opinions may be read on the Court’s website:
NO. 05-8300-21
IN THE MATTER OF THE AMENDMENT OF RULE 7-504 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules for Courts of Limited Jurisdiction Committee to amend Rule 7-504 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and, Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rule 7-504 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the Chief Judge of the Bernalillo County Metropolitan Court shall file a status report regarding the effects of these amendments on or before January 1, 2007;

IT IS FURTHER ORDERED that the amendments of Rule 7-504 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts shall be effective for cases filed on and after January 1, 2006; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced form by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 15th day of December, 2005.

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

7-504. Discovery; cases within metropolitan court trial jurisdiction.

A. Disclosure by state. Not less than ten (10) days before trial, the prosecution shall disclose and make available for inspection, copying and photographing any records, papers, documents and recorded statements made by witnesses or other tangible evidence in its possession, custody and control which are material to the preparation of the defense or are intended for use by the prosecution at the trial or were obtained from or belong to the defendant.

B. Disclosure by defendant. Not less than ten (10) days before trial, the defendant shall disclose and make available to the prosecution for inspection, copying and photographing any records, papers, documents or other tangible evidence in the defendant’s possession, custody or control which the defendant intends to introduce in evidence at the trial.

C. Witness disclosure. Not less than ten (10) days before trial, the prosecution and defendant shall exchange a list of the names and addresses of the witnesses each intends to call at the trial. Upon request of a party, any witness named on the witness list shall be made available for interview prior to trial.

D. Failure to complete interviews. In all cases in which the metropolitan court is a court of record, if a witness interview has not been conducted by the date of trial and the witness is in the court or immediately available, then the court shall order the interview to be conducted at that time and proceed to trial, or, if prejudice can be demonstrated by the party conducting the interview, the court shall continue the trial to the earliest practicable date. The court may also issue an order holding an attorney or party in contempt of court.

D. Continuing duty to disclose. If a party discovers additional material or witnesses which the party previously would have been under a duty to disclose and make available at the time of such previous compliance if it were then known to the party, the party shall promptly give notice to the other party of the existence of the additional material or witnesses.

E. Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, except as otherwise provided in Paragraph D of this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from calling a witness not disclosed, or introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate under the circumstances, including but not limited to holding an attorney or party in contempt of court.

G. Statement defined. As used in this rule, “statement” means:

1. a written statement made by a person and signed or otherwise adopted or approved by such person;
2. any mechanical, electrical or other recording, or a transcription thereof, which is a recital of an oral statement; and
3. stenographic or written statements or notes which are in substance recitals of an oral statement.

H. Applicability. This rule applies only to cases within metropolitan court trial jurisdiction.

[As amended, effective January 1, 2006.]
ORDER

WHEREAS, this matter came on for consideration upon the Court’s own motion to amend Rule 3-103 of the Rules of Civil Procedure for Metropolitan Courts and Rule 7-103 NMRA of the Rules of Criminal Procedure for Metropolitan Courts, and the Court being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rule 3-103 of the Rules of Civil Procedure for Metropolitan Courts and Rule 7-103 NMRA of the Rules of Criminal Procedure for Metropolitan Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rule 3-103 of the Rules of Civil Procedure for Metropolitan Courts and Rule 7-103 NMRA of the Rules of Criminal Procedure for Metropolitan Courts shall be effective immediately;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced rules by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 15th day of December, 2005.

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

3-103. Local rules and forms.

A. Local rules; approval procedure. [The] A metropolitan court may from time to time make and amend local rules governing its practice not inconsistent with these rules or other rules of the Supreme Court. Copies of proposed local rules and amendments shall be submitted to the Supreme Court and to the chair of the Supreme Court’s Rules for Courts of Limited Jurisdiction Committee for review. The Rules for Courts of Limited Jurisdiction Committee shall review any proposed local rule for content, appropriateness, style and consistency with the other local rules, statewide rules and forms and the laws of New Mexico, and it shall advise the Supreme Court and the chief judge of the metropolitan court of its opinion regarding the proposed rules. Any local rule or local rule amendment promulgated by [the] a metropolitan court shall not become effective until such rule is approved by order of the Supreme Court, filed with the clerk of the Supreme Court and published in the Bar Bulletin or in the New Mexico Rules Annotated.

B. Forms. Forms used in the metropolitan courts shall be substantially in the form approved by the Supreme Court.

C. Local rules committee. The chief judge of a metropolitan court may form a local rules committee to implement the provisions of this rule. The local rules committee shall include at least one member from the Rules for Courts of Limited Jurisdiction Committee.

[As amended, effective December 15, 2005.]
From the New Mexico Supreme Court

OPINION

EDWARD L. CHÁVEZ, JUSTICE

{1} A jury convicted Joe Garcia (“Defendant”) of aggravated battery likely to result in death or great bodily injury, a third degree felony. Defendant filed a motion for a new trial on the grounds of newly-discovered evidence. The newly-discovered evidence consisted of photographs of the victim taken by a police officer shortly after the altercation which was the subject of the trial. Believing that the photographs would have been helpful to a jury, the district court granted Defendant a new trial. On appeal, the Court of Appeals reversed the district court’s decision, concluding that the six factors needed in order to grant a new trial under State v. Volpato, 102 N.M. 383, 384-85, 696 P.2d 471, 472-73 (1985) had not been met. We granted Defendant’s Petition for Certiorari and reverse the Court of Appeals. We remand the case to district court for a new trial because we do not believe the district court abused its discretion in granting the motion for a new trial.

FACTS AND PROCEDURAL HISTORY

On March 8, 2002, after a heated verbal dispute involving borrowed money, the victim and Defendant got into a physical altercation. At trial, five witnesses gave varying accounts of the events. The victim and his fiancée testified that Defendant had been the first aggressor, and that the victim, who apparently suffers from rheumatoid arthritis and osteoporosis, had been physically incapable of defending himself, much less of throwing punches. They also testified that during the fight Defendant punched the victim in the face, causing him to fall down, and then repeatedly kicked him. According to the victim, Defendant kicked him in the face.

{2} On March 8, 2002, with a digital camera but had either misplaced the photo disk or had taken more photographs over them.

{4} The police officer who investigated the fight also testified at trial for the State. He indicated that the victim had been in shock, or at least that he had been staring and had dilated pupils. The left side of the victim’s face was swollen, and the officer recalled seeing blood around the victim’s mouth and on his left nostril, but no other injuries. The officer also testified about the missing photos at issue in this appeal. He testified that he had photographed the victim’s facial injuries on the night of March 8, 2002, with a digital camera but had either misplaced the photo disk or had taken more photographs over them.

{5} On May 6, 2003, Defendant filed a motion for a new trial or, in the alternative, a motion to replace the felony aggravated battery conviction with a conviction for misdemeanor aggravated battery pursuant to the step-down jury instruction given at trial. In his motion, Defendant argued that the pictures—which the State had inadvertently turned over to the Clovis Public Defender along with the discovery material for another case—did not support the jury’s conclusion that his actions on March 8, 2002, would likely produce death or great bodily harm. The district court granted Defendant’s motion for a new trial, and the State appealed. The Court of Appeals held that the district court abused its discretion by granting the motion because the newly-discovered evidence would not change the result of the trial since: 1) the photographs depicted what the photographs had been helpful to a jury, the district court granted Defendant a new trial. On appeal, the Court of Appeals reversed the district court’s decision, concluding that the six factors needed in order to grant a new trial under State v. Volpato, 102 N.M. 383, 384-85, 696 P.2d 471, 472-73 (1985) had not been met. We granted Defendant’s Petition for Certiorari and reverse the Court of Appeals. We remand the case to district court for a new trial because we do not believe the district court abused its discretion in granting the motion for a new trial.

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{3} Defendant and his fiancée, who is also the victim’s sister, offered a slightly different version of the events. They admitted that Defendant punched the victim, exchanged blows with him on the ground, and then popped up and kicked the victim while he was still on the ground. However, Defendant and his fiancée claimed that the victim had been the first aggressor and had swung his cane at Defendant. They also claimed that the victim threatened to kill Defendant and had reached into the back of his pocket as if to pull out a gun, causing Defendant to hit and kick the victim in self-defense.

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JURISDICTION
[6] The State cites State v. Conn, 115 N.M. 99, 100, 847 P.2d 744, 745 (1993) for the proposition that our review on certiorari in this case is inappropriate, and specifically that “our jurisdiction in certiorari cases does not encompass weighing or reviewing the resolution of factual issues by the Court of Appeals.” In Conn, the State asked us to review a Court of Appeals decision holding that a district court had abused its discretion in admitting evidence of an assault conviction in a criminal sexual contact with a minor case. The defendant had pled guilty to the assault nine years and eight months before the trial. Id. at 101, 847 P.2d at 746. There, because we were being asked to examine a question of fact regarding a district court’s exercise of discretion on an evidentiary issue, we held that “it is not within the purview of our jurisdiction on certiorari to resolve mere factual conflicts between the district court of this State and the Court of Appeals.” Id. In this case, however, we are being asked to review a district court’s decision to grant a new trial on the basis of newly-discovered evidence. While the facts of the case constituted a part of the district court’s consideration in granting a new trial, the district court’s decision remained a legal one. State v. Ashley, 1997-NMSC-049, ¶ 9, 124 N.M. 1, 946 P.2d 205. Conn does not preclude our review of whether the Court of Appeals erred in concluding that the district court abused its discretion in evaluating the effect of the newly-discovered evidence.

MOTION FOR A NEW TRIAL
[7] The general rule is that we will not disturb a trial court’s exercise of discretion in denying or granting a motion for a new trial unless there is a manifest abuse of discretion. State v. Romero, 42 N.M. 364, 370, 78 P.2d 1112, 1116 (1938). Because “the function of passing upon motions for new trial on newly-discovered evidence belongs naturally and peculiarly, although not exclusively, to the trial court,” id., “[t]he discretion of a trial court is not to be lightly interfered with as to the granting of a motion for new trial.” State v. Fuentes, 67 N.M. 31, 33, 351 P.2d 209, 210 (1960).

[8] A motion for a new trial on grounds of newly-discovered evidence will not be granted unless the newly-discovered evidence fulfills all of the following requirements:

1) it will probably change the result if a new trial is granted;
2) it must have been discovered since the trial; and
3) it could not have been discovered before the trial by the exercise of due diligence; 4) it must be material; 5) it must not be merely cumulative; and 6) it must not be merely impeaching or contradictory.

When asked by the State to make specific findings after granting the motion for a new trial, the judge stated:

The reason for this is that Victor Herrera testified that he was kicked in the face and the photographs go to that issue as to whether or not he was kicked in the face. And so the jury should have had that evidence available to consider when they determined whether or not he was kicked in the face because that, I think, is the action that distinguishes this from simple battery, being kicked in the head. So that’s the reason for my ruling.

[10] In State v. Melendez, 97 N.M. 740, 643 P.2d 609 (Ct. App. 1981), rev’d on other grounds by 97 N.M. 738, 643 P.2d 607 (1982), the Court of Appeals found that the trial court should have granted the defendant’s motion for a new trial on the grounds of newly-discovered evidence. There, the defendant was convicted of the voluntary manslaughter of a rival gang member, and after trial a bullet was found lodged under the hood of the defendant’s car. Evidence of the bullet’s angle of entry and rifling characteristics supported the defendant’s self-defense theory that the bullet had been fired by a member of the victim’s gang and bore on the truthfulness of two important State witnesses. Melendez, 97 N.M. at 743, 643 P.2d at 612. It was clear in that case from the jury verdict “that defendant’s claimed self-defense was not believed; else the defendant would have been acquitted.” Id. Because with the additional evidence “a jury could well have reached a different result on defendant’s
guilt,” the Court of Appeals held that a new trial should have been allowed. *Id.*

{11} Here, the victim was the only witness who testified that Defendant kicked him in the face. The victim’s fiancée, Defendant, and Defendant’s fiancée all testified that Defendant kicked the victim when the victim was on the ground, but none pinpointed where the kick or kicks landed. Furthermore, the State and defense witnesses described the victim’s injuries differently. The victim testified that he had bruises on both sides of his face, broken dentures, scratches on his neck, and that his face “was beaten pretty bad.” The victim’s fiancée testified that Defendant had a big bruise across his chest, that the side of his face was bruised, that he had knots on his head, that his lips were “all busted,” and that his nose and mouth were bleeding. Defendant and his fiancée, on the other hand, denied seeing any injuries on the victim’s face besides mucous and denied the victim’s claim that he had been wearing his dentures. As in *Melendez*, it is clear that the jury did not believe Defendant’s theory of the case, or else it would have acquitted him. However, the color photographs showing minor injuries to the victim, which might have been obtained in the scuffle instead of from a kick to the head, support Defendant’s claim that his actions were not likely to result in death or great bodily harm and bear on the credibility of the testimony of the victim and his fiancée. With the additional evidence a jury could well have reached a different result. See *Melendez*, 97 N.M. at 743, 643 P.2d at 612.

**THE NEWLY-DISCOVERED EVIDENCE WAS NOT MERELY CUMULATIVE**

{12} The State argues that the photographs are cumulative because they do not contribute anything new or different concerning whether the victim was kicked in the face. Specifically, the State argues that the district court’s findings four and five (that the photographs show only minor injuries and that Defendant had copies of the victim’s medical reports also detailing minor injuries), coupled with the prosecutor’s argument that Defendant’s actions were likely to cause great bodily harm and not that they actually did, demonstrate that the color photographs are cumulative. We addressed the “cumulative” prong of what is now known as the *Volpato* test in the case of *State v. Houston*, 33 N.M. 259, 263 P. 754 (1927). There, we explained that the phrase merely cumulative “means cumulative evidence the weight of which would probably be insufficient to turn the scales in defendant’s favor.” *Id.* at 266, 263 P. at 757 (quotations removed).

{13} In *State v. Pettigrew*, 116 N.M. 135, 860 P.2d 777 (Ct. App. 1993), the Court of Appeals was asked to review the relevancy and prejudice of a photograph of a battery victim that had been admitted at trial. There, the Court stated: “Photographs are the pictured expressions of data observed by a witness. They are often more accurate than any description by words, and give a clearer comprehension of the physical facts than can be obtained from the testimony of witnesses.” *Id.* at 139, 860 P.2d at 781 (quoting *State v. Carlton*, 83 N.M. 644, 648, 495 P.2d 1091, 1095 (Ct. App. 1972)). The Court of Appeals in *Pettigrew* also found the photograph to be “relevant because it depicts the extent of Victim’s injuries and because it makes more probable than not the potential of great bodily harm, which is an element of aggravated battery.” *Id.*

{14} In this case, while it is true that Defendant had access to medical reports describing bruising and minor injuries, the prosecution was able to effectively capitalize on the lost photographs. When asked on cross-examination whether the medical reports documented the victim’s claim that he had bruising on both sides of his face, the victim stated, “no, but the pictures do.” Furthermore, even though the prosecutor argued in closing that it was not a question of whether Defendant caused great bodily harm but only whether his actions were likely to do so, the prosecutor still emphasized the victim’s injuries. For example, at the beginning of his closing argument, the prosecutor stated:

Let’s start with Officer Lutz. I know it’s kinda going backwards but I think it’s really key some of what he told you. Did he mess up by losing the pictures? Yeah. But do any of you doubt that he saw what he saw? He was pretty straight forward: “I got there and victim’s face was all swollen, kinda glassy-eyed, it was bleeding.”

That’s what he saw. He’s got no interest or bias in this thing. He got called out. Here’s what I saw. Two other witnesses say there were injuries, Mr. Herrera and Ms. Evans. Two witnesses don’t. Let’s see, who are they? Oh, that’s right, the defendant and his fiancée. Nope, no injuries, even though the defendant is happy to tell you, “I got the better of it. He didn’t even have a chance to, and yeah he was getting some blows in while we were down but I definitely.” Well, there was some mucous, that’s what the defendant told you. But no blood.

Later, the prosecutor said: And remember, it’s not that this actually happened, it’s that his actions of kicking someone in the face while they are on the ground defenseless could have resulted in that, likely resulted in that kind of offense, kind of damage. I think it’s very likely if you are kicking anywhere from 3 to five or more times someone in the face that those are the kind of injuries that you get. You get that broken neck, you get that smashed eye. In this case, you get lost teeth. (Emphasis added.) While there is nothing inherently wrong with a prosecutor claiming that injuries are not necessary to convict while at the same time emphasizing the injuries that a victim suffered, we cannot say that in this case the pictures would “probably be insufficient to turn the scales in defendant’s favor.” *Houston*, 33 N.M. at 266, 263 P. at 757 (quotations removed).

Therefore, we find that the photographs, or “pictured expressions,” of the victim’s face were not merely cumulative. See *Pettigrew*, 116 N.M. at 139, 860 P.2d at 781.

**THE NEWLY-DISCOVERED EVIDENCE WAS NOT MERELY IMPEACHING OR CONTRADICTORY**

{15} The State argues that the color photographs provide only impeaching evidence to the testimony of the victim and his fiancée. In *Volpato*, the trial court denied the defendant’s motion for a new trial on the basis that the newly-discovered evidence was merely contradictory of other evidence and the bulk of the testimony at trial. 102 N.M. at 385, 696 P.2d at 473. The newly-discovered evidence in *Volpato* was the testimony of a woman who had previously been afraid to testify as a witness. Her testimony corroborated the defendant’s account that two men had entered his pharmacy and murdered his wife. She placed two men outside the defendant’s pharmacy on the night in question and remembered hearing a series of gunshots in the same sequence as described by the defendant. *Id.* Her testimony also indicated how one of the men could have obtained the defendant’s gun prior to the murder. *Id.* We concluded that the new evidence in *Volpato* was corroborative and was not merely contradictory. To support this conclusion,
we cited *State v. Fuentes*, 67 N.M. at 32, 351 P.2d at 210, for the proposition that “[i]t is not a question of which story the judge himself believed to be true, but, rather, whether the defendant should have the right to have all of the testimony submitted to a jury in order that the jury might then determine his guilt or innocence.” *Id.*

{16} In this case, the newly-discovered evidence is not testimony, as in *Fuentes*. Nevertheless, we believe Defendant should have the right to have the color photographs presented at a new trial. While the color photographs might impeach or contradict the testimony of the victim, his fiancée, and the police officer, they also corroborate Defendant’s claim that his actions were not likely to result in death or great bodily harm. Therefore, the color photographs are not merely impeaching or contradictory to evidence presented at Defendant’s trial.

**CONCLUSION**

{17} We conclude that the Court of Appeals erred in reversing the district court’s order granting Defendant a new trial. The Court of Appeals gave insufficient deference to the district court’s determination that the newly-discovered evidence would probably change the result in a new trial. The district court was entitled to view that evidence as corroborative, rather than merely cumulative, impeaching or contradictory. While in the future district court judges might make findings more specifically tailored to the six *Volpato* requirements, the sum of the district court judge’s findings justify the decision to grant a new trial. Therefore, we reverse the decision of the Court of Appeals and remand this case to the district court for a new trial.

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

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

RICHARD C. BOSSON, Chief Justice

PAMELA B. MINZNER, Justice

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

**OPINION**

LYNN PICKARD, JUDGE

{1} In this case, we decide whether an officer may arrest an individual solely on the basis of probable cause that a minor criminal offense for which jail time is not authorized has been committed. The United States Supreme Court has decided that such arrests are permissible under the Fourth Amendment to the United States Constitution. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Holding that the greater privacy protections afforded by Article II, Section 10 of the New Mexico Constitution do not permit arrests for non-jailable offenses on the basis of probable cause alone, and siding with the four dissenting justices of the United States Supreme Court, we reverse Defendant’s convictions for possession of a controlled substance and tampering with evidence. We affirm his conviction for being a minor in possession of alcohol and remand for sentencing solely on that conviction.

**BACKGROUND**

{2} The undisputed facts are as follows. On August 1, 2003, Hobbs police officer Antonio De La Fuente stopped the vehicle in which Defendant was a passenger for running a stop sign. As the officer approached the driver’s side of the car, he saw Defendant attempt to place something under his seat, and he noted a wet spot on the passenger’s side floorboard. When Officer De La Fuente asked Defendant what was under the seat, Defendant put both of his hands under the seat and appeared to attempt to push something further back...
[3] Officer De La Fuente then ordered Defendant out of the vehicle and called for backup. When his backup arrived, Officer De La Fuente looked underneath the passenger’s seat and found a partially empty bottle of beer. When the officer asked Defendant’s age, Defendant replied that he was eighteen. Officer De La Fuente also noted that Defendant exhibited several indicia of intoxication, including blood-shot, watery eyes. Based on this information, the officer arrested Defendant on suspicion of being a minor in possession of alcohol and transported him to the Hobbs City Jail. Subsequently, Officer De La Fuente searched the backseat of the patrol car where Defendant had been sitting and found a white, powdery residue on the seat itself and a folded dollar bill containing a similar substance. The substance was later found to be cocaine.

[4] Defendant was charged with possession of a controlled substance in violation of NMSA 1978, § 30-30-23 (1990), tampering with evidence in violation of NMSA 1978, § 30-22-5 (2003) (for leaving the cocaine in the patrol car), and being a minor in possession of alcohol in violation of NMSA 1978, § 60-7B-1(C) (2004). Defendant moved to suppress all the contraband, arguing that there was no probable cause for the initial search resulting in the seizure of the beer bottle, making his arrest illegal, and that the cocaine found in the patrol car should thus be suppressed because it was a product of the arrest. In the alternative, Defendant argued that even if the initial search was permissible, the arrest was still illegal (and the cocaine should be suppressed) because the New Mexico Constitution does not permit an arrest for a minor criminal offense that cannot result in incarceration, such as being a minor in possession of alcohol. See § 60-7B-1(G). The State contended that all the contraband was admissible because it was seized pursuant to an arrest based on probable cause. The trial court denied Defendant’s motion and found Defendant guilty of all three offenses. The only issue Defendant raises on appeal is whether his arrest was permissible under the New Mexico Constitution.

STANDARD OF REVIEW

[5] Because this case presents only the pure legal question of whether the New Mexico Constitution permits arrests for minor offenses that cannot result in jail time, we conduct a de novo review of the trial court’s denial of the motion to suppress. See State v. Attaaway, 117 N.M. 141, 145, 870 P.2d 103, 107 (1994) (indicating de novo review of “threshold constitutional issues”), modified on other grounds, State v. Lopez, 2005-NMSC-018, 138 N.M. 9, 116 P.3d 80.

DISCUSSION

[6] We analyze this question in accordance with the interstitial approach outlined in State v. Gomez, 1997-NMSC-006, ¶¶ 21-22, 122 N.M. 777, 932 P.2d 1. We therefore begin with a discussion of Atwater, in which the U.S. Supreme Court decided that a warrantless arrest based only on probable cause of a seatbelt violation for which jail time was not authorized was permissible under the Fourth Amendment. 532 U.S. at 323, 354. The Court first determined that the historical record did not support a conclusion that such arrests would have been prohibited under the original understanding of the Fourth Amendment. Id. at 340. The Court then rejected the arrestee’s argument that a modern understanding of the Fourth Amendment’s reasonableness requirement forbids arrest when “conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention.” Id. at 346.

[7] In rejecting this second argument, the Court reiterated its strong preference for easily administrable categorical rules in the Fourth Amendment area. Id. at 347 (indicating that standards must be “sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made”). The arrestee’s proposed rule of forbidding arrest for non-jailable offenses absent a compelling need, the Court said, could prove unworkable in the field because officers might not know whether an offense was jailable, and in some cases, the jailable determination could be based on facts not immediately ascertainable. Id. at 348-49 (citing statutes providing jail time only for subsequent DWI offenses and statutes basing punishment on the weight of drugs possessed). The Court’s concerns were not alleviated by the arrestee’s proposed exception to the rule for instances in which either arrest is necessary to enforce traffic laws or subjects might endanger others by continuing the offense despite a citation. Id. at 349-50. Such an exception, the Court said, would also be unworkable because it would engender frequent questions regarding the genuineness of the risk that an individual would continue the offense, and it would potentially subject officers to expanded 42 U.S.C. § 1983 liability, leading to under-enforcement of laws. Atwater, 532 U.S. at 350-51. Finally, the Court reaffirmed that the probable cause standard is applicable to “‘all arrests, without the need to “balance” the interests and circumstances involved in particular situations.’” Id. at 354 (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979)). Such balancing, the Court said, should only be conducted when the arrestee can meet the high standard from Whren v. United States by showing that the arrest was “‘conducted in an extraordinary manner, unusually harmful to [his] privacy or even physical interests.’” Atwater, 532 U.S. at 352-53 (alteration in original) (quoting Whren v. United States, 517 U.S. 806, 818 (1996)). Thus, after Atwater, the federal constitution permits any arrest based on probable cause, no matter how disproportionately under the circumstances, so long as the arrest does not rise to the level of a violation under Whren.

[8] In dissent, Justice O’Connor concluded that the Fourth Amendment does not allow arrest for a non-jailable offense based solely on probable cause. Atwater, 532 U.S. at 363 (O’Connor, J., dissenting). Because the historical record was unclear, Justice O’Connor found it necessary to balance “‘the degree to which [the arrest] intrudes upon an individual’s privacy’” with “‘the degree to which [the arrest] is needed for the promotion of legitimate governmental interests.’” Id. at 361 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)). She determined that the governmental interest in making this type of arrest was often “limited, at best.” Id. at 365. If a suspect is not a flight risk and arrest is not necessary to abate the proscribed behavior, then a citation may “serve the State’s . . . law enforcement interests every bit as effectively as an arrest.” Id. With regard to the individual interests at stake, Justice O’Connor noted that the intrusion on personal privacy caused by an arrest can be severe. Id. at 364. Individuals may be subject to a full search including confiscation of personal items, and, if an individual is a passenger in a car, a search of the entire passenger compartment of the vehicle, including any containers found therein. Id. Moreover, arrestees can be detained for up to 48 hours, housed with other potentially dangerous individuals, and subjected to the consequences of the arrest becoming part of the permanent public record. Id. at 364-65.

[9] Because the balancing of interests in these cases tends to weigh so heavily in favor of the individual, Justice O’Connor would have adopted a standard similar to
that of Terry v. Ohio:

I would require that when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion” of a full custodial arrest. Atwater, 532 U.S. at 366 (alteration in original) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)). This standard, Justice O’Connor argued, would do nothing more than require officers to articulate “a legitimate reason for the decision to escalate the seizure into a full custodial arrest.” Atwater, 532 U.S. at 366.

[10] Justice O’Connor further explained that the majority’s two main concerns—that officers would be subject to personal § 1983 liability and that underenforcement would result—would be “more than adequately resolved by the doctrine of qualified immunity.” Atwater, 532 U.S. at 367. She explained that because qualified immunity protects officials from liability when they make reasonable mistakes, an officer who reasonably but incorrectly concluded that an offense was jailable would not be subject to liability. Id.

[11] Finally, Justice O’Connor asserted that the majority’s per se rule that arrests for non-jailable offenses are reasonable so long as there is probable cause creates a significant danger of officers abusing their arrest powers. Id. at 372. Noting that infractions as minor as littering and failing to pay a highway toll were misdemeanors in some states, and that the consequences of arrest can be so severe, Justice O’Connor expressed grave concern about the majority’s rule, which she said “gives officers unfettered discretion to choose to arrest an individual without articulating a single reason why such action is appropriate.” Id. at 371-72.

[12] Relying on Atwater, the State argues that probable cause that Defendant was a minor in possession of alcohol was all that was required to make an arrest. We disagree. Over the past two decades, our courts have interpreted Article II, Section 10 of the New Mexico Constitution to guarantee a “broad right” to be “free from unwarranted governmental intrusions.” State v. Gutierrez, 116 N.M. 431, 444, 863 P.2d 1052, 1065 (1993). This interpretation has often provided significantly greater protections than those afforded under the Fourth Amendment. See, e.g., Attaway, 117 N.M. at 150 & n.6, 870 P.2d at 112 & n.6 (holding that Article II, Section 10 mandates a “knock and announce” rule for officers executing search warrants); Gutierrez, 116 N.M. at 447, 863 P.2d at 1068 (rejecting the “good-faith” exception to the exclusionary rule); State v. Cordova, 109 N.M. 211, 215-16, 784 P.2d 30, 34-35 (1989) (rejecting the federal “totality of the circumstances” approach to probable cause determinations based on tips from informants).

[13] The “ultimate question” in all cases involving Article II, Section 10 is reasonableness. Attaway, 117 N.M. at 149, 870 P.2d at 111. In determining reasonableness, our courts have “avoided bright-line, per se rules.” State v. Paul T., 1999-NMSC-037, ¶ 9, 128 N.M. 360, 993 P.2d 74. For example, the New Mexico Supreme Court held that even though a statute authorized warrantless arrests based only on probable cause for certain drug offenses, such arrests were not automatically reasonable. See Campos v. State, 117 N.M. 155, 158, 870 P.2d 117, 120 (1994). Rejecting a “blanket federal rule,” the Court held that “each case must be reviewed in light of its own facts and circumstances.” Id. The Court concluded that for this type of arrest to be reasonable, the arresting officer must be able to demonstrate not only probable cause, but also “some exigency . . . that precluded the officer from securing a warrant.” Id. at 159, 870 P.2d at 121. Similarly, in Gomez, the Court held that a “particularized showing of exigent circumstances” is required to conduct a warrantless search of an automobile. 1997-NMSC-006, ¶ 39. In imposing the exigency requirement, the Court rejected the “federal bright-line automobile exception,” despite acknowledging that “it may be true that in most cases involving vehicles there will be exigent circumstances justifying a warrantless search.” Id. ¶ 44.

[14] The greater search and seizure protections afforded by Article II, Section 10 of the New Mexico Constitution and the disfavor that our courts have shown for bright-line categorical rules lead us to adopt the rule proposed by Justice O’Connor in Atwater. First, we find Justice O’Connor’s rule to be the one most consistent with prior New Mexico cases interpreting Article II, Section 10. In both Campos and Gomez, the Court rejected bright-line rules that would have held certain categories of searches or seizures to be per se reasonable so long as there was probable cause. Instead, the Court in both cases adopted fact-specific reasonableness inquiries that require some showing of exigency. What we do here is similar. We hold that, under Article II, Section 10, probable cause that a non-jailable offense has been committed does not automatically make arrest reasonable, and that for such arrests to be reasonable, there must be “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion of a full custodial arrest.” Atwater, 532 U.S. at 366 (O’Connor, J., dissenting) (alteration in original) (quoting Terry, 392 U.S. at 21).

[15] We also find this standard to be appropriate because we agree with Justice O’Connor that when a non-jailable offense has been committed, the balancing of governmental and individual interests will generally weigh heavily in favor of the individual, such that it will often be unreasonable to make an arrest. In this case, there do not appear to have been any circumstances that made it necessary for the officer to arrest Defendant. There is no suggestion that Defendant acted in a violent or confrontational manner. He was not driving the vehicle, and he appears to have complied with all of the officer’s requests. In these circumstances, a citation would likely have “serve[d] the State’s . . . law enforcement interests every bit as effectively as an arrest.” See Atwater, 532 U.S. at 365 (O’Connor, J., dissenting). Thus, under the standards we have adopted, Defendant’s arrest was unreasonable because there were no circumstances justifying the officer’s choice to arrest Defendant rather than issue a citation.

[16] We also side with Justice O’Connor in believing that our interpretation of Article II, Section 10 will not create undue administrative difficulties or lead to underenforcement. We agree with Justice O’Connor’s qualified immunity analysis, and we reiterate that reasonable mistakes regarding the jaiability of a particular offense will not subject an officer to § 1983 liability, and thus underenforcement will not be a major concern. To the extent that such reasonable mistakes occasionally do result in evidence that is seized pursuant to arrest being later suppressed, we find that to be a necessary collateral effect of protecting the privacy interests of those who commit non-jailable misdemeanors. We believe that protecting those interests and preventing the official abuses of the misdemeanor arrest power detailed by Justice O’Connor, Atwater, 532 U.S. at 371-72, justify imposing the simple requirement that officers be able...
to articulate why it is necessary to arrest a subject for a non-jailable offense.  

{17} We also note that it appears as though the majority of state courts that have addressed the question of whether Atwater should be followed as a matter of state constitutional law have decided that it should not. See, e.g., State v. Askerooth, 681 N.W.2d 353, 361-63 (Minn. 2004) (en banc); State v. Bauer, 2001 MT 248, ¶ 33, 36 P.3d 892 (Mont. 2001); State v. Bayard, 71 P.3d 498, 502 (Nev. 2003) (per curiam); State v. Brown, 2003-Ohio-3931, ¶ 7, 792 N.E.2d 175 (Ohio 2003). We do not deem it critical that the reasoning of some of these cases may have been supported by local statutes or rules. See, e.g., Askerooth, 681 N.W.2d at 372-73 (Anderson, J., concurring specially). In addition, a case that considered these cases and declined to adopt their reasoning did so because, contrary to the situation in New Mexico, that jurisdiction’s settled law was that the state constitutional provision was “co-extensive with the Fourth Amendment.” State v. Mondaine, No. ED 851168, 2005 WL 2206790, at *4 (Mo. Ct. App. Sept. 13, 2005) (internal quotation marks and citation omitted).

{18} Finally, we briefly address the State’s two remaining arguments. First, the State relies on two New Mexico cases holding that an officer may arrest a subject if there is probable cause to believe that a misdemeanor is being committed in the officer’s presence. See State v. Hawkins, 1999-NMCA-126, ¶ 17, 128 N.M. 245, 991 P.2d 989; State v. Warren, 103 N.M. 472, 475, 709 P.2d 194, 197 (Ct. App. 1985). These cases do not distinguish between offenses that can result in jail time and those that cannot. Believing that to be an important distinction, we note that the cases cited by the State are not inconsistent with our holding in this case. See Moffat v. Branch, 2005-NMCA-103, ¶ 22, 138 N.M. 224, 118 P.3d 732 (“[C]ases are not authority for propositions not considered.”) (quoting Fernandez v. Farmer’s Ins. Co., 115 N.M. 622, 627, 857 P.2d 194, 197 (Ct. App. 1993)), cert. granted, 2005-NMCERT-8, 138 N.M. 329, 119 P.3d 1266.

{19} Second, the State cites two New Mexico statutes that appear to allow warrantless arrests for non-jailable misdemeanors. NMSA 1978, § 3-13-2(A)(4)(d) (1988) states that an officer “shall . . . apprehend any person in the act of violating the laws of the state or the ordinances of the municipality and bring him before competent authority for examination and trial.” NMSA 1978, § 66-8-123(F) (1989) states, “A law enforcement officer who arrests a person without a warrant for a misdemeanor violation of the . . . Liquor Control Act . . . may use the uniform traffic citation, issued pursuant to procedures outlined in [NMSA 1978, § 31-1-6(B)-(E) (1987)], in lieu of taking him to jail.” Section 60-7B-1(C), which is the minor in possession charge on which Defendant was arrested, is part of the Liquor Control Act. We agree that both of these statutes facially authorize the type of arrest that occurred here. But as explained in Campos, 117 N.M. at 157-58, 870 P.2d at 119-20, all arrests must be reasonable, and statutory authority does not automatically make an arrest reasonable. Because we have concluded that arrests for non-jailable offenses are unreasonable under Article II, Section 10 of the New Mexico Constitution in the absence of specific and articulable facts that warrant an arrest, we construe both statutes to apply to situations that meet that standard. We also note that this result is in keeping with other New Mexico statutes that demonstrate a preference for citations rather than arrest in the context of minor criminal offenses. See § 66-8-123(A) (stating that with certain exceptions, subjects arrested for certain misdemeanor motor vehicle offenses shall be given a citation and released from custody).

{20} In sum, we note that our holding today mandates only the following: when an individual has not committed an offense that our Legislature has deemed significant enough to warrant a loss of liberty, that individual should not be deprived of his or her liberty through arrest unless there is a legitimate reason for the deprivation.

CONCLUSION

{21} We reverse Defendant’s convictions for possession of a controlled substance and tampering with evidence, and we affirm his conviction for being a minor in possession of alcohol. We remand for sentencing solely on the latter conviction.

{22} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

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

Opinion Number: 2005-NMCA-142

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
LEONARDO GALLEGOS,
Defendant-Appellant.
No. 24,480 (filed: October 28, 2005)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
MARK A. MACARON, District Judge

PATRICIA A. MADRID,
Attorney General
Santa Fe, New Mexico

JOHN BIGELOW,
Chief Public Defender
KARL ERICH MARTELL,
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

STEVEN S. SUTTLE,
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

OPINION

MICHAEL VIGIL, JUDGE

[1] Defendant was convicted of one count of criminal sexual contact of a minor in the third degree by a person in a position of authority against Jamie S., and two counts of aggravated indecent exposure against Ursula C. NMSA 1978, § 30-9-13(A) (1990); NMSA 1978, § 30-6-3 (1990). The dispositive issue on appeal is whether Defendant was entitled to a separate trial involving each victim. Concluding that the counts regarding Jamie should have been severed from the counts regarding Ursula, we reverse and remand for two new trials.

BACKGROUND

[2] Defendant was a juvenile correction officer (guard) at the Youth Diagnostic and Detention Center (YDDC) in Albuquerque, New Mexico, in which minors were incarcerated, and the victims were residents of YDDC under Defendant’s control and supervision. Counts 1-7 of the indictment alleged offenses against Jamie. The indictment charged that between September 1, 1998, and January 19, 1999, Defendant engaged in criminal sexual contact of a minor in the third degree by a person in a position of authority by touching Jamie's breasts on three occasions (Counts 1-3), touching her buttocks on three occasions (Counts 4-6), and having her touch his penis on one occasion (Count 7). The remaining counts alleged offenses against Ursula, charging that in a similar time frame, Defendant committed aggravated indecent exposure against Ursula on three occasions (Counts 8-10), and on two occasions asked Ursula to disrobe for him, thereby contributing to the delinquency of a minor (Counts 11-12).

[3] In a separate, earlier-filed indictment, it was alleged that in the same time frame Defendant sexually penetrated M.G., a minor, who was incarcerated at YDDC while under Defendant’s control and supervision as a juvenile correctional officer. The State filed a motion to consolidate both indictments in a single trial. The judge who was presiding over the separate indictment (Judge Allen) denied the State’s motion on the basis that the evidence pertaining to each victim would not be cross-admissible in separate trials and unfair prejudice would result in a joint trial involving all three victims. He expressly relied on State v. Ruiz, 2001-NMCA-097, 131 N.M. 241, 34 P.3d 630, in his ruling.

[4] In this case, Defendant then filed a motion for separate trials on Counts 1-7 involving Jamie and Counts 8-12 involving Ursula. Defendant alleged that he would be unduly prejudiced in a joint trial, that evidence of the counts involving Jamie would not be admissible in a separate trial on the counts involving Ursula, that evidence as to one victim would allow the jury to unfairly infer criminal disposition as to the other alleged victim, and that the prejudice in a joint trial outweighed any consideration of judicial economy. The motion was denied, notwithstanding Judge Allen’s earlier ruling refusing to consolidate both indictments into a single trial. The basis expressed by the trial court was that “it appear[ed] that the central thrust of the evidence would be to show that both are part of a continuing scheme or plan which by its nature was ongoing throughout this period of time that involved both girls and the Defendant’s employment.” The court also noted that “one of the areas that evidence from both cases could be used in the other [would be] to show there was opportunity.” The specific type of opportunity to which the court referred was that Defendant used his position of authority as a guard “to create and further opportunities for access to the girls who were housed at that facility for sexual reasons.” In particular, Defendant, by virtue of his position, was able to utilize acts of favor to gain access to the girls, as well as put the girls in a position where the alleged offenses could take place.

[5] Jamie testified that she first met Defendant while she was a resident of YDDC during the fall of 1998. For the first month of their relationship, Jamie and Defendant would talk occasionally but generally behaved like any other resident and any other guard. However, their relationship changed when they began talking during a dinner held in the facility’s chapel. Several days later, Defendant entered the facility’s cafeteria while Jamie was cleaning up after dinner. The couple ended up in a nearby restroom where they began kissing. Jamie testified that, while they were in the restroom kissing, Defendant “put his hand on [her] butt and breast.” She was not scared and she enjoyed it. Further, Jamie thought Defendant was “extremely handsome” and she “felt lucky” when he showed interest in her. Jamie and Defendant continued to have three to four such encounters per week. During one such encounter, Defendant got Jamie’s hand and he put her hand on his penis when they were kissing. On this single occasion, Jamie “got scared and . . . pulled away” from Defendant. During cross-examination, Jamie testified that her relationship with Defendant could be properly characterized as girlfriend and boyfriend. In addition to her physical
contact with Defendant, Jamie would write him letters and call him at home. Finally, she said that Defendant did not coerce or force her at any time, nor did he threaten her by virtue of his position as a guard if she rebuffed his advances.

{6} Ursula testified that she was also a resident at YDDC in 1998. When she first met Defendant, she would occasionally have casual, friendly conversations with him. However, shortly after they met, Defendant’s attitude toward her began to change. When Defendant was alone with Ursula, he was friendly toward her and frequently complimented her. He would also occasionally bring her snacks. However, when other people were around, he would curse at her and call her foul names.

{7} Ursula had difficulty following the rules at YDDC. As a result, the YDDC staff placed her into a special unit known as the Adjustment Unit. The YDDC staff also frequently moved her to an observation room where she could be constantly watched. The observation room was a single small room equipped with a mattress, a toilet, and a sink. It contained a large window of one-way glass that separated the adjacent control unit from the observation room. The staff allowed staff in the control unit to see into the observation room while preventing the resident in the observation room to see into the control unit. From the control unit, YDDC staff controlled the lights in both the control unit and the observation room. While she was in the observation room, Ursula was able to communicate with the staff in the control unit by way of a speaker system.

{8} While it was not generally possible to see from the observation room into the control room, Ursula testified that, if the lights in the observation room and the control unit were turned off, it was possible to see into the control unit from the observation room. Ursula recalled that while she was in the observation room there were a few times when the lights were adjusted such that she could see into the control unit. On these occasions, Defendant was usually in the control unit. The first time that she was able to see into the control room, Ursula “didn’t really know what was going on.” Defendant was speaking to her and “doing something” but she “didn’t know what it was.” Thinking about it, she “kind of figured out, like, he was like touching himself and asking [her] if [she] liked it or if it was cool.” Ursula testified that on two subsequent occasions, the lights were turned off so that she could see into the control unit and she observed “[Defendant] jacking off in front of [her].” On yet a separate occasion when she was in the observation room, Defendant “told [her] to take [her] shirt off or just flash him.” She refused.

{9} In voir dire the prospective jurors were advised by the trial court that Defendant was charged with seven counts of criminal sexual contact of a minor in the third degree by a person in a position of authority, three counts of aggravated indecent exposure, and two counts of contributing to the delinquency of a minor.

{10} After the State rested, Defendant’s motion for a directed verdict on Counts 1-6 was granted on grounds that there was an absence of evidence that Defendant used his position to coerce Jamie to submit to criminal sexual contact. The State stipulated to a directed verdict on one count of contributing to the delinquency of a minor (Count 12), and it was also removed from the jury’s consideration. Counts 7-11 of the indictment were then renumbered as Counts 1-5. The jury was never advised that Counts 1-6 and 12 of the indictment were dismissed or given any instructions on how to treat the evidence that was admitted as to these dismissed charges.

{11} The jury was instructed on a single count of criminal sexual contact of a minor by use of coercion by a person in a position of authority as to Jamie and three counts of indecent exposure and one count of contributing to the delinquency of a minor involving Ursula. Defendant did not testify. His attorney relied on inconsistencies in Jamie’s and Ursula’s testimony and the duty of the State to prove the crimes beyond a reasonable doubt in his closing statement to argue for an acquittal.

{12} The jury found Defendant guilty of criminal sexual contact of a minor in the third degree by a person in a position of authority on the charge involving Jamie. It then found Defendant guilty of two counts of indecent exposure, not guilty of one count of indecent exposure, and not guilty of contributing to the delinquency of a minor on the charges involving Ursula.

{13} Defendant again argued in a motion for a new trial that the trial court erred in denying his motion to sever counts. The motion was denied.

{14} Defendant appeals. Because we held that the trial court improperly denied Defendant’s motion to sever, we reverse and remand.

STANDARD OF REVIEW

{15} Rule 5-203(C) NMRA provides in pertinent part: “If it appears that a defendant . . . is prejudiced by a joinder of offenses . . . the court may order separate trials of offenses[.]” Since the resolution of a motion to sever charges “depends in a large measure upon the special circumstances of each case,” the trial court has “broad discretion” in ruling on such a motion. State v. Duffy, 1998-NMSC-014, ¶ 42, 126 N.M. 132, 967 P.2d 807 (internal quotation marks and citation omitted). Therefore, a ruling on a motion to sever charges is ordinarily reviewed by the deferential abuse of discretion standard of review. Id. However, it is well settled that a trial court abuses its discretion in denying severance when “prejudicial testimony, inadmissible in a separate trial, is admitted in a joint trial.” Ruiz, 2001-NMCA-097, ¶ 11 (internal quotation marks and citation omitted). This is because prejudice results as a matter of law. However, “[i]f evidence of one offense would be admissible in the trial of the other, a trial court does not abuse its discretion in denying a motion to sever.” State v. Peters, 1997-NMCA-084, ¶ 12, 123 N.M. 667, 944 P.2d 896. We therefore proceed to determine whether evidence of the offenses involving Jamie would be admissible in a separate trial involving the offenses against Ursula, and vice versa.

See State v. Massengill, 2003-NMCA-024, ¶ 50, 133 N.M. 263, 62 P.3d 354 (noting we review a trial court decision to admit or exclude evidence under an abuse of discretion standard, unless application of the law to the facts is necessary, which requires de novo review); State v. Elinski, 1997-NMCA-117, ¶ 8, 124 N.M. 261, 948 P.2d 1209 (applying de novo review to evidence admitted over objection based on a “misapprehension of the law”).

DISCUSSION

{16} The parties do not dispute that whether evidence of the offenses as to each victim would be cross admissible in a separate trial is governed by Rule 11-404(B) NMRA. This rule of evidence provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

{17} On its face, Rule 11-404(B) prohibits the introduction of certain evidence. When the evidence consists of “other crimes, wrongs or acts” and its admission will
“prove the character of a person in order to show action in conformity therewith[,]” the Rule flatly states such evidence is “not admissible.” See State v. Williams, 117 N.M. 551, 557, 874 P.2d 12, 18 (1994) (stating that “[t]he purpose of Rule 404(B) is to exclude the admission of character traits to prove that a defendant acted in accordance with those traits”). As a result, we have noted that “Rule 11-404(B) is fundamentally a rule of exclusion.” State v. Otto, 2005-NMCA-047, ¶ 13, 137 N.M. 371, 111 P.3d 229, cert. granted, 2005-NMCERT-004, 137 N.M. 455, 112 P.3d 1112; see also State v. Kerby, 2005-NMCA-106, ¶ 24, 138 N.M. 232, 118 P.3d 740, cert. granted, Sup. Ct. No. 29,336 (August 12, 2005). “[I]t is essential to recognize that the prohibition against propensity evidence set out in Rule 11-404(A) and in the first sentence of Rule 11-404(B) remains operative even when evidence of other acts is being admitted” for a purpose allowed by Rule 11-404(B). As such, the rule reflects a well-settled principle of American jurisprudence that a “man should not be judged strenuously by reference to the awesome spectre of his past life.” M.C. Slough & J. William Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325, 325 (1956). Therefore, in a criminal prosecution “[t]he State may not show defendant’s prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.” 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5232, at 343 (1978) (quoting Michelson v. United States, 335 U.S. 469, 475-76 (1948)). The underlying concern is that if evidence of a defendant’s character is improperly presented to the jury it “is likely to be given more probative value than it deserves and may lead the fact-finder to punish a bad person regardless of the evidence of what happened in the specific case.” State v. Lamure, 115 N.M. 61, 69, 846 P.2d 1070, 1078 (Ct. App. 1992) (Hartz, J., specially concurring); see Slough & Knightly, supra, at 325 (noting that “[e]vidence of other crimes and misdeeds is not excluded because of an inherent lack of probative value, but is withheld as a precaution against inciting prejudice”). Therefore, we must take care to ensure that a defendant is not convicted of an offense “because, generally, he is a bad man, or has committed other crimes” but rather is convicted based solely “on evidence showing he is guilty of [the charged] offense.”

State v. Beachum, 96 N.M. 566, 569, 632 P.2d 1204, 1207 (Ct. App. 1981) (internal quotation marks and citation omitted). {18} This task is particularly critical when sex offenses involving children are charged, as in this case. In State v. Mason, 79 N.M. 663, 664, 448 P.2d 175, 176 (Ct. App. 1968), the defendant was charged with committing sexual assault upon an eleven-year-old girl and attempted rape of a twelve-year-old girl. Two fifteen-year-old girls testified over objection about sexual relations they had with the defendant, and he was convicted of the offenses involving the eleven- and twelve-year-old girls. Id. at 664-65, 448 P.2d at 176-77. The convictions were reversed because the evidence involving the fifteen-year-old girls was improperly admitted as character and disposition evidence and it was unduly prejudicial. Id. at 668, 448 P.2d at 180. This Court first observed that, “[o]rdinarily proof of a distinct offense independent of the offense with which the accused is charged and for which he is being tried is not admissible.” Id. at 665, 448 P.2d at 177. It is particularly pertinent to this case that the court then said:

Because of the emotional persuasiveness of evidence involving sex offenses with or upon children, the evidence of similar but distinct offenses with or upon other children should ordinarily be excluded. The danger or prejudice so often outweighs the permissible probative value of such evidence. This does not mean such evidence may not properly be received if it is relevant to, and its probative force is sufficiently great upon, some material element of the crime charged which is in issue and upon which there is doubt, such as identity, intent, knowledge, etc.

Id. at 667, 448 P.2d at 179. {19} This admonition as it relates to sex offenses involving children has been repeated and applied several times. See Ruiz, 2001-NMCA-097, ¶ 14 (stating that “prior-bad-acts evidence is especially damaging when the case involves a particularly reprehensible crime against a child”) (internal quotation marks and citation omitted); State v. Montoya, 116 N.M. 72, 75, 860 P.2d 202, 205 (Ct. App. 1993) (“Evidence that a defendant committed a prior illegal sex act against a child is extremely prejudicial.”); State v. Aguayo, 114 N.M. 124, 131, 835 P.2d 840, 847 (Ct. App. 1992) (stating that evidence of uncharged conduct “can be incendiary in child abuse cases” and that “in these volatile cases the courts must be especially careful in applying the rules of evidence”); State v. Lucero, 114 N.M. 489, 494, 840 P.2d 1255, 1260 (Ct. App. 1992) (“Prior bad acts evidence is so powerful that it is outcome-determinative in most cases of sexual contact with a child.”) (quoting Chris Hutton, Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child, 34 S.D. L. Rev. 604, 625-26 (1989))).

{20} To determine whether “the evidence would have been cross-admissible in separate trials with respect to each [victim]” under Rule 11-404(B), we use a two-step process. Ruiz, 2001-NMCA-097, ¶ 15. Our first inquiry is whether the evidence is being offered for a purpose that “satisfies a valid exception to the general prohibition on propensity evidence.” Id. If the evidence satisfies this requirement, our second inquiry is under Rule 11-403 NMRA in which we “balance the prejudicial effect of the evidence against its probative value to determine if ‘the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.’” Ruiz, 2001-NMCA-097, ¶ 15 (quoting Rule 11-403) (alteration in original).

A. Evidence of Defendant’s Prior Bad Acts to Show Scheme or Plan

{22} Rule 11-404(B) permits evidence of “other crimes, wrongs or acts” to be admitted to prove a “plan.” The authorities recognize a “plan” under this exception in two separate, distinct ways. See generally George L. Blum, Annotation, Admissibility, In Rape Case, of Evidence That Accused Raped or Attempted to Rape Person Other Than Prosecutrix—Prior Offenses, 86 A.L.R.5th 59, 81-82 (2001) (noting that “common plan or scheme” exception is used in two ways: where the common scheme or plan embraces the commission of two or more crimes; and when there are sufficient similarities between the charged crime and other offense); George L. Blum, Annotation, Admissibility, In Rape Case, of Evidence That Accused Raped, or Attempted to Rape, Person Other Than Prosecutrix—Offenses Unspecified As to Time, 88 A.L.R.5th 429, 440 (2001) (same);...
permitting the use of propensity to prove conduct." Id. at 74, 860 P.2d at 204 (second alteration in original) (internal quotation marks and citation omitted). As a result, we reversed the trial court’s admission of the evidence of the prior bad act because “without some other proof that such a plan actually existed, evidence that the charged conduct is part of a bigger plan because Defendant did the same thing once before is nothing more than irrelevant propensity evidence.” Id.; see also State v. Velaarde, 67 N.M. 224, 227, 354 P.2d 522, 524 (1960) (holding it was reversible error to allow cross examination about the defendants’ sexual assault of a Navajo woman in a prosecution for rape of an Apache woman one month later because, “[i]t was wholly irrelevant and could serve no purpose other than to show a disposition on the part of the [defendants] to commit the crime with which they were charged”).

{25} Second, other jurisdictions have held that evidence is also admissible to show a “plan” under Rule 11-404(B) where the same “plan” is used repeatedly to commit separate crimes that are markedly similar to the way in which the charged crime was committed. See DeVincenzo, 74 P.3d at 124-26 (discussing this type of “plan” in detail). In order to constitute an admissible “plan” under this exception, the similarities between the charged bad act and the charged offense must be substantial. See Matthews v. Super. Ct., 247 Cal. Rptr. 226, 231-32 (Cal. Ct. App. 1988) (affirming the admission of evidence of prior sexual assaults because “the three instances were strikingly similar and consequently did tend to show defendant had a common plan for picking up and raping young women at a certain place and in a certain way”); State v. Kackley, 92 P.3d 1128, 1133 (Kan. Ct. App. 2004) (noting that “[a] number of decisions have upheld the admission of [evidence of prior bad acts] in sex crime cases where the details of the plan for the prior crimes and the crime for which the defendant was on trial were ‘strikingly similar’”); State v. Frazier, 476 S.E.2d 97, 300 (N.C. 1996) (affirming the admission of evidence of prior sexual misconduct to show the defendant’s plan or scheme in part because the evidence “tended to prove that defendant’s prior acts of sexual abuse occurred . . . in a strikingly similar pattern”). Our own cases, however, do not appear to utilize such a broad reading of “plan” under Rule 11-404(B). Compare Griffin, 116 N.M. at 691-92, 866 P.2d at 1158-59 (describing a strikingly similar, signature-type of method of committing bank robberies, involving the robber’s wearing an all-black costume, utilizing ear phones and devices attached to a belt, using a gym bag for carrying the proceeds, and jumping athletically onto and over counters), with Montoya, 116 N.M. at 73-74, 860 P.2d at 203-04 (described above, the court holding the evidence inadmissible), and State v. Jones, 120 N.M. 185, 186, 189, 899 P.2d 1139, 1140, 1143 (Ct. App. 1995) (invoking the very similar behavior of the defendant accosting two victims while they waited in drive-up lines late at night and getting into their cars, going to another location, forcing himself upon them, and releasing them the next morning, the court holding the evidence inadmissible).

{26} With respect to the allegations against Defendant, we conclude that evidence of the crimes would not be cross-admissible to show such a plan. Even if we were to broaden the “plan” exception beyond that which has been adopted in our past cases, with respect to each victim, Defendant’s crimes against Jamie and Ursula are not “strikingly similar.” Defendant used his position as a guard to cultivate a romantic relationship with Jamie and used his authority within that relationship to force unlawful sexual contact with her. His contact with Jamie frequently occurred in a cafeteria restroom while she was working. The offenses against Ursula were committed in an entirely different manner. Defendant did not use his position as a guard to convince Ursula to do anything. The offenses all occurred while Ursula was confined in the observation room, and none of the offenses involved physical contact with Defendant. Defendant’s offenses against Jamie and Ursula do not reflect a plan to repeatedly commit separate offenses in a markedly similar way because they do not reflect a plan to commit the offenses “at a certain place and in a certain way.” Matthews, 247 Cal. Rptr. at 231-32. To the extent that he used his position as a guard, he used it in a very different way to commit offenses against Jamie than he did to commit offenses against Ursula. In the end, there is simply not “a close degree of similarity or connection between” the offenses against the two victims. State v. Berry, 503 S.E.2d 770, 772 (S.C. Ct. App. 1998) (internal quotation marks and citation omitted).
B. Evidence of Prior Bad Acts to Show Opportunity

[28] The State does not argue that the evidence as to each victim was cross-admissible to show Defendant’s opportunity to commit the crimes charged. However, the trial court denied Defendant’s motion to sever in part because “evidence from both cases could be used in the other to show there was opportunity.” See Rule 11-404(B) (stating that evidence of other bad acts “may . . . be admissible for other purposes, such as proof of . . . opportunity”).

[29] The “opportunity” exception to the prohibition on evidence of other bad acts “is something of a mystery.” Wright & Graham, supra, § 5241, at 484; see 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 110, at 626 (2d ed. 1994) (noting that “there is little indication of [the] source or intended meaning” of the “opportunity” exception).

Further, we are aware of no New Mexico cases that have examined the meaning of the “opportunity” exception. However, federal appellate courts have. See Lamure, 115 N.M. at 68, 846 P.2d at 1077 (noting that New Mexico’s Rule 11-404 is “virtually identical to Federal Rule[] of Evidence 404”) (Hartz, J., specially concurring). For example, the First Circuit Court of Appeals has noted that “[t]o show ‘opportunity’ is to show that the defendant had some special capacity, ability or knowledge that would enable him to commit the crime.” United States v. Maravilla, 907 F.2d 216, 222 (1st Cir. 1990). Similarly, in United States v. Fairchild, 526 F.2d 185, 188 (7th Cir. 1975), the defendant argued that his conviction for distributing counterfeit Federal Reserve notes should be reversed because the trial court improperly admitted evidence that he had possessed a large number of counterfeit notes. Id. The appellate court concluded that the trial court properly admitted the evidence because it was not offered to show the defendant’s propensity to commit the crime, but was instead offered because it “tended to prove that [the defendant] had the ability to distribute the notes.” Id. at 189.

[30] The evidence that because Defendant was a guard at YDDC and therefore had access to the inmates and was familiar with the facility unquestionably demonstrated that he had the “capacity, ability or knowledge” to commit the offenses against each victim. We therefore assume, without deciding, that evidence of the offenses against Jamie would be cross-admissible in a separate trial of the offenses involving Ursula pursuant to Rule 11-404(B) (and vice-versa) to prove that Defendant had an “opportunity” to commit the offenses because such evidence would include proof that Defendant was a guard at YDDC. Contrary to the trial court’s expressed rationale, there was no specific evidence admitted that Defendant used any special knowledge or anything else related to his position as a guard to create an opportunity for sexual interaction with the victims. However, even if general opportunity evidence would be cross-admissible under Rule 11-404(B), we must still consider whether its probative value was “substantially outweighed by the danger of unfair prejudice.” Ruiz, 2001- NMCA-097, ¶ 15 (internal quotation marks and citation omitted); Rule 11-403. The probative value of the evidence depends in part on “the availability of other means of proof.” State v. Fuson, 91 N.M. 366, 368, 574 P.2d 290, 292 (Ct. App. 1978). In this case it was uncontested at trial that Defendant was a guard at YDDC with access to the inmates and familiarity with the facility. Further, to the extent that the State needed to show that Defendant had the “capacity, ability or knowledge” necessary to commit offenses against each victim, significant “other means of proof” were readily available. For example, Defendant’s former colleagues testified that Defendant worked at YDDC while Ursula and Jamie were residents at the facility. Therefore, the probative value achieved by cross-admitting evidence of the offenses against each victim in a separate trial would be extremely limited. On the other hand, as we have noted above, evidence that a defendant performed an illegal sex act with another minor is especially prejudicial. See Montoya, 116 N.M. at 75, 860 P.2d at 205.

[31] The probative value of the cross-over evidence to show “opportunity” was extremely limited, while the resulting prejudice was overwhelming. See Beachum, 96 N.M. at 569, 632 P.2d at 1207 (reversing convictions for criminal sexual contact of a minor and aggravated battery where confession to three possible prior acts of rape was admitted over objection to prove identity, there were “other means of proof” of the defendant’s identity, and it was not necessary to the state’s case on identity to admit the defendant’s statement). We therefore hold that evidence of Defendant’s offenses against each victim was not cross-admissible to show Defendant’s opportunity to commit the charged offenses.

C. Prejudicial Effect of Joint Trial

[32] A “defendant must prove he was prejudiced” to obtain a severance. State v. Gallegos, 109 N.M. 55, 64, 781 P.2d 783, 792 (Ct. App. 1989). Since Defendant was found not guilty of two of the five charges submitted to the jury, we proceed to determine whether Defendant was prejudiced. When evidence of prior bad acts evidence is admitted in violation of Rule 11-404(B), “prejudice is established when there are convictions” because “we will not speculate that the erroneous admission of other crimes did not cause a compromise verdict of guilty of some charges and not guilty of others.” Jones, 120 N.M. at 190, 899 P.2d at 1144. The evidence in this case was not cross-admissible under Rule 11-404(B) to show Defendant’s plan. However, since we assumed the evidence was cross-admissible to show “opportunity,” which necessitates further analysis of its admissibility under Rule 11-403, our inquiry is not over. We indicated in Jones that where evidence is admissible under Rule 11-404(B) but it should have been excluded under Rule 11-403 and the jury acquitted the defendant of some of the charges, we will not assume that the other bad-acts evidence was “so overwhelmingly prejudicial as to completely contaminate the jury.” Jones, 120 N.M. at 190, 899 P.2d at 1144. Instead, we undertake to determine whether the error in admitting the evidence was harmless. See Kerby, 2005-NMCA-106, ¶ 33 (undertaking harmless error analysis after holding that evidence of other bad acts evidence concerning the victim was inadmissible).

[33] Where evidence is erroneously admitted in a criminal trial, if “there is a reasonable possibility that the evidence complained of might have contributed to the conviction,” it is not harmless. Clark v. State, 112 N.M. 485, 487, 816 P.2d 1107, 1109 (1991); see Kerby, 2005-NMCA-106, ¶ 33; see also State v. Balderama, 2004-NMSC-008, ¶ 41, 135 N.M. 329, 88 P.3d 845. The extremely limited probative value of cross-admitting evidence of offenses against each victim to show an “opportunity” to commit the offenses was overwhelmed by its substantial prejudicial effect. In particular, the strength of the evidence of Defendant’s using his position to coerce Jamie was not particularly strong, inasmuch as she testified that he did not use his position at all. Although there were acquittals for two of the five offenses involving Ursula, since there was only one offense involving Jamie submitted to the jury and since Defendant was convicted of that offense, we cannot say that the jury did not improperly use the evidence regarding
the offenses against Ursula as propensity evidence in its deliberations regarding the offense against Jamie. Regarding Ursula, the acquittals are readily explainable because of inconsistencies in Ursula’s own testimony. Without the evidence regarding Jamie, the jury may well have found Ursula’s testimony insufficient to warrant any convictions. In short, we cannot say that there is no reasonable possibility that the evidence complained of did not contribute to the convictions. See Clark, 112 N.M. at 487, 816 P.2d at 1109.

D. Sufficiency of the Evidence

{34} Defendant also argues that his convictions are not supported by substantial evidence. As discussed above, we reverse the trial court’s denial of Defendant’s motion to sever. However, “principles of double jeopardy would bar retrial if Defendant’s convictions are not supported by substantial evidence.” State v. Barragan, 2001-NMCA-086, ¶ 22, 131 N.M. 281, 34 P.3d 1157.

{35} To determine whether Defendant’s convictions were supported by sufficient evidence, we must consider “whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to each element essential to a conviction.” State v. Johnson, 2004-NMSC-029, ¶ 54, 136 N.M. 348, 98 P.3d 998 (internal quotation marks and citation omitted). This determination requires a two-step inquiry. Our first step is to “view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict.” State v. Graham, 2005-NMSC-004, ¶ 6, 137 N.M. 197, 109 P.3d 285 (internal quotation marks and citation omitted). Second, we must “determine[] whether the evidence, viewed in this manner, could justify a finding by any 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).

{36} To convict Defendant of sexual contact with a minor by a person in a position of authority as alleged, the State was required to show that: (1) Defendant “unlawful[ly] and intentional[ly] caus[ed]” Jamie to touch his “primary genital area”; (2) Jamie was “a child thirteen to eighteen years of age”; and (3) Defendant was “in a position of authority over [Jamie] and use[d] that authority to coerce [her] to submit[.]” Section 30-9-13(B)(2)(a). Defendant argues that his conviction on this charge was not supported by sufficient evidence because the State failed to show that Defendant used his authority to coerce Jamie to touch his penis.

{37} We disagree. Defendant relies on Jamie’s testimony that he did not use his position to cause the contact to happen. However, our cases make it clear that appellate courts do not consider the merit of evidence that would lead to a result contrary to the jury’s verdict. See State v. Vigil, 110 N.M. 254, 256, 794 P.2d 728, 730 (1990). In addition, the State need only prove that “[t]he unlawful contact was at least in part a result of Defendant’s position of authority.” See State v. Gardner, 2003-NMCA-107, ¶¶ 33, 38, 134 N.M. 294, 76 P.3d 47.

{38} Defendant’s convictions for aggravated indecent exposure are also supported by the evidence. Ursula testified that she saw Defendant masturbating on three occasions. However, she acknowledged that on the first occasion she “couldn’t make out what he was doing at the time.” Based on this testimony, we hold that Ursula’s eyewitness testimony is sufficient evidence to support Defendant’s conviction on two counts of aggravated indecent exposure.

{39} As discussed above, we hold that the State presented “substantial evidence of either a direct or circumstantial nature . . . to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to” Defendant’s convictions on one count of criminal sexual contact with a minor and two counts of aggravated indecent exposure. Johnson, 2004-NMSC-029, ¶ 54.

E. Defendant’s Other Arguments

{40} Defendant also argues that his convictions should be overturned because: (1) the trial court improperly refused to allow him to present rebuttal witnesses; (2) the prosecutor made inappropriate remarks in her closing argument that amounted to prosecutorial misconduct; and (3) cumulative error deprived him of a fair trial. Because we conclude that the trial court improperly denied Defendant’s motion to sever and remand, we need not reach these arguments.

CONCLUSION

{41} The trial court denied Defendant’s motion to sever the counts in the indictment relating to each victim, with the result that the jury heard and was allowed to consider the evidence pertaining to both victims. The evidence relating to each victim would not have been cross-admissible in separate trials to show Defendant’s plan to commit the offenses or to show that he had the opportunity to commit them. As a result, the trial court abused its discretion when it denied Defendant’s severance motion. Therefore, we reverse Defendant’s conviction and remand for two separate trials.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:
LYNN PICKARD, Judge
JAMES J. WECHSLER, Judge
Certiorari Denied, No. 29,549, December 12, 2005

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-143

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
STANLEY BRYANT HILL,
Defendant-Appellee.
No. 24,727 (filed: October 31, 2005)

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
THOMAS J. HYNES, District Judge

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Attorney General
Santa Fe, New Mexico

JOHN BIGELOW,
Chief Public Defender
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for Appellant

for Appellant

Opinion

JAMES J. WECHEL, Judge

[1] This case began in January 1989 when the State filed a complaint in magistrate court charging Defendant Stanley Bryant Hill with two counts of criminal sexual penetration of a minor under the age of thirteen (CSPM) for acts allegedly occurring in 1988 and 1989. The case was dismissed later that year. The State refiled the charges in 2002. The district court dismissed the charges based on speedy trial and due process grounds. The State appeals the district court’s order dismissing the charges. We remand for the district court to select a remedy that is appropriate regarding the lost evidence based on Chouinard.

FACTUAL AND PROCEDURAL BACKGROUND

[2] The 1989 complaint alleged that Defendant had put his penis in the mouth of his five-year-old niece. During the investigation, the niece had a medical examination and was diagnosed with gonorrhea of the mouth and throat, evidence that supported the allegations of sexual penetration. Defendant was also tested for gonorrhea during the investigation, and the results were negative.

[3] At the time of two preliminary hearings in 1989, the niece was six years old and was unable to testify in court because she was apparently traumatized by the alleged incidents of abuse or frightened by the courtroom procedures. In addition, a physician failed to honor a subpoena to testify for the State. Presumably, the physician would have testified about the diagnosis of the niece’s gonorrhea. Further, during the course of the 1989 investigation, Defendant took a polygraph test. At the conclusion of the test, the administering detective told Defendant that the results indicated deception, and Defendant allegedly confessed his guilt to the detective. This confession was recorded. The magistrate ruled, however, that the confession was inadmissible. Without the victim’s or the physician’s testimony, and without Defendant’s alleged confession, the State dismissed the charges in July 1989.

[4] The interested parties knew that the case was dismissed in 1989. Defendant was present at both preliminary hearings. An August 1989 supplemental sheriff’s report stated that the charges against Defendant were dismissed. An August 1989 district attorney’s case disposition report directed to the records custodian of the sheriff’s department stated that the case was dismissed prior to trial because the magistrate had found no probable cause at preliminary hearings. In addition, the assistant district attorney prosecuting the case wrote a letter in August 1989 to a sergeant who was listed as a witness. The letter advised the sergeant that the case was dismissed due to lack of probable cause and that it was not necessary for him to appear as a witness for the State. The niece and her family moved to Arkansas, and they did not pursue the case. Defendant was not further investigated or contacted about the charges; the State did not further prosecute until 2002.

[5] On November 5, 2002, in the course of an investigation of an unrelated report of sexual abuse that also implicated Defendant, Detective Kenneth Weisheit was introduced to a nineteen-year-old woman. The woman accompanied the victim of the reported sexual abuse to an interview. She advised Detective Weisheit that she was Defendant’s niece and that she had been sexually abused by Defendant when she was five years old. She stated that she was able to remember the sexual abuse and wanted to pursue the charges against Defendant.

[6] After this information came to light, on November 15, 2002, the State charged Defendant with two counts of CSPM in the first degree for the alleged conduct involving the niece that had occurred in 1988 and 1989. Sometime before 2002, however, the district attorney’s file and the magistrate court file were destroyed in accordance with the applicable regulations regarding the retention and disposal of evidence on closed cases. The sheriff’s department file was partially preserved. Certain items that should have been contained in it, however, including some medical records, Defendant’s tape-recorded confession, and Defendant’s polygraph interviews and
results, had been destroyed. Defendant filed motions to dismiss the 2002 charges with prejudice.

[7] In the motion to dismiss for denial of due process, Defendant argued that during the thirteen-year interval, the State destroyed, lost, or failed to preserve evidence material to his innocence and defense and that the intentional deprivation of such evidence prejudiced him. In the motion to dismiss for denial of speedy trial, Defendant argued that his right to a speedy trial was triggered by his arrest on the original charges in January 1989. Defendant maintained that he was “severely prejudiced by the [approximately thirteen-year] delay . . . because during the lengthy delay files, records, and evidence, all necessary for his defense, have been destroyed.”

[8] The district court held an evidentiary hearing on Defendant’s motions to dismiss. It granted Defendant’s motion to dismiss for denial of speedy trial, finding that Defendant’s speedy trial right began to run, pursuant to Salandre v. State, 111 N.M. 422, 806 P.2d 562 (1991), when Defendant was arrested and charged with CSPM on the original complaint, approximately thirteen years earlier on January 24, 1989. In addition, the district court granted the motion to dismiss for denial of due process, finding that due to the loss and destruction of evidence, Defendant was prejudiced by the State’s actions.

DISMISSAL FOR VIOLATION OF RIGHT TO SPEEDY TRIAL

[9] Defendant contends that his speedy trial right attached in 1989 when he was originally arrested and charged with CSPM. He does not complain about any delay since the 2002 charges, but argues that the approximately thirteen-year delay between the initial dismissal and the refiling of the charges, with no continuing investigation on the part of the State, violated his right to a speedy trial. Defendant also maintains that the district court correctly dismissed the charges against him, because, during the delay, the State destroyed exculpatory evidence, prejudicing his defense. The State contends that Defendant’s right to a speedy trial attached in November 2002, when he was arrested and charged. It argues that the period during which charges were not pending against Defendant, from approximately July 1989 to November 2002, should not be included in the calculation for the delay for speedy trial purposes. On appeal in a speedy trial claim, “we [defer] to the district court’s fact finding” and determine from our review of the record whether the district court’s ruling is supported by the law. See State v. Plouse, 2003-NMCA-048, ¶ 34, 133 N.M. 495, 64 P.3d 522; see also State v. Urban, 2004-NMSC-007, ¶ 11, 135 N.M. 279, 87 P.3d 1061; State v. Coffin, 1999-NMSC-038, ¶ 58, 128 N.M. 192, 991 P.2d 477; State v. Manzanares, 1996-NMSC-028, ¶ 1, 121 N.M. 798, 918 P.2d 714.

[10] The parties’ arguments address the Sixth Amendment mandate that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI. As our Supreme Court noted in Salandre, 111 N.M. at 425, 806 P.2d at 565, the speedy trial right attaches “when the putative defendant becomes an ‘accused,’” either at the time of a formal indictment or information or at time of the actual restraint imposed by arrest and the requirement to answer a criminal charge. See id. at 426, 806 P.2d at 566; United States v. Marion, 404 U.S. 307, 320 (1971).

[11] The United States Supreme Court explained the difference in focus between the speedy trial clause of the Sixth Amendment and the due process clause of the Fifth Amendment in United States v. MacDonald, 456 U.S. 1 (1982). In that case, military charges for three murders had been brought against the defendant and were dismissed after a lengthy hearing. Id. at 4-5. The investigation continued, and, more than four years after the dismissal, a federal grand jury indicted the defendant, charging him with the three murders. Id. at 5. The Court held that, like the period before indictment and arrest, the right to a speedy trial does not attach after charges are dismissed in good faith. Id. at 7. The Court differentiated between due process and speedy trial rights by noting that the due process clause, not the Sixth Amendment, applies to delay prior to arrest or indictment, including, under the constitution, “prejudice to the defense caused by passage of time.” Id. at 8. The Court discussed that the right to a speedy trial, on the other hand, “is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.” Id. The Court discerned that when charges are dismissed, “any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.” Id. at 9. As a consequence, according to the Court, when “charges are dismissed, the speedy trial guarantee is no longer applicable.” Id. at 8. It held that the right to a speedy trial did not apply to the period in which no charges were pending against the defendant. Id. at 9-10.

[12] Our appellate courts have followed the United States Supreme Court’s holding in MacDonald. In State v. McCrory, 100 N.M. 671, 675, 675 P.2d 120, 124 (1984), the state filed nolle prosequis, the defendants were released from custody without prejudice, and the state subsequently reinstated charges. Our Supreme Court held that “once charges are dropped in good faith, the delay is not scrutinized by the speedy trial clause of the Sixth Amendment of the federal constitution.” Id. Likewise, in State v. Jacquez, 119 N.M. 127, 130, 888 P.2d 1009, 1012 (Ct. App. 1994), this Court did not consider the time during which charges were dismissed by the state in good faith. The defendant was free of restrictions on his liberty after a magistrate judge had dismissed the charges for lack of probable cause until he was arrested on a bench warrant issued by a district judge based on an amended complaint. Id. at 130-31, 888 P.2d at 1012-13; see State v. Sanchez, 108 N.M. 206, 207, 769 P.2d 1297, 1298 (Ct. App. 1989) (holding that the speedy trial right does not attach upon arrest when the defendant has been arrested, released without restriction, and charged nineteen months later).

[13] In this case, there is no allegation that the State exhibited bad faith when the charges were dismissed in 1989. See MacDonald, 456 U.S. at 7 (limiting the holding that once charges are dismissed, the speedy trial guarantee is no longer applicable to a speedy trial claim under the Sixth Amendment to the United States Constitution when “the Government, acting in good faith, formally drops charges” and subsequently reindicts). The 1989 charges were dismissed for lack of probable cause. In addition, in the interval between when the charges against Defendant were dismissed in 1989 and the subsequent arrest on the same charges in 2002, Defendant was not in custody for the 1989 charges. In fact, the case had not been pursued or investigated by the State since it was dismissed in 1989. Although this interval is lengthy, the period of time does not alter our analysis because of the purpose of right to a speedy trial. As stated above, Defendant knew that the 1989 charges were dismissed, and he
does not present evidence that his liberty was impaired after the 1989 charges were dismissed.

{14} On appeal, Defendant argues that he “suffered anxiety and concern over the outcome of these charges for the entire time until . . . the trial court dismissed the pending case on February 10, 2004, a delay of fifteen years.” However, Defendant testified at the hearing on the motions to dismiss that he was told that the 1989 case was dismissed and he thought he would not have to worry about the case being brought back against him. Again, Defendant was not questioned, contacted, or held on the 1989 charges after they were dismissed in 1989 until his arrest in 2002. Defendant also argues that McDonald, McCrary, and Jacquez are distinguishable because, in those cases, the government was actively investigating whereas, in this case, the State did nothing during the period in which charges were not pending. We do not understand how this distinction would make a difference, except perhaps by making this case even less persuasive as one involving a speedy trial violation. If the point of the speedy trial guarantee is to minimize the disruption to a defendant’s personal interests caused by pending charges, a case the government had completely dropped would present less of a speedy trial violation, rather than a greater violation.

{15} The right to a speedy trial based on the 1989 complaint did not run from 1989 to 2002 because Defendant was not an “accused” and knew he was not an accused during the approximately thirteen-year interval when no CSPM charges were pending against him. See id. Therefore, the district court erred in determining that Defendant’s speedy trial right was violated. Defendant’s speedy trial right for this case did not attach until 2002. Defendant does not argue that his speedy trial right was violated with regard to the 2002 indictment. Thus, we need not conduct a speedy trial analysis using the Barker v. Wingo, 407 U.S. 514, 530 (1972), framework that governs speedy trial claims.

DISMISSAL FOR LACK OF DUE PROCESS FOR DELAY AND DESTRUCTION OF EVIDENCE

{16} In addition to the dismissal for a speedy trial violation, the district court also dismissed Defendant’s case on due process grounds. Defendant essentially contends that the delay, coupled with the State’s intentional destruction of evidence, denied him due process. We analyze the dismissal of criminal charges on due process grounds under a de novo standard, deferring to the district court’s findings of fact when they are supported by substantial evidence. See State v. Gonzales, 2002-NMCA-071, ¶ 10, 132 N.M. 420, 49 P.3d 681; State v. Armijo, 118 N.M. 802, 811, 887 P.2d 1269, 1278 (Ct. App. 1994) (reviewing dismissal for prosecutorial misconduct under a de novo standard). As stated in MacDonald, “[t]he Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations.” MacDonald, 456 U.S. at 8.

{17} Statutes of limitations provide the primary protection based strictly on the passage of time. “[T]he due process clause of the [F]ifth [A]mendment provides additional, albeit limited, protection against improper preaccusation delay.” Gonzales v. State, 111 N.M. 363, 364, 805 P.2d 630, 631 (1991). It requires dismissal when a defendant proves “prejudice and an intentional delay by the state to gain a tactical advantage.” Id. at 365, 805 P.2d at 632. If a defendant “makes a prima facie showing of prejudice and that the state knew or should have known delay was working a tactical disadvantage on [the] defendant, then the burden of production shifts to the prosecution to articulate a legitimate reason for the delay.” Id. at 366, 805 P.2d at 633. Otherwise, the state is entitled to the pre-indictment period that the legislature, as a matter of public policy, has enunciated in the applicable statute of limitations.” Id. at 365-66, 805 P.2d at 632-33.

{18} The State alleges that Defendant committed CSPM between September and December of 1988 and in January of 1989. Therefore, as the State acknowledges, and Defendant does not dispute, the applicable statute of limitations at the time Defendant allegedly committed CSPM is fifteen years. See NMSA 1978, § 30-9-11(A)(1) (1987) (classifying CSPM as a first degree felony); see also NMSA 1978, § 30-1-8(B) (1980) (stating that the statute of limitations for first degree felony is “fifteen years from the time the crime was committed”); cf. State v. Norush, 97 N.M. 660, 662, 642 P.2d 1119, 1121 (Ct. App. 1982) (noting prohibitions to removing defenses available at the time the act was committed). There is no statute of limitations issue in this case because the State filed its criminal information charging Defendant with CSPM on December 9, 2002.

{19} We therefore focus our analysis on the district court’s dismissal for preaccusation delay and destruction of evidence. As to this basis for dismissal, Defendant does not point to evidence of intentional delay by the State to gain a tactical advantage. The State did not pursue the case in 1989, because, at that time, it lacked the evidence to go forward with the case. Now, it has such evidence. The niece who, in 1989, was a young child victim and apparently too traumatized to testify, has voluntarily come forward to testify. There is no evidence that the State intended the delay to work a tactical disadvantage on Defendant or that the State knew or should have known that the delay would cause any specific tactical disadvantage to Defendant. Defendant asserts that “the [S]tate has a clear tactical advantage because the [S]tate destroyed the exculpatory evidence in its possession and then the prosecutor re-filed the charge.” But Defendant does not assert that the State improperly obtained such a tactical advantage. Dismissal is therefore not warranted on this basis.

{20} Destruction of evidence can also result in a denial of due process. New Mexico has adopted a three-part test to determine whether deprivation of evidence violates a criminal defendant’s right to due process and requires suppression of the evidence. Chouinard, 96 N.M. at 661, 634 P.2d at 683. With regard to each item of evidence, the district court must determine whether:

1) The State either breached some duty or intentionally deprived the defendant of evidence;
2) The improperly “suppressed” evidence [was] material; and
3) The suppression of [the] evidence prejudiced the defendant.

Id. (quoting State v. Lovato, 94 N.M. 780, 782, 617 P.2d 169, 171 (Ct. App. 1980)). Moreover, the defendant must show materiality and prejudice if the State demonstrates that it did not act in bad faith. Chouinard, 96 N.M. at 663, 634 P.2d at 685.

{21} Chouinard provides the two possible options available to the district court when the loss or destruction of evidence is known prior to trial. The district court can either exclude “all evidence which the lost evidence might have impeached” or admit the evidence “with full disclosure of the loss and its relevance and import.” Id. at 662, 634 P.2d at 684. “The fundamental interest at stake is assurance that justice is done, both to the defendant and to the public.” Id. In selecting its option, the district court must analyze the materiality of the evidence and the prejudice to the defendant to reach a just decision. Id.
The district court’s order does not reflect that it applied the *Chouinard* three-part test. The district court found that the State made no effort to preserve evidence, pursue this case, or show that it intended to bring charges against Defendant once they were dismissed for lack of probable cause in 1989. The order concludes, as required by *Chouinard*, that the State’s actions prejudiced Defendant. However, the order does not explicitly decide that the State breached some duty or intentionally deprived Defendant of material evidence, as required under the three-part test in *Chouinard*. Id. at 661, 634 P.2d at 683. *Chouinard* was not properly applied to this case, and dismissal was not proper.

Even if the findings required by *Chouinard* had been made, the proper remedy would have been one of the remedies set forth in *Chouinard*. Dismissal is not a proper remedy without a showing that the defendant “will be deprived of a fair trial if . . . tried without the missing evidence.” *State v. Bartlett*, 109 N.M. 679, 680-81, 789 P.2d 627, 628-29 (Ct. App. 1990) (stating that, “in a discovery sanctions case, ‘dismissal is an extreme sanction to be used only in exceptional cases’”). The district court did not specifically find that Defendant would be deprived of a fair trial on the 2002 charges without the destroyed evidence. Accordingly, we reverse the district court’s order dismissing the case and remand for trial, including, on remand, application of the *Chouinard* test to each item of evidence that is missing or destroyed.

**CONCLUSION**

Based on the foregoing, we reverse the district court’s order dismissing Defendant’s charges and remand for the district court to apply the *Chouinard* three-part test and select the appropriate remedy, because dismissal was not an option in this case.

*IT IS SO ORDERED.*

**JAMES J. WECHSLER,**

Judge

**WE CONCUR:**

LYNN PICKARD, Judge

CYNTHIA A. FRY, Judge

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From the New Mexico Court of Appeals

**Opinion Number:** 2005-NMCA-144

**Topic Index:**

- Appeal and Error: Preservation of Issues on Appeal
- Workers’ Compensation: Reimbursement

LIBERTY MUTUAL INSURANCE COMPANY and ATLAS RESOURCES, Plaintiffs-Appellants, versus RICHARD SALGADO, Defendant-Appellee.

No. 25,302 (filed: November 16, 2005)

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

WILLIAM F. LANG, District Judge

EDWARD RICCO

JOCelyn C. DRENNAN

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

Albuquerque, New Mexico

ROBERT A. CORCHINE

STEVEN J. LEIBEL

DINES & GROSS, P.C.

Albuquerque, New Mexico

for Appellees

for Appellants

**OPINION**

**LYNN PICKARD, Judge**

1. This appeal involves the right of an employer and its insurer (Plaintiffs) to pursue an action against an allegedly negligent third-party defendant (Defendant) to recover workers’ compensation benefits paid to two injured workers. On appeal, Plaintiffs argue that the district court erred in dismissing Plaintiffs’ claims against Defendant because *Gutierrez v. City of Albuquerque*, 1998-NMSC-027, 125 N.M. 643, 964 P.2d 807, now recognizes a direct right of subrogation for employers/insurers against third-party tortfeasors under NMSA 1978, § 52-5-17 (1990). In the alternative, Plaintiffs argue that their claims should nonetheless be reinstated because they have a right to intervene to protect their statutory right to reimbursement. Under either scenario, Plaintiffs contend that a statute of limitations bar to a worker’s tort claim should not bar an employer/insurer from pursuing its own timely filed action for recovery against a third party.

2. We hold that *Gutierrez* did not expand Section 52-5-17 to recognize an independent right to bring suit against a third-party tortfeasor. Consistently with our case law, we conclude Section 52-5-17 only provides a right to seek reimbursement from injured workers for workers’ compensation benefits when workers also recover from a third party. Because the statute provides a derivative right, we further hold that Plaintiffs’ claims for reimbursement against Defendant for benefits paid to one worker are barred by the statute of limitations. Although Plaintiffs suggest they have a right to intervene in the other worker’s third-party action, we do not address this issue because Plaintiffs did not preserve the argument before the district court. We therefore affirm the district court’s dismissal of Plaintiffs’ subrogation claims.

**BACKGROUND**

3. Roberto Chavez and Enrique Mier Rojo were injured in the course and scope of their employment while repairing the roof of a house owned by Defendant. The workers recovered workers’ compensation benefits from their employer, Atlas Resources, provided by Liberty Mutual Insurance Company (Plaintiffs). Before either worker had filed tort actions to recover damages relating to the injuries for which they had received benefits, Plaintiffs filed a complaint against Defendant alleging, based on *Gutierrez*, that they were entitled to pursue subrogation claims against Defendant to recover for workers’ compensation benefits they paid to the workers. Both workers subsequently filed individual personal injury actions against Defendant,
which were consolidated with Plaintiffs’ claims for subrogation.

[4] The district court granted summary judgment disposing of Rojo’s claim because the statute of limitations had run before Rojo filed his lawsuit. In the remaining consolidated actions of Plaintiffs and Chavez, Defendant filed a motion (joined by Chavez) to dismiss Plaintiffs’ subrogation claims under Rule 1-012(B)(6) NMRA. Defendant argued that Section 52-5-17 does not create an independent cause of action for employers/insurers but only provides the right to seek reimbursement when a worker receives workers’ compensation benefits and then recovers duplicate compensation in a third-party tort action. Defendant argued that Gutierrez did not change this long-standing interpretation of the statute. Thus, he argued, Plaintiffs had no right to bring their own suit against the third party. Defendant also argued that the limitations bar to Rojo’s claim precluded Plaintiffs from recovering benefits paid to Rojo. After a hearing, the district court granted Defendant’s motion to dismiss. Plaintiffs timely appealed the dismissal.

DISCUSSION

[5] We begin our analysis of this case by addressing Plaintiffs’ contention that Gutierrez changed the interpretation of Section 52-5-17 from a reimbursement statute to a subrogation statute. We then proceed to analyze Plaintiffs’ alternative argument that, regardless of how we interpret Gutierrez, the district court erred in dismissing their subrogation claims because Plaintiffs should be allowed to remain in the suit to protect their right to reimbursement. Finally, we address Plaintiffs’ contention that the statute of limitations does not bar their claims.

Standard of Review

[6] A district court’s ruling under Rule 1-012(B)(6) raises a question of law we review de novo. See Wallis v. Smith, 2001-NMCA-017, ¶ 6, 130 N.M. 214, 22 P.3d 682. A district court’s order of dismissal for failure to state a claim under Rule 1-012(B)(6) tests the legal sufficiency of the complaint. Wallis, 2001-NMCA-017, ¶ 6. Dismissal is proper when the law does not support the claim under any state of facts provable under the claim. Id.

Section 52-5-17 Provides Employer/Insurer with a Right to Reimbursement

[7] As Plaintiffs concede, appellate courts in New Mexico have consistently interpreted Section 52-5-17 as a reimbursement statute, which allows employers/insurers who pay workers’ compensation benefits the right to collect from workers who subsequently recover damages from negligent third parties. However, Plaintiffs allege that the Supreme Court changed the law on this issue in Gutierrez. Plaintiffs argue that New Mexico now views Section 52-5-17 as providing an employer/insurer with a direct right of subrogation against a third-party tortfeasor. This issue involves statutory interpretation, which we review de novo. See Morgan Keegan Mortgage Co. v. Candelaria, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066.

[8] Section 52-5-17(B), entitled “Subrogation,” provides:

[T]he receipt of compensation from the employer shall operate as an assignment to the employer or his insurer . . . . of any cause of action, to the extent of payment by the employer to or on behalf of the worker for compensation or any other benefits to which the worker was entitled under the Workers’ Compensation Act . . . . and that were occasioned by the injury or disablement, that the worker or his legal representative or others may have against any other party for the injury or disablement.

[9] Despite the title and plain language of Section 52-5-17 and its predecessors, our courts have historically held that an employer/insurer does not have a statutory assignment or subrogation interest in a worker’s third-party claim. See St. Joseph Healthcare Sys. v. Travelers Cos., 119 N.M. 603, 606, 893 P.2d 1007, 1010 (Ct. App. 1995) (noting that case law clearly interprets section as a reimbursement statute); Seaboard Fire & Marine Ins. Co. v. Kurth, 96 N.M. 631, 633, 635, 633 P.2d 1229, 1231, 1233 (Ct. App. 1980) (recognizing that, although a worker may assign the claim by contract, the statute only creates a right of reimbursement and not a right of subrogation or assignment in the employer/insurer). Our courts also have established that an employer’s/insurer’s right of action for reimbursement under Section 52-5-17 is against the worker and not the third party.


[10] As our case law makes clear, the right of subrogation does not arise by operation of law under the statute. Seaboard Fire & Marine Ins. Co., 96 N.M. at 635, 633 P.2d at 1233. “We have held this to be a reimbursement statute and that there is but a single cause of action in the employee, even though a part of the recovery is to be paid to the employer or his insurer.” Royal Indem. Co. v. S. Cal. Petroleum Corp., 67 N.M. 137, 144, 353 P.2d 358, 363 (1960). Absent an express assignment of the right, recovery by an employer/insurer of workers’ compensation benefits paid to the worker depends upon the worker successfully pursuing a claim against a third-party tortfeasor responsible for the worker’s injury. See Seaboard Fire & Marine Ins. Co., 96 N.M. at 633-35, 633 P.2d at 1231-33; Transport Indem. Co. v. Garcia, 89 N.M. 342, 344-45, 552 P.2d 473, 475-76 (Ct. App. 1976). Therefore, an employer’s/insurer’s statutory right of reimbursement is not effective until a worker recovers upon the third-party claim by verdict or settlement. See id.

[11] Plaintiffs now assert that Gutierrez overruled our longstanding precedent regarding Section 52-5-17. In Gutierrez, the Supreme Court addressed how to apportion a worker’s recovery from a third-party tortfeasor between the worker and an employer pursuant to the employer’s statutory right of reimbursement. 1998-NMSC-027, ¶ 4. In discussing apportionment, the Court described the interest of an employer that attaches after a worker recovers from a third party in terms of subrogation. Id. ¶ 20 (“Once the amount of the employer’s interest in the tort recovery has been determined, we believe the legislature intended that amount to be paid or assigned to the employer under principles of subrogation.”).

Plaintiffs argue the Court’s language indicates a new interpretation of Section 52-5-17 as a subrogation statute.

[12] We think Plaintiffs ascribe too much importance to the subrogation language in Gutierrez. In Gutierrez, the Court specifically addressed the extent of an employer’s interest in a worker’s fair but partial recovery after the third-party claim has been reduced to a sum certain. 1998-NMSC-027, ¶ 2. Thus, Gutierrez was concerned solely with the division of tort recovery, not with whether an employer/insurer would have its own cause of action. In the context of apportionment, the Court recognized that an employer’s/insurer’s interest in recapturing benefits paid to workers who receive compensation for their injuries from other sources is entitled to protection by legal principles that avoid inequities to employ-
suffering while employers will advocate for a proportionately greater award for medical expenses or lost wages. The difference in their interest could create conflict in such basic decisions as to whether to settle or take a matter to trial. These practical realities counsel that we not view the Gutierrez language on which Plaintiffs reply as a sharp break from our past cases.

¶ 15 For these reasons, we do not think the Gutierrez Court intended either expressly or implicitly to overrule the idea that Section 52-5-17 is a reimbursement statute pursuant to which an employer/insurer has a limited role. We therefore reject Plaintiffs’ argument that we should interpret their right of reimbursement under the statute as supporting a direct and independent claim for subrogation against a third-party tortfeasor. Thus, the district court did not err in dismissing Plaintiffs’ subrogation claims based on Gutierrez.

District Court Did Not Err in Dismissing Plaintiffs From Lawsuit

¶ 16 Plaintiffs argue that even if we conclude that New Mexico does not recognize a direct right of action for subrogation against a third-party tortfeasor, the district court still erred in dismissing Plaintiffs from the lawsuit. In Plaintiffs’ view, they should have been allowed to remain as co-plaintiffs to pursue their statutory right of reimbursement. We first address Defendant’s contention that this issue was not preserved before the district court. In reviewing a Rule 1-012(B)(6) dismissal for failure to state a claim, the normal rules of preservation apply. See Rule 12-216(A) NMRA; Spectron Dev. Lab. v. Am. Hollow Boring Co., 1997-NMCA-025, ¶ 32, 123 N.M. 170, 936 P.2d 852 (noting that the rules “serve the important purposes of expediting litigation and promoting finality” and holding that normal preservation rules apply to dismissals for failure to state a claim). Therefore, it must appear that Plaintiffs presented this argument below and invoked a ruling of the district court on the matter. See Woolwine v. Furr’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987).

¶ 17 Plaintiffs contend that the issue of whether Plaintiffs should have been allowed to remain as co-plaintiffs even without a direct right of subrogation was adequately before the district court due to the procedural posture of the case and their arguments in response to the motion to dismiss. According to Plaintiffs, they became parties to the workers’ actions when the district court consolidated their subro-

tion claims with the workers’ actions. While pursuing their subrogation claims, Plaintiffs argue they gave the district court notice of their objective as co-plaintiffs to recover benefits paid to the injured workers. Plaintiffs claim that by arguing in response to the motion to dismiss that Gutierrez created a new right of subrogation, they notified the district court by inference that the cases prior to Gutierrez established a derivative right of reimbursement. Thus, Plaintiffs maintain they adequately alerted the district court that it would be error to dismiss their claims because they were entitled to reimbursement.

¶ 18 Notwithstanding these arguments, we find nothing in the record to indicate Plaintiffs based their argument that they should remain in the lawsuit on the ground that they have a right to intervene in the workers’ suits. Plaintiffs initiated their subrogation claim before there was any action by the workers in which to intervene. The first amended complaint does not request leave for intervention and does not allege Plaintiffs received an express assignment from either worker. Nor did Plaintiffs attempt to join either worker as an involuntary plaintiff prior to the statute of limitations. After the workers filed their own actions against Defendant, Plaintiffs did not attempt to intervene in either worker’s personal injury action. In response to the motion to dismiss, the record indicates no request for leave to amend Plaintiffs’ complaint to intervene. Instead, Plaintiffs continued to allege full participatory rights as co-plaintiffs. Thus, it appears from the record that the issue before the district court was whether the statute provided Plaintiffs with a direct right of subrogation, and not the alternative ways Plaintiffs could remain at least a nominal party in the lawsuit to protect their right of recovery. Rather than treat hearings on motions to dismiss as rehearsals for appellate review, we review the case actually litigated below. Spectron, 1997-NMCA-025, ¶ 32. Because Plaintiffs did not argue that they should remain in the lawsuit as anything but co-plaintiffs with independent subrogation rights, the issue of whether the district court erred in dismissing Plaintiffs because they have a right to intervene fails on preservation grounds.

¶ 19 Even if not preserved, Plaintiffs argue that the issue of whether the district court erred in dismissing them from the lawsuit should be decided as a matter of general importance to clarify procedures for pursuing reimbursement claims in a single judicial action. We decline to do so. As we
have indicated, a number of procedures already exist to allow an employer/insurer to participate in a lawsuit in a limited capacity. These procedures attempt to protect an employer’s/insurer’s interest in reimbursement without encroaching on a worker’s right to recover for personal injuries against third-party tortfeasors. In reaching this conclusion, we express no opinion on Plaintiffs’ ability to intervene in any pending litigation in Chavez v. Salgado, Second Judicial Dist. No. CV-2003-2979.

Statute of Limitations Defense to Worker’s Tort Claim Bars Plaintiffs’ Claim for Reimbursement

[20] Having concluded that Gutierrez does not recognize a direct right of subrogation, we summarily reject Plaintiffs’ claim that pursuant to that right, a statute of limitations defense that operates to bar a worker’s tort claim does not operate to bar an employer’s/insurer’s subrogation claim. We do, however, discuss Plaintiffs’ argument that their timely claim for reimbursement for benefits paid to Rojo should not be barred by Rojo’s failure to institute a timely lawsuit.

[21] Plaintiffs argue that even if we conclude that Gutierrez did not recognize a direct right of subrogation, our Supreme Court clearly communicated the goal of implementing alternative legal principles to avoid inequities to employers/insurers arising from the mishandling of a third-party claim. See 1998-NMSC-027, ¶¶ 9, 20. As Plaintiffs argue, if an employer’s/insurer’s otherwise timely filed claim is barred from proceeding because a worker failed to file a timely third-party claim, an employer/insurer must forfeit the ability to recover benefits paid to the worker, which allows the defendants to escape without accountability. Instead of making the wrongdoer pay for its negligent actions as Gutierrez indicated was desirable, the workers’ compensation system must bear the losses. In Plaintiffs’ view, these results contravene the principle of employing alternative legal principles to avoid inequities to employers/insurers.

[22] As Plaintiffs concede, this Court has previously indicated that a statute of limitations bar to a worker’s tort claim would preclude an employer’s/insurer’s claim for reimbursement. See Seaboard Fire & Marine Ins. Co., 96 N.M. at 632-33, 633 P.2d at 1230-31. Plaintiffs now assert that Seaboard Fire & Marine Insurance Co. no longer controls this issue because Seaboard Fire & Marine Insurance Co. was decided when our courts viewed the statute as seeking only to prevent double recovery by a claimant. Now that the Supreme Court in Gutierrez has recognized additional objectives in Section 52-5-17, such as avoiding inequities to employers, Plaintiffs contend this Court must construe the statute to realize those goals.

[23] We reject Plaintiffs’ contention that because of the employer/insurer fairness concepts articulated in Gutierrez, we should no longer adhere to Seaboard Fire & Marine Insurance Co. As we have discussed, the statute does not provide Plaintiffs with an independent claim for subrogation. Section 52-5-17 provides a right for reimbursement that derives from a worker’s right to recover damages from a negligent third party. Absent an independent cause of action, Plaintiffs lack standing to maintain a third-party claim against Defendant. That is not to say that employers/insurers lack alternatives. For example, an employer/insurer may arrange for an assignment of a worker’s cause of action against a tortfeasor or intervene in a worker’s action for the limited purpose of collecting any compensation the worker receives that duplicates the benefits paid. See St. Joseph Healthcare Sys., 119 N.M. at 607-08, 893 P.2d at 1011-12. However, these types of dependent claims are subject to the same defenses the third party may assert against a worker’s claim, including a statute of limitations defense. See Seaboard Fire & Marine Ins. Co., 96 N.M. at 632-33, 633 P.2d at 1230-31; Transport Indem. Co., 89 N.M. at 344, 552 P.2d at 475. For the foregoing reasons, we conclude that once the district court properly dismissed Rojo’s claim against Defendant as barred by the statute of limitations, Plaintiffs’ claim for subrogation or reimbursement also was barred.

CONCLUSION

[24] We affirm the order of the district court dismissing Plaintiffs’ claim for subrogation against Defendant.

[25] IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

JONATHAN B. SUTIN, Judge
SETTLE NOW

PROFESSIONAL MEDIATION STATEWIDE
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The University of New Mexico
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Calendar of Events
January 2006
27 Simms/Alumni Lecture
Harold Koh, Dean Yale Law School
“The Supreme Court and Globalization” Is the new Su-
preme Court ready for the age of globaliza-
tion? What are the cas-
es before the US Supreme Court in recent Terms that raise global issues? Does the Court’s current
membership have a consistent
philosophy about how to address these important questions? And what changes to this philosophy, if any, will the appointments of Chief Justice John Roberts and the new nominee Judge Samuel Alito bring?

April 2006
6 Dedication – Governor Bruce
King Reading Room
For more information please call
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In Session Open House 9:00-11:00a
Wednesday, January 11, 2006
Open House 2:00- 4:00p
Sunday, February 12, 2006

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505-243-6659 www.manzanodayschool.org
Fairfield, Farrow & Strotz P.C. is pleased to announce that Paige Dannette Hessen and Larry Dale Lucas have joined the Firm.

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Domestic Violence Prosecutor
First Judicial District Attorney’s Office
The First Judicial District Attorney’s Office, which includes Santa Fe, Rio Arriba and Los Alamos counties, has a position available January 3, 2006 in its domestic violence unit. This position is in the magistrate division prosecuting misdemeanor cases. Salary will be based on experience. Please email resume to sweinstein@da.state.nm.us or mail to Shari Weinstein, Chief Deputy District Attorney, PO Box 2041, Santa Fe, NM, 87504-2041.

Associate To Senior Trial Attorney
3rd Judicial District
The 3rd Judicial District Attorney’s Office has a vacancy for an Associate Attorney to a Senior Trial Attorney, depending upon experience. Qualifications and salary are pursuant to the New Mexico District Attorney’s Personnel & Compensation Plan. Resumes can be faxed to Kelly Kuenstler at (505) 524-6379, or mailed to 201 W. Picacho, Suite B, Las Cruces, NM 88005.

Narcotic and Violent Crimes Prosecutor
Ninth Judicial District Attorney’s Office
Assistant Trial Attorney to Senior Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney’s Office, which includes Curry and Roosevelt Counties. The responsibility of this particular position will focus primarily on felonies, including narcotics and violent crimes. Qualifications and salary are pursuant to the New Mexico District Attorney’s Personnel & Compensation Plan. Resumes can be faxed to Ninth Judicial District Attorney Matthew Chandler at (505) 769-3198, or mailed to 700 N. Main, Suite 16, Clovis, NM 88101.

Attorney
Seeking attorney to handle residential foreclosure and related cases. No billable hours requirement. Prior foreclosure, real estate title, &/or litigation experience required. Fax cover letter, resume & references to Susan C. Little, 254-4722 or mail to PO Box 3509, Alb 87190.

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**Attorney**
Sole practitioner seeks association with another attorney or small firm experienced in education, employment law and litigation desiring to grow existing practice into area of charter school representation. Would also consider experienced part-time associate with background in same areas. Salary D.O.E. Prior educators/administrators encouraged to apply. Send resume with letters of interest to 7 Avenida Vista Grande B-7 #428; Santa Fe, New Mexico 87508; fax (505) 466-3296 or pam@nmmatthews.com.

**Request for Applications**

**City of Albuquerque**

**Paralegal Position**
Paralegal Position - Litigation Division: This is a para-professional position requiring considerable knowledge of legal terminology and Federal and State court procedures. The position requires the ability to perform legal research, assist with trial preparation, draft memorandum, correspondence, briefs, opinions and discovery. Must have Associate of Applied Science in Paralegal Studies plus three (3) years experience as a Paralegal OR National certification in Paralegal Studies plus five (5) years experience as a legal secretary. Entry level salary: $33,966.40, Please apply online at www.cabq.gov. Application deadline is January 13, 2006.

**Paralegal**
City of Santa Fe, City Attorney's Office is currently seeking a full-time paralegal. The position requires at least two (2) years legal experience with advanced legal skills in litigation and contract review. To obtain an application, visit our website at www.santafenm.gov. Please submit your application to Human Resources, 200 Lincoln Avenue, P.O. Box 909, Santa Fe, NM 87504.

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Ethics Advisory Opinions

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• Original questions, involving one’s own conduct, should be sent to the Ethics Advisory Committee, c/o State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860 or membership@nmbar.org.

* The published advisory opinions are also available at the UNM School of Law Library and the Supreme Court Library.
is pleased to announce

JOHN C. BIENVENU
has joined the firm as a partner

Mr. Bienvenu’s practice focuses on complex civil litigation in the areas of employment law, civil rights and commercial disputes.

BENNETT J. BAUR
has joined the firm as an Associate in the Santa Fe office

Mr. Baur joins our comprehensive criminal law practice group, providing services in security clearance matters, corporate response to subpoenas and search warrants, agency investigations, civil proceedings with criminal implications, as well as state and federal investigations and prosecutions.

DONNA CONNOLLY
has joined the firm as an Associate in the Santa Fe office

Ms. Connolly joins our Indian Law practice group.
She was formerly an attorney in the Office of Legal Counsel to Pueblo of Pojoaque.