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Seminar Registration Form
CLE Programs - State Bar Center

January - Video Replay Tuesdays

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Lawyering with Emotional Intelligence
Tuesday, January 31
9:00 a.m. - Noon
State Bar Center
1.6 Professionalism and 1.0 Ethics
CLE Credits
☐ $89

Environmental Justice and the Public Welfare: Evolving Concepts of the Public Interest
Tuesday, January 31
9:00 a.m. - 4:00 p.m.
State Bar Center
4.1 General and 1.6 Professionalism
CLE Credits
☐ $179

2005 Professionalism: Lawyers Concerned for Lawyers
Tuesday, January 31
1:00 - 3:00 p.m.
State Bar Center
1.6 Professionalism CLE Credits
☐ $59

Ethics: Now What Are You Gonna Do?
Tuesday, January 31
3:00 - 4:00 p.m.
State Bar Center
1.0 Ethics CLE Credit
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*Professionalism Tip*

With respect to my clients:

I will advise my client against pursuing matters that have no merit.

Meetings

January

23 Lawyers Professional Liability Committee, noon, State Bar Center
24 Technology Utilization Committee
   4 p.m., State Bar Center
25 Committee on Women and the Legal Profession
   noon, Lewis and Roca, Jontz Dawe, LLP
27 Board of Bar Commissioners
   10 a.m., The Lodge at Cloudcroft

February

1 Employment and Labor Law Section Board of Directors
   noon, State Bar Center
3 Prosecutors Section Board of Directors
   3 p.m., State Bar Center
8 Children’s Law Section Board of Directors
   noon, Juvenile Justice Center
8 Law Office Management Committee
   noon, State Bar Center

State Bar Workshops

January

25 Consumer Debt/Bankruptcy Workshop
   6 p.m., State Bar Center
25 Family Law Workshop
   5:30 p.m., Branigan Library, Las Cruces
26 Consumer Debt/Bankruptcy Workshop
   5:30 p.m., Branigan Library, Las Cruces
26 Lawyer Referral for the Elderly Workshop
   Credit/Debt Issues; New Bankruptcy Law
   1:15 p.m., Meadowlark Senior Center
   Rio Rancho

February

1 Lawyer Referral for the Elderly Workshop
   9 a.m., Munson Senior Center, Las Cruces
2 Lawyer Referral for the Elderly Workshop
   2:30 p.m., Socorro Senior Center

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

COURT NEWS

New Mexico Board of Legal Specialization

Comments Solicited

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

Environmental Law
Thomas M. Hnasko

Natural Resources–Oil and Gas Law
William F. Carr

Real Estate Law
Edward J. Roibal

Trial Specialist–Civil Law
Turner W. Branch

Trial Specialist–Criminal Law
Ray Twohig

First Judicial District Court

ADR Program Change

The 1st Judicial District Court has issued an administrative order adopting an Alternative Dispute Resolution (ADR) Pilot Project which will substantially change the court’s ADR program. The major components of the restructured program are the implementation of quality assurance features and payment of settlement facilitators. The transition to the new ADR program structure is expected to be complete by May 1.

Attorneys who practice in the district are invited to apply for inclusion on the court’s list. Attorneys who are already on the court’s list of volunteer settlement referees will receive an information and application packet in the mail. Other attorneys who practice in the district may request a packet by e-mail or phone.

For more information or to request a packet, contact the supervising judge of the ADR Program, District Judge Raymond Z. Ortiz, Div. III, (505) 827-5083 or sfedrzoo@nmcourts.com, or Celia A. Ludi, Esq., ADR program director, (505) 827-5072, or sfedcal@nmcourts.com.

Eighth Judicial District

Announcement of Vacancy

A vacancy on the 8th Judicial District Court will exist in Raton as of Feb. 1, upon the retirement of the Honorable Peggy J. Nelson.

The chair of the 8th Judicial District Nominating Commission solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14, of the New Mexico Statutes, Annotated 1978. Applications may be obtained from the Judicial Selection Web site: http://lawschool.unm.edu/judsel/index.htm, or call Sandra Bauman, (505) 277-4700, to receive e-mail/fax/mail. The deadline for applications is 5 p.m., Jan. 31. Applications received after that date will not be considered.

STATE BAR NEWS

Attorney Support Group

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.

Board of Bar Commissioners

Jan. 27 Meeting Agenda
10 a.m., The Lodge at Cloudcroft, Cloudcroft, NM

1. Approval of Dec. 9 meeting minutes
2. Finance Committee report
3. Acceptance of November 2005 financials
4. Approval of Bylaws/Policies Committee report
   A. New Reserve Policy
   B. New Whistleblower Policy
   C. Bylaw Amendment to Article II, Section 2.9, Affiliate Membership
   D. Bylaw Amendment to Article IV, Section 4.1, Board Composition
5. Pro Hac Vice Subcommittee report
6. Disciplinary Rules Subcommittee report
7. Appointments to Access to Justice Commission
8. American Bar Association (ABA) Mid-year Meeting Agenda
9. New award/recognition requests
10. Section/committee annual reports
11. President’s report
12. Executive Director’s report
13. Division reports
14. New business

Casemaker Free Online Legal Research

The State Bar of New Mexico is proud to offer its newest member benefit, Casemaker. Casemaker is online legal research made available to State Bar members at no charge. That’s free legal research.

Casemaker will be available from the State Bar’s Web site at www.nmbar.org with an anticipated launch date of July 2006 as part of the Annual Meeting in Durango. The library will include most everything needed for the New Mexico lawyer, including federal material.

Casemaker allows the user to search by:
• word, word combinations or phrases,
• official case citation,
• statute number,
• judge’s name, or
• attorney’s name.

Casemaker has two search options:
• The basic search engine allows the user to formulate a search using natural language or Boolean search logic. Natural language allows the user to type in a word or sentence, and the search engine will recognize important words or phrases. For Boolean searches, enter keywords and connectors.

• The advanced search feature allows the user to enter data into fields. Plug in key information about a case, such as the cite, syllabus, date, attorneys, court and more.

With the full-text search capabilities of Casemaker, there is no need to rely on annotation to find which cases are cited. When the user plugs a statute into the basic search screen, he or she will retrieve the full text of all cases that discuss the code in question.

New Mexico joins a growing consortium of Casemaker states. As a consortium, New Mexico lawyers will get access to all other member state libraries, which currently include: Alabama, Colorado, Connecticut, Georgia, Idaho, Indiana, Kentucky, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington and West Virginia. Casemaker promises
to be a tremendous asset to New Mexico practitioners. 

The New Mexico library will include:

- New Mexico Supreme Court from 1949
- New Mexico Court of Appeals from 1966
- New Mexico Statutes
- New Mexico Regulations
- New Mexico Acts
- New Mexico Civil Jury Inst.
- New Mexico Criminal Jury Inst.
- New Mexico Attorney General Opinions
- New Mexico Law Review
- Children's Court Rules and Forms
- Civil Forms
- New Mexico Criminal Forms
- New Mexico Domestic Relations Forms
- New Mexico Code of Judicial Conduct
- New Mexico Judicial Standards Commission Rules of NM
- New Mexico Probate Court Rules
- New Mexico Rules of Appellate Procedure
- New Mexico Rules of Civil Procedure for District Courts
- New Mexico Rules of Crim. Proc. for District Courts
- New Mexico Rules of Evidence
- New Mexico Rules Governing Admission to the Bar
- New Mexico Rules Governing Discipline
- New Mexico Rules Governing the New Mexico Bar
- New Mexico Rules Gov. the Recording of Judicial Proc.
- New Mexico Rules of Legal Specialization
- New Mexico Rules for Minimum Continuing Legal Education
- New Mexico Rules of Professional Conduct

Federal Materials
- U.S. Supreme Court from 1937 to current, selected cases from 1790–1937
- USCA all from 1995, some 1989
- F Supp (CT) from 1989
- U.S. Constitution
- Code of Federal Regulation
- U.S. Code
- U.S. Circuit Appellate Rules for all Member Districts
- U.S. 8th Circuit Appellate Rules
- Federal Rules of Practice and more
- Federal Bankruptcy decisions

Watch for more information about Case-maker. Contact Joe Conte jconte@nmbar.org or 505-797-6099 with questions.

Lawyer Compensation Survey Results Available

Results from the 2005 lawyer compensation survey conducted by Research & Polling, Inc., are now available online at www.nmbar.org. Member usernames (Bar ID number) and passwords (last name) will be required to access the data. Additional copies may be purchased for $25 plus tax. Order online or request copies by contacting Madonna Vandeventer, mvandeventer@nmbar.org or (505) 797-6035.

Employment and Labor Law Section
Board Meetings Open to Section Members

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be Feb. 1. (Lunch is not provided). For more information about the section, visit the State Bar Web site, www.nmbar.org., or call Cindy Lovato-Farmer, section chair, (505) 667-3766.

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."

NM Commission on Access to Justice Appointment

The Board of Bar Commissioners will make two appointments to the New Mexico Commission on Access to Justice for three-year terms. Members wishing to serve on the commission should send a letter of interest and brief resume by Jan. 25 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Paralegal Division
Monthly Brown Bag CLE for Attorneys and Paralegals

The Paralegal Division invites members of the legal profession to bring a lunch and join their monthly CLE from noon to 1 p.m., Feb. 8, at the State Bar Center. Anne Rose, Ph.D., will present Use of Forensic Psychological Evaluations in the Courtroom. Participants will earn 1.0 general 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
Nominations Sought for Public Lawyer Award

The State Bar Public Law Section is currently accepting nominations for the ninth annual public lawyer of the year award, which will be presented on Law Day, May 1. Prior recipients include Florenceruth Brown, Frank D. Katz, Douglas Meiklejohn, Martha A. Daly, Charles N. Estes, Mary M. Mcinerney, Gerald Bruce Richardson, Peter T. White, Robert M. White and Paul L. Biderman. Send nominations by 5 p.m., March 1 to Doug Meiklejohn by e-mail, dmeiklejohn@nmelc.org or by mail to New Mexico Environmental Law Center, 1405 Luisa St. #5, Santa Fe. The selection committee will consider all nominated candidates and may nominate candidates on its own.

The following are factors that will be considered in making this award. An applicant need not meet all of these criteria. The work or service recognized by the award must have occurred in New Mexico. A candidate must be admitted to practice in New Mexico, but does not have to be a member of the Public Law Section to be eligible.

1. Significant length of service in government, which does not have to be continuous, or for one specific employer or for work as an attorney;
2. Excellence as an attorney/advocate and/or advocate;
3. Training or education of the public or bar concerning public issues;
4. Mentorship of junior attorneys in the public sector;
5. Role model for other public lawyers;
6. Involvement in one particularly difficult or important case or negotiation that significantly advanced a governmental policy or purpose;
7. Service to social welfare organizations, charitable institutions or nonprofit entities connected with the practice or enhancement of an area of public law;
8. Advocacy of, or work on, issues or legislation of importance in the public sector, such as open meetings and public records, public procurement and administrative procedures;
9. A lawyer who is not likely to be recognized for his or her outstanding work as a public lawyer;
10. A lawyer whose personal character and dedication to public law and public service furthers the integrity and repute of the legal profession.

OTHER BARS
Albuquerque Bar Association
Annual Meeting Luncheon
The Albuquerque Bar Association’s annual meeting luncheon will be held at noon, Feb. 7, at the Albuquerque Petroleum Club. Mayor Martin Chavez will present the luncheon program on The State of the City. The CLE program, May It Peeve the Court, 2006 Update, moderated by Wendy York, will be held from 1:30 to 3:45 p.m. Attendees will earn 2.0 general CLE credits. Lunch and CLE: $60 members/$75 non-members with advanced registration, $5 additional at the door. Lunch and CLE: $60 members/$75 non-members, $5 additional at the door. CLE only: $40 members/$60 non-members. Register for lunch by noon, Feb. 6, by:
2. Sending e-mail to abqbar@abqbar.com.
3. Calling (505) 243-2615 or (505) 842-1151.
4. Faxing to (505) 842-0287.

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 ABAs Web site at www.abanet.org/leadership/2006/midyear/pelimagenda.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.

UNM SCHOOL OF LAW
Law Library
Monday–Thursday 8:00 a.m.–11:00 p.m.
Friday 8:00 a.m.–6:00 p.m.
Saturday 9:00 a.m.–6:00 p.m.
Sunday Noon–6:00 p.m.
Reference Monday–Thursday 9:00 a.m.–9:00 p.m.
Friday 9:00 a.m.–6:00 p.m.
Saturday 9:00 a.m.–6:00 p.m.
Sunday Noon–4:00 p.m.

Yale Law School Dean to Speak at UNM
Harold Hongju Koh, dean of Yale University Law School, will give a free public lecture on International Law and the U.S. Supreme Court, from 5:30 to 6:30 p.m., Jan. 27, at the UNM School of Law, 1117 Stanford NE, Albuquerque. A reception will follow. Free parking is available in the law school’s “L” lot.

Koh will cite recent Supreme Court cases involving global issues and discuss whether they demonstrate a consistent philosophy. He will also discuss changes that may result from the recent appointment of Chief Justice John Roberts and possible appointment of nominee Judge Samuel Alito.

Koh has been on the faculty of the Yale Law School since 1985 and became the school’s 15th dean in July 2004. A Korean-American, Koh first moved to New Haven as a child with his family in 1961. He graduated from Harvard College, Magdalene College at Oxford University and Harvard Law School.

Koh clerked for Judge Malcolm Richard Wilkey of the D.C. Circuit and Justice Harry Blackmun of the U.S. Supreme Court. After a brief stint practicing with a Washington, D.C. firm, he began teaching at George Washington University National Law Center before joining the faculty at Yale where he is the Gerard C. and Bernice Latrobe Smith Professor of International Law. In addition to teaching international law, he leads courses in 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 the co-author of Foundations of International Law and Relations.

The UNM School of Law Alumni Association, in conjunction with the John Field Simms Memorial Lecture Series, sponsors the talk. The Simms lectures were established in 1954 by a gift from Albert Simms in memory of his brother, John, a trial lawyer and justice of the New Mexico Supreme Court.

Members of the State Bar may earn 1.0 general CLE credit. The CLE registration form is posted online at http://lawschool.unm.edu/announcements/simms/form.php.

For more information, contact Claire Conrad, (505) 277-0080.

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.
• Nominators 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.

Pre-Merger Notification Survey
Lex Mundi member law firms in jurisdictions around the world have completed a multi-jurisdictional Pre-Merger Notification Survey. The survey, a compendium of information on pre-merger notifications in more than 50 countries, was developed by the members of the Lex Mundi Antitrust, Competition and Trade Practice Group, whose legal practices involve representation of clients in merger regulatory matters.

According to Alan H. Silberman, a partner at Lex Mundi’s member firm for Illinois, Sonnenschein Nath & Rosenthal LLP, and chair of the Lex Mundi Antitrust, Competition and Trade Practice Group, a substantial number of jurisdictions have implemented pre-merger notification procedures. The types of transactions addressed by regulatory regimes, the type of information (if any) required to be submitted, the ability of regulators to delay a transaction, and the effect of pre-merger procedures, vary from jurisdiction to jurisdiction. This pre-merger notification survey is designed to help legal advisors and their clients understand the basic pre-merger regulatory environments through which cross-border mergers and acquisitions must maneuver.


National Legal Fiction Writing Competition for Lawyers
SEAK, Inc., a provider of continuing education and professional training for lawyers, is sponsoring the 5th Annual National Legal Fiction Writing Competition for Lawyers. The competition is open to any licensed attorney in the U.S. and its territories. A short story or novel excerpt in the legal fiction genre should be submitted. There is no fee to enter the competition and authors will maintain the original copyright to their materials. A cash prize of $1,000 will be awarded to the First Prize winner. The deadline for submissions is June 30. For more information, interested attorneys should contact Kevin J. Driscoll, Esq., (508) 548-4542 or kevin.driscoll@verizon.net.

To find the most current contact information regarding active and inactive State Bar members go to www.nmbar.org and click on the Attorney/Firm Finder link.

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.

Editor’s Note: Beginning with this issue, the covers of the 2006 Bar Bulletins will feature historic photographs of the cities and towns of New Mexico. We wish to thank the staff at the Palace of the Governors, the New Mexico History Museum, for their help and cooperation in attaining these treasures. We hope you enjoy them.
LETTERS TO THE EDITOR

Editor’s Note: This is the Editorial Board’s first authorization of the publication of a Letter to the Editor as a vehicle for responding to previously published articles and for encouraging discussion among members of the Bar. We hope to publish other letters as appropriate on future issues. The board will exercise its discretion in publication decisions and will edit submissions for length and content.

The Dec. 19th Bar Bulletin article entitled My House Is Your House defending the U.S. Supreme Court’s decision in Kelo v. City of New London should have been more appropriately entitled, Your House Is My House. The Kelo decision requires the individual to surrender his property to the state if the state deems it economically advantageous for the community. The Bar Bulletin article defended the Kelo decision as “simply a restatement of 50 years of takings jurisprudence,” and characterizes criticism of the decision as “mass hysteria.” To the private citizens whose homes were seized and conveyed to a corporate giant, there was ample justification for concern. For those concerned with preserving private property rights from the ever-extending reach of government, the decision was an anathema.

According to Amendment IX of the United States Constitution, government is allowed only such power as we the people give to it. The Constitution provides very limited means for government to disturb the private property rights of the individual, permitting private property to be taken only for public use. Id. at Amendment V.

The five-member majority of the court in Kelo confused the concepts of public use and blurred them with the amorphous concept of “public purpose,” a phrase not found in the Constitution. The Kelo majority permitted government, under the guise of “public purpose” to condemn private property and to transfer it to another private individual because government determined that public purpose (i.e., higher tax revenues) justified the seizure.

The four dissenting justices in Kelo also considered the decision unjustifiable based on existing takings jurisprudence. Justice Sandra Day O’Connor’s ringing dissent expressed concern that: “[t]oday the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded (i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public) in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings ‘for public use’ is to wash out any distinction between private and public use of property and thereby effectively to delete the words ‘for public use’ from the Takings Clause of the Fifth Amendment.” Kelo v. City of New London, 125 S.Ct. 2655, 2671 (2005).

The Court’s holding in Kelo is a new shift that, as Justice O’Connor reasoned, “significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public, such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words ‘for public use’ do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power.” Id. at 2675.

The decision authorizes the government to seize a person’s property and give it to a private developer on the grounds that private commercial development might yield some public benefit in the form of increased tax dollars or job creation. The decision even allows takings when the government has no concrete plans, but does have some vague idea what type of private commercial development might be beneficial in the future. Defining “public use” to include private commercial use for economic development is a radical departure from takings jurisprudence.

In light of the Kelo decision, it is important to draft laws that unequivocally protect private property rights. Communities around the country are drafting resolutions and ordinances that limit the power of government to deprive individuals of their private property. However, it is difficult to imagine relying on local governments to institute laws to protect individuals from governmental greed and excess.

The United States Constitution protects property rights, and individuals should not have to go hat-in-hand to local governments for protection from those who would deprive the individual of the rights secured to them. Indeed, requiring individuals to do so is not much different than requiring a chicken to petition the fox for a ban on foxes stealing chicken eggs. Individuals should not be required to petition the government to ensure that citizens will not be forcibly removed from their homes because the government would rather see a new retail center built on the property. Private ownership is freedom and should be zealously guarded as other constitutionally protected rights.

The Kelo decision also raises a fundamental question of who is serving whom. The U.S. Supreme Court has ruled that government regulations which devalue property are not necessarily considered a taking. Yet, under Kelo, if the government determines that its tax base is suffering as a result of inefficient property use by the individual, the government has eminent domain as a tool to ensure that the sovereign’s treasury is maintained. Thus, an economic loss to the individual caused by the government is permitted while the economic interests of the government are protected. This turns the government-citizen relationship on its head. The fundamental philosophy underlying the Kelo decision is that the people exist to serve the government and not that government exists to serve the people.

The government’s highest purpose is the protection of the individual’s right to fulfill his potential. The individual does not exist to maintain or expand government. The Kelo decision implies that the individual is subservient to the state and that all property is subject to seizure by the state to be used in a manner that the state deems best. This is wrong, and it is not “mass hysteria” to resist it.

Ned Fuller

Mr. Fuller has practiced law in New Mexico for more than 12 years. He served as a judge with the New Mexico Workers’ Compensation Administration and is currently in private practice with Dixon, Scholl & Bailey, PA.

Submit Letters to the Editor to notices@nmbar.org.
MCLE – mcle@nmbar.org or www.nmmcle.org

2005 MCLE Annual Compliance Reports will be sent to active licensed NM attorneys at the end of February. Did you complete your 2005 credit requirements?

Yes - The Annual Report will indicate you completed the required 15 credits in 2005.

No, Help! - The Annual Report will indicate your status as non-compliant, and you will be subject to the $100 late compliance sanction. Access www.nmmcle.org for approved courses, access www.nmbar.org for upcoming CLE courses, and look in your weekly bar bulletin for approved courses. Please remember that 2005 deficits can only be completed via approved live seminars or live teleconferences, no online or DVD self-study programs.

I’m not sure - Access www.nmmcle.org to view your credits earned, contact MCLE at mcle@nmbar.org or (505) 797-6015.

MCLE Rule Changes for 2006

Effective January 1, 2006 every active licensed New Mexico attorney shall complete twelve (12) hours of continuing legal education during each compliance year. One (1) hour (credit) of continuing legal education will be equivalent to sixty (60) minutes of instruction.

Of the (12) credits of approved continuing legal education, at least one (1) credit must be ethics and only one (1) credit must be professionalism.

Self-Study: No more than four (4) credits may be given during one (1) compliance year for self-study activities. Self-study credits may be applied only to the continuing legal education requirements for the year in which they are earned, and may not be carried over to subsequent year requirements or backward to prior year requirements.

Access www.nmmcle.org for more information regarding the 2006 rule changes.

LEGAL SPECIALIZATION – ls@nmbar.org or (505) 797-6057

ADVERTISING BOARD CERTIFIED SPECIALIST STATUS
If you want to advertise your status as a specialist, the proper wording pursuant to 19-202(G) of the Rule of Legal Specialization is “New Mexico Board of Legal Specialization Certified Specialist in ____” and states your area of specialization. This can be shortened to “Board Certified Specialist in ____.”

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THANK YOU to the Board of Legal Specialization and the Specialty Committee members. Their efforts make this program possible.

Access www.nmbar.org> Other Bars/Legal Groups for information regarding the Legal Specialization program including a list of Board Certified Specialists.
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27 International Law and the United States Supreme Court
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**WRITS OF CERTIORARI**

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

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court

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

**Effective January 23, 2006**

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

Kathleen Jo Gibson, Chief Clerk
New Mexico Supreme Court
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

**Effective January 23, 2006**

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<td>State v. Otto (COA 23,280)</td>
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<td>State Farm v. Luebbers (COA 23,556)</td>
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<td>State v. Rodriguez (COA 23,455)</td>
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<td>State v. Romero (COA 25,926)</td>
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<td>Paragon v. Livestock (COA 25,256)</td>
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<td>State v. Cardon (COA 25,176)</td>
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<td>29,600</td>
<td>Woolstenhulme v. Williams (12-501)</td>
<td>1/6/06</td>
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**Certiorari Granted and Submitted to the Court**

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

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<td>28,816</td>
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## Published Opinions

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<td>24646</td>
<td>13th Jud Dist Valencia</td>
<td>CV-01-734, Stephen Selmeczki v. NM Department of Corrections</td>
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<td>25872</td>
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<td>JQ-03-23, State ex rel. CYFD v. Elsie N.</td>
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<td>24557</td>
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<td>CR-02-258, State v. Herbert Worrick</td>
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<td>24725</td>
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## Unpublished Opinions

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<td>25893</td>
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<td>CV-03-55, Wells Fargo Bank Minnesota, N.A. v. Jerry Martinez, High Desert Capital Corporation, Angela Lovato Martinez, Taxation and Revenue Department, John and Jane Doe</td>
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<td>24570</td>
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<td>CV-01-1771, James Candelaria v. United Food Services, Inc. d/b/a Shamrock Foods</td>
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<td>26026</td>
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<td>CR-02-281, State v. Leslie Kerby</td>
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<td>24941</td>
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<td>CR-03-894, State v. Ronny Garcia</td>
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<td>reverse</td>
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**Slip Opinions for Published Opinions may be read on the Court’s website:**

February

Choice of Business Entity - 2006

This annual program updates practitioners on current business, tax, and other legal issues that should be considered in the choice of business entity and decision on the consequences of the choice of different types of entities. The panels will consider the different forms of organization, including limited liability companies (LLCs), S corporations, C corporations, and partnerships, including limited partnerships and LLPs, and various structures that use those forms.

10:00 a.m. - 2:00 p.m. • 3.6 General CLE Credits • $199 Standard

Advanced Estate Planning Practice Update - 2006

This three-hour update offers an opportunity to explore the most current and important issues in estate planning and wealth transfer taxation. Join the nationwide community of knowledgeable lawyers who participate in these third-annual updates.

10:00 a.m. - 1:15 p.m. • 3.0 General CLE Credits • $199 Standard

March

Limited Liability Entities - 2006

This fourteenth annual update will include a look at recent developments in compensating service providers, new trends in the treatment of LLCs under bankruptcy, drafting issues such as the impact on duties of the selection of a centralized or de-centralized management structure, and some other new directions in LLC's.

10:00 a.m. - 2:00 p.m. • 3.6 General CLE Credits • $199 Standard

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For More Information About Our Programs

Visit: www.nmbar.org, Click CLE.

Las Cruces 200 E. Picacho Center

FOUR WAYS TO REGISTER:

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CLE Registration Form

Name ________________________________________________________________
City/State/Zip _______________________________________________________
Phone ___________________________ Fax ___________________________

Program Title ________________________________________________ Program Date
Program Location ________________________________ Program Cost

By check enclose $5 Checks payable to CLE
By Visa  □ MC  □ AMEX  □ Discover
Credit Card # ____________________________________________ Exp. Date _______________________

Register early! Standard Fee $169 • Government & Paralegal $159

REGISTER EARLY: Advance registration is recommended as space and course materials are limited, and registration will be accepted at the door.

CANCELLATIONS AND REFUNDS: If you feel that you must cancel your registration, send a written notice of cancellation via fax by 5 p.m., one week prior to the program of interest. Refund, less a $50 processing charge will be issued. Registrants who fail to notify CLE by the date and time indicated will receive a receipt of course materials via mail following the program.

MCLE CREDIT INFORMATION: Courses have been approved by the New Mexico MCLE Board. CLE of SBNM will provide attorneys with necessary forms to file for New Mexico credit in other states. A separate MCLE billing form may be required.

ATTENTION PERSONS WITH DISABILITIES: Our meetings are held at facilities which are fully accessible to persons with mobility disabilities. If you plan to attend our program and will need an auxiliary aid or service, please contact the CLE of SBNM office one week prior to the program.

PROGRAM CANCELLATION: Pre-registration is recommended. Programs will be canceled one week prior to scheduled date if attendance is insufficient. Preregistrants will be notified by phone and full refunds given.

TAPE RECORDING OF PROGRAMS IS NOT PERMITTED.

CLE AUDIT POLICY: Members of the State Bar of New Mexico (to include attorneys and paralegals) and other legal staff (legal staff being defined as legal assistants and staff of members of the State Bar of New Mexico) may audit State Bar CLE courses at a cost of $70, space permitting. Course materials, hard and/or soft, if applicable, may be purchased at an additional cost of $29. Auditors should contact the CLE office in advance to obtain a CLE audit form. Auditors will be responsible for their own travel and lodging expenses. Auditors who receive CLE credit prior to the program will not be allowed to change to audit. No exceptions will apply.

This policy applies to live seminars only and excludes special events.

8:30 a.m.  Registration
9:00 a.m.  Introductory Remarks
9:15 a.m.  Understanding the Dynamics of Predatory Small Loan Lending
Payday/Title Loan Data
Overview of the Payday/Title Loan Marketplace
The Players
3:00 p.m.  Lunch
3:15 p.m.  How to Recognize a Predatory Small Loan
Warning signs of an abusive loan
Identifying the most important documents
Case Study
3:45 p.m.  Non
4:15 p.m.  Break
4:30 p.m.  Overview of Legal Remedies Available
Unfair Trade Practices Act
Small Loan Act
Truth in Lending Act

ATTENTION: Look for an expanded display of American Bar Association publications at our seminar.

NOTE: Programs subject to change without notice.

FEBRUARY

Tips On Section 1031 Exchanges for Real Estate and Beyond

Wednesday, February 15, 2006 • State Bar Center, Albuquerque

2.5 General CLE Credits

Standard Fee (CLE and Lunch) $85

This program is the first of four scheduled cross-disciplinary forums in 2006 that will look at the finer points of 1031 Exchanges. First up are increasingly popular tax deferral plans. Each forum will consist of a morning CLE program followed by an afternoon of golfing the Ryder Cup format. The CLE will take place at the State Bar Center in Albuquerque and the golfing event will occur at the Albuquerque Country Club (with other outings scheduled at Four Hills Golf Course, Twin Warriors Golf Course and Black Mesa Golf Course). Each round of golf will be captained by PGA Class A professionals and will be preceded by a Teaching lesson from one of the Southwest’s best golf-teaching professionals.

8:45 a.m. CLE Registration (requested sign-up by February 5)
9:00 a.m.  1031 Exchanges
James J. Owens, Esq.
(provided at State Bar Center)
10:30 a.m. Break
Noon Adjourn to Golf Tournament

NOTE FOR GOLF TOURNAMENT: All questions should be directed to James J. Owens, Esq. at the Wellesley Family Law Center: (505) 266-0800, Ext. 109.

An Attorney’s Guide To Using The Unfair Trade Practices Act & Other Statutes To Litigate Payday/Title Loan Cases

Friday, February 17, 2006 • State Bar Center, Albuquerque

6.2 General CLE Credits

Co-Sponsor: Law Access New Mexico
Presenters: Members of NM Attorney General’s Office, Law Access New Mexico, and the State Bar

Standard Fee $169 • Government & Paralegal $159

SATELLITE BROADCASTS

FEBRUARY

15

16

17
Pro Se Can You See: Navigating the Fog of the Pro Se Litigant

Friday, February 24, 2006 • State Bar Center, Albuquerque via Satellite from UNM Media Center
10:00 - 11:00 a.m. 1.0 Ethics CLE Credit • 11:00 a.m. - Noon 1.0 Professionalism CLE Credit
(new 60 minute credit hour)
Also to be broadcast live via Webcast and Satellite

Co-Sponsor: SBNM Commission on Professionalism • Presenter: Jack Marshall, Esq.

Standard Fee $70

Pro Se adversaries present a multitude of ethical challenges for attorneys, only some of which are covered by the Rules of Professional Conduct. The perils of dealing with unrepresented parties are always present, and the usually clear-cut standards of what constitutes “Pro Se Can You See?” is a two-hour CLE seminar focusing on both the professional rules and the ethical principles that can come into play when your client’s adversary is representing himself or herself. Through the use of challenging interactive hypotheticals and lively discussion, the program will examine both common and uncommon dilemmas, not only identifying relevant rules, but also tools and concepts that can prove invaluable when the rules fail to provide a clear path to the right course of action. This seminar will fulfill one hour of ethics and one hour of professionalism with two hours of stimulating inquiry.

2-4

Rocky Mountain Regional Young Lawyers Conference

Inn and Spa at Loretto • 211 Old Santa Fe Trail, Santa Fe, New Mexico 87501
www.innatloretto.com • 800-737-5631

Thursday March 2 - Saturday, March 4, 2006 • Including 4.0 General and 1.0 Ethics CLE Credits

Hosted by the Young Lawyers Division of the State Bar of New Mexico and Co-Sponsored by the Center for Legal Education of the New Mexico State Bar Foundation and the American Bar Association Young Lawyers Division (ABAYLD)

Conference Registration Fees: Standard Fee $219 • YLD Member $159

Thursday, March 2, 2006
6:00 - 7:30 p.m. Conference Registration and Ski Sign-Up
8:00 p.m. Welcome Reception (Inn and Spa at Loretto) (included in Registration Fee)

Friday, March 3, 2006
7:00 a.m. Continental Breakfast (included in Registration Fee)
8:00 a.m. ‘Royal Tour’ of New Mexico Supreme Court (Limited to first 25 tour registrants)
Hon. Patricio M. Serna
8:30 a.m. CLE Session with Members of the New Mexico Supreme Court and Court of Appeals
- Territorial Justice in New Mexico, 1846-1912
- Judicial Administration and the Appellate Courts
Hon. Thomas J. Zucco
Today
- Attorney Discipline: Process and Pointers (1.0 Ethics)
11:30 a.m. Adjourn
11:45 a.m. Box Lunch for Ski Slopes (included in Registration Fee) Noon Depart for Santa Fe Ski Basin

PLEASE NOTE: Hotel accommodations and skiing are not included. For hotel accommodations, call Inn and Spa at Loretto. Ask for special rate for Rocky Mountain Regional Young Lawyers Conference of $106.00. A ski representative will be available for sign-ups at registration on Thursday, March 2, 2006 from 6:00-7:30 p.m. Sign-up on Thursday evening is strongly encouraged due to start time for skiing on Friday.

REGARDING CLE PORTION OF CONFERENCE: State CLE accreditation has been sought by the Young Lawyers Division of the State Bar of New Mexico for the following state. New Mexico. Attendees seeking CLE accreditation for other states must pursue such accreditation on their own. General CLE accreditation through the American Bar Association will not be sought.

* Nearby Santa Fe Plaza shopping, sight-seeing and spa activities also available for non-skiers.

10

The 21st Annual Bankruptcy Year in Review

Friday, March 10, 2006 • State Bar Center, Albuquerque
6.0 General and 1.0 Ethics CLE Credits

Co-Sponsor: Bankruptcy Law Section

Standard Fee $219 • Bankruptcy Section Member $179

The seminar will focus on developments in case law and bankruptcy practice, and ethics issues, resulting from enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The seminar will also cover, in a more abbreviated form than in past years, developments in case law on bankruptcy issues in 2005, both nationally and locally, with special emphasis on decisions by the U.S. Supreme Court, 10th Circuit, 10th Circuit BAP and New Mexico bankruptcy judges.

8:00 a.m. Registration
8:30 a.m. Annual Bankruptcy Case Review
Robert H. Jacobvitz, Jacobvitz, Thuma & Walker P.C.
7:00 a.m. Break
10:15 a.m. BAPCPA—Chapter 7 Developments
Professor Nathalie Martin, UNM School of Law
11:15 a.m. Presentation by Clerk of the Bankruptcy Court
Norman H. Meyer Jr., Clerk U.S. Bankruptcy Court, District of NM
11:45 a.m. Presentation by the Office of the United States Trustee
Teresa C. Sherry
6:30 p.m. Dinner at Inn & Spa at Loretto (included in Registration Fee)
12:30 p.m. Lunch (provided at State Bar Center)

FEBRUARY 2006

Cle-at-a-glance - 2

MARCH 2006

Cle-at-a-glance - 3

Holding the line on the Abuse Prevention and Consumer Protection Act of 2005. The seminar will also cover, in a more abbreviated form than in past years, developments in case law on bankruptcy issues in 2005, both nationally and locally, with special emphasis on decisions by the U.S. Supreme Court, 10th Circuit, 10th Circuit BAP and New Mexico bankruptcy judges.

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12:30 p.m. Lunch (provided at State Bar Center)
NO. 06-8300-02
IN THE MATTER OF THE AMENDMENTS OF RULE 23-106 NMRA OF THE SUPREME COURT GENERAL RULES

ORDER

WHEREAS, this matter came on for consideration upon the Court’s own recommendation to adopt amendments to Rule 23-106 NMRA to require use of gender-neutral language in the formatting of proposed amendments to existing rules and jury instructions and proposed new rules and jury instructions;

WHEREAS, on April 12, 1994, the New Mexico Supreme Court and the Committee on Women and the Legal Profession issued the original handbook on gender equality in the courts in recognition of the fact that bias exists and must be eliminated;

WHEREAS, the handbook was reissued in 2000 to affirm the commitment of the New Mexico Supreme Court and all New Mexico courts to the equal treatment of all people involved in the judicial system and to recognize a continuing need to create a bias-free environment;

WHEREAS, the handbook recognized efforts in recent years to rewrite jury instructions, forms, regulations, and statutes to eliminate words and expressions that exclude women or perpetuate the assumption that men form the basis for the norm and replace them with gender-neutral terms that better reflect a world where men and women are treated with equal respect; and

WHEREAS, the Court wishes to reaffirm its commitment to the use of gender-neutral language in its rules, forms, and uniform jury instructions 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 23-106 of the Supreme Court General Rules hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments to Rule 23-106 of the Supreme Court General Rules 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 Rule 23-106 by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 10th day of January, 2006.

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

23-106. Supreme Court Committees.

A. Authority to appoint. The Supreme Court may appoint standing committees and special or temporary committees to make recommendations to the Court and to assist the Court in drafting and revising rules and instructions of the Supreme Court.

B. Composition of committees. Most standing committees will be comprised of nine members who will be appointed by the Court to reflect geographical balance and to represent the various factions of the bar, i.e., prosecutors, defense attorneys, private attorneys and government attorneys. The following committees will be comprised of more than nine members: Code of Professional Conduct Committee will be comprised of fifteen members; Appellate Rules Committee will be comprised of ten members; Board of Bar Examiners will be comprised of twelve members; and Disciplinary Board shall be comprised of eleven members. Special or temporary committees will be comprised of as many members as the Court deems necessary with the same considerations of balance as for standing committees.

C. Chairperson. The Court may appoint a chair and vice-chair for each standing and special or temporary committee. The chair shall have the authority to call meetings of the committee on whatever basis deemed necessary to ensure that the work of the committee is accomplished. The chair will preside at all meetings. In the absence of the chair, the vice-chair or the chair’s designee shall assume the authority of the chair.

D. Terms of appointment. Standing committee members, including the chair and vice-chair, shall be appointed for a term of three (3) years. No member shall serve for more than two terms unless ordered by Court. Members of special or temporary committees shall be appointed for a term decided by the Court; however, said term shall not exceed three (3) years. If any committee member, including the chair or vice-chair, shall be absent from three consecutive committee meetings, that person is deemed to have resigned from the committee. Said resignation shall be reported to the Court by the chair or vice-chair in writing. Any member, including the chair or vice-chair, may resign at any time during the member’s term by informing the Court in writing.

E. State bar representative. The Board of Bar Commissioners may appoint a liaison to each standing, special or temporary committee.

F. Supreme Court liaison. The chief justice may appoint a liaison justice to a committee.

G. Committee staff. The Court may appoint or contract for such staff as may be needed for each committee. If appointed, the staff attorney will be responsible for notifying the members and the liaison of meetings, taking notes of the committee’s actions, drafting and revising rules and instructions and any other duties requested by the Court or the chair or vice-chair. It shall not be necessary for committees to keep minutes or make any record of their proceedings.

H. Quorum and voting. All appointed members, including the chair and vice-chair, shall have one vote. Staff attorneys, guests and liaisons may participate in meetings, but may not vote. A quorum of the committee, five voting members, must be present and voting before any committee business may be adopted and recommended to the Court. Committees may, however, meet and discuss matters without a quorum present.

I. Rule-making procedure. Committees may make recommendations to the Court on their own motion or upon the request of the Court or the bar.

(1) When a majority of the voting quorum so votes, rules or instructions shall be submitted to the staff attorney appointed by
the Court for proper formatting prior to submission to the Court. When formatting all proposed amendments and new rules, gender-neutral language shall be used unless the use of gender-neutral language would alter the meaning of the rule or compromise its clarity. For purposes of this subparagraph, “gender-neutral language” means language that does not explicitly or implicitly refer to one sex to the real or apparent exclusion of the other sex and that does explicitly or implicitly refer to both sexes without distinguishing between them.

(2) Upon submission to the Court, it may publish for comment the proposed amendments or new rules;

(3) If the proposed amendments or new rules are published for comment, after the comment deadline, the Court may request the committee to respond to any comments received by the Court;

(4) Upon receipt of the committee’s responses to the comments, and after its review of the recommended rules or instructions, any comments received by the Court and the committee’s remarks to the comments, the Court shall:
   (a) adopt;
   (b) reject;
   (c) meet with committee representatives to discuss the recommendations;
   (d) modify on their own motion; or
   (e) send back to the committee for further drafting or revising.

(5) If new rules or amendments are recommended to the Rules of Professional Conduct, Rules Governing Discipline, Rules Governing the New Mexico Bar, Rules Governing Admission to the Bar, or the Code of Judicial Conduct, said recommendations may be submitted to the president of the New Mexico State Bar prior to the Court’s final action on such proposal in order to provide for input from the bar. Upon final enactment by the Court on such rules or amendments, they may be submitted for publication by the state bar at least forty-five (45) days prior to the effective date. If the Supreme Court determines that it is necessary to have a different effective date than that provided for in this subparagraph, it shall so provide in its order of adoption.

(6) After any rule or instruction has been approved by the Court, arrangements shall be made for publication by the state bar, if necessary, and the compilation commission in New Mexico Rules Annotated. Rules and instructions shall be published by the state bar if they will become effective prior to the next publication date of the NMSA Advanced Annotation Service or yearly supplement or if required by Subparagraph (5) of this Paragraph.

J. Standing committees. The following is a list of Supreme Court standing committees:


(2) Rules of Civil Procedure for the District Courts Committee which is responsible for Rules of Civil Procedure for the District Courts, and Civil Forms for the District Courts;

(3) Appellate Rules Committee which is responsible for Rules of Appellate Procedure;

(4) Rules of Evidence Committee;

(5) Uniform Jury Instructions-Civil Committee;

(6) Uniform Jury Instruction-Criminal Committee;

(7) Rules of Criminal Procedure for the District Courts Committee which is responsible for Rules of Criminal Procedure for the District Courts, and the criminal forms for the district courts;

(8) Children’s Court Rules Committee;

(9) Minimum Continuing Legal Education Committee which is responsible for administering the Minimum Continuing Legal Education program pursuant to Supreme Court rules;

(10) Specialization Board which is responsible for implementing and administering the Supreme Court specialization program;

(11) Board Governing Reporting of Judicial Proceedings;

(12) Board of Bar Examiners;

(13) Disciplinary Board;

(14) Code of Professional Conduct Committee; and


K. Failure to comply. Failure to comply with any or all of the provisions of this rule by the Supreme Court shall not affect the validity of any rules adopted by the Supreme Court.
OPINION

PATRICIO M. SERNA, JUSTICE

[1] A jury found Defendant Robert Fry guilty of first degree murder, see NMSA 1978, § 30-2-1 (1994), kidnapping, see NMSA 1978, § 30-4-1 (1995, prior to 2003 amendment), attempted criminal sexual penetration, see NMSA 1978, §§ 30-9-11 (1995, prior to 2001 & 2003 amendments), -28-1 (1963), and tampering with evidence, see NMSA 1978, § 30-22-5 (1963, prior to 2003 amendment), in relation to a killing in Farmington, New Mexico. The jury then specified a sentence of death, and the trial court sentenced Defendant to death. See NMSA 1978, §§ 31-18-14(A) (1993) (“When a defendant has been convicted of a capital felony, he [or she] shall be punished by life imprisonment or death.”), -20A-3 (1979) (“In a jury sentencing proceeding in which the jury unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances enumerated in [NMSA 1978, § 31-20A-5 (1981)] . . ., and unanimously specifies the sentence of death . . ., the court shall sentence the defendant to death.”). Defendant appeals his conviction and sentence to this Court on numerous grounds. See N.M. Const. art. VI, § 2 (“Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court.”); NMSA 1978, § 31-20A-4(A) (1979) (“The judgment of conviction and sentence of death shall be automatically reviewed by the supreme court of the state of New Mexico.”). We affirm.

I. FACTS

[2] Defendant and his companion, Leslie Engh, went to a bar in Farmington. After the bar closed, they met friends at a nearby restaurant. Defendant initiated an argument with another customer, and he subsequently went to his car and returned wearing a jacket. Witnesses described seeing a bulge underneath Defendant’s jacket. He told one of his friends that he had an eight-inch Bowie knife and he was “going to stick somebody tonight.” Defendant and Engh left the restaurant in Defendant’s car and went to a convenience store for cigarettes. [3] Defendant saw a woman, the victim,1 at a pay phone. The woman was crying and stranded at the store. Defendant offered her a ride to her house in Shiprock. A clerk at the convenience store heard a man fitting Defendant’s description offer a ride to a woman fitting the victim’s description and also placed Engh in Defendant’s car as it drove away with three people inside. Defendant drove down an isolated dirt road under the pretext that he needed to urinate. The victim got out of the car and began to walk away. Defendant convinced the victim to return to the car.

[4] After driving the car a short distance back down the dirt road, Defendant stopped the car, opened the passenger door, and pulled the victim out of the car by her hair. Defendant told Engh to hold the victim’s legs while Defendant tried to disrobe her. When the victim struggled, Defendant stabbed her two inches deep in her chest with his eight-inch Bowie knife. The stab wound penetrated the breastbone and the heart sac but did not pierce the victim’s heart. The victim removed the knife from her chest and threw it toward a ravine. She tried to run away, but Defendant and Engh caught her and removed her shirt and pants. Engh then went to look for the knife. When the victim tried to run again, Defendant retrieved a ten-pound sledgehammer from his car and hit the victim in the back of the head with the sledgehammer at least three and possibly five times, killing her. Blunt force trauma was the cause of death, and the stab wound was a contributing factor. Defendant and Engh then dragged the victim’s body a significant distance to some bushes by the ravine. They also kicked articles of the victim’s clothes off the road. As Defendant drove away, his car got stuck in soft sand on the dirt road and had to be towed out the next day. Defendant’s parents picked up Defendant and Engh and drove them home.

[5] Police found the knife and the sledgehammer at the scene, along with tire tracks and shoe impressions. A witness recognized the knife at the scene as one that he had sharpened for Defendant a week

1 We do not refer to the victim by name out of respect for her dignity and privacy. See State v. Allen, 2000-NMSC-002, ¶ 2 n.1, 128 N.M. 482, 994 P.2d 728.
before the killing. The tire tracks from the scene included three different treads and were determined to be consistent with the three different tire treads on Defendant’s car. Police found a pair of boots in Defendant’s home that was consistent with the shoe impressions at the scene. Police also found a black t-shirt in Defendant’s home that matched the shirt witnesses described Defendant as having worn on the night of the killing, and they found one of the victim’s earrings in Defendant’s car. The boots and black t-shirt from Defendant’s home had blood on them, and police also found blood in Defendant’s car and on a flashlight in the car that Defendant had used to signal his parents after getting stuck. An expert testified that the blood on the knife and sledgehammer and on Defendant’s car, shirt, shoes, and flashlight all matched DNA samples from the victim. In addition, the police seized a pair of black tennis shoes belonging to Engh, and the blood on those shoes also matched the victim’s DNA. An expert testified that a blood spatter analysis of Defendant’s shirt and shoes and Engh’s shoes indicated that while many of the blood stains on Defendant’s shirt and shoes were created by medium velocity impact spatter from a blunt instrument striking a blood source in front of the person wearing the shirt and shoes, Engh’s shoes contained only low velocity transfer stains and no spatters or projection-type stains. Based on these blood stains, as well as spatter stains on the sledgehammer, the expert opined that the person wearing the clothing with spatter, that is, Defendant’s black t-shirt and shoes, was leaning over the victim and repeatedly striking a source of blood with the sledgehammer, whereas the person wearing the shoes without spatter did not strike the victim with the sledgehammer. On the day after the murder, Defendant lied to the police about his activities the previous evening and what clothing he had been wearing, and he concealed his involvement in the crime.

{6} The State charged Defendant with first degree murder, kidnapping, attempted criminal sexual penetration, and tampering with evidence. Engh pleaded guilty to first degree murder and kidnapping and testified against Defendant at trial. The jury found Defendant guilty of all counts. Following further argument of counsel and additional instruction by the trial court, the jury then found the only submitted aggravating circumstance, murder committed with an intent to kill in the commission of kidnapping, beyond a reasonable doubt. After Defendant presented evidence of mitigating circumstances, and following additional instruction by the trial court, the jury specified a sentence of death.

II. EXCUSAL OF PROSPECTIVE JURORS

{7} Defendant first argues that the trial court erred in excusing seven members of the venire for cause based on their religious opposition to the death penalty. He contends that the exclusion of these prospective jury members violated his constitutional right to an impartial jury, U.S. Const. amends. VI, XIV; N.M. Const. art. II, §§ 14 (amended 1994), 18 (amended 1972), and the veniremembers’ state and federal constitutional protection of the free exercise of religion, U.S. Const. amends. I, XIV. See State v. Singleton, 2001-NMCA-054, ¶ 9, 130 N.M. 583, 28 P.3d 1124 (“[B]oth the state and the defendant in a criminal action can protect the rights of prospective jurors to be free from discriminatory exclusion.”).

Defendant relies on Article VII, Section 3 of the New Mexico Constitution, which provides that the right of citizens to sit on a jury shall not be hindered on the basis of religion, as well as various other protections of religious freedom in the state Constitution. Defendant also relies on the Treaty of Guadalupe Hidalgo. See Treaty of Peace, Friendship, Limits and Settlement, art. IX, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922, 930.2

{8} The United States Supreme Court has held that “the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror’s views would prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.” Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quotations marks omitted); see Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968). Under this standard, “[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him [or her] to do.” Morgan v. Illinois, 504 U.S. 719, 729 (1992). “[B]ecause such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror[; and] a capital defendant may challenge for cause any prospective juror who maintains such views.” Id. Similarly, “a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause.” Id. at 728 (emphasis added). Such jurors are sometimes referred to as Witherspoon-excludables. “[T]he quest is for jurors who will conscientiously apply the law and find the facts.” Witt, 469 U.S. at 423.

{9} We have on numerous occasions applied this standard in addressing challenges to the exclusion of jurors who expressed religious opposition to the death penalty, whether the challenges were based on the defendant’s right to an impartial jury, due process, or equal protection, or on prospective jurors’ religious freedom as protected in Article VII, Section 3 and other provisions of the New Mexico Constitution. Allen, 2000-NMSC-002, ¶¶ 85-86; State v. Clark, 1999-NMSC-035, ¶¶ 4-17, 128 N.M. 119, 990 P.2d 793; State v. Sutphin, 107 N.M. 126, 129-30, 753 P.2d 1314, 1317-18 (1988); State v. Gilbert, 100 N.M. 392, 396, 671 P.2d 640, 644 (1983); State v. Simonson, 100 N.M. 297, 299-300, 669 P.2d 1092, 1094-95 (1983); State v. Hutchinson, 99 N.M. 616, 619-20, 661 P.2d 1315, 1318-19 (1983); State v. Trujillo, 99 N.M. 251, 252, 657 P.2d 107, 108 (1982); State v. Trivett, 89 N.M. 162, 164-66, 548 P.2d 442, 444-46 (1976). We held that “[t]he trial court may properly exclude a juror for cause if the juror’s views would substantially impair the performance of the juror’s duties in accordance with the instructions and oath.” Clark, 1999-NMSC-035, ¶ 10. We explained that “[t]he fact that the potential juror’s inability to perform his or her duty is based upon religious objection and belief does not violate the religious
protections of the New Mexico Constitution, because exclusion from the jury was not based upon religious affiliation.” *Id.* ¶ 17. “[R]ather than the court excluding jurors because they are members of a particular religion, the court excluded jurors who were unable to apply the law.” *Id.* ¶ 12. “For purposes of disqualifying an individual from serving on a jury in a death penalty case, it is the fact that the individual’s vote will be automatic, rather than the particular reasons he or she gives for casting such an automatic vote, that is dispositive.” *Allen*, 2000-NMSC-002, ¶ 86.

[10] We have also discussed the appropriate standard of review in response to challenges of this nature. “This Court has stated that the trial court is in the best position to assess a juror’s state of mind, by taking into consideration the juror’s demeanor and credibility. It is within the trial court’s discretion as to whether a prospective juror should be excused.” *Clark*, 1999-NMSC-035, ¶ 10. “We will not disturb the trial court’s decision absent a clear abuse of discretion or a manifest error.” *Wathpin*, 107 N.M. at 130, 753 P.2d at 1318.

[11] Defendant does not challenge the trial court’s discretionary ruling that all seven members of the venire highlighted on appeal were unable to impose the death penalty in any case so as to substantially interfere with their ability to perform the duties of a juror in accordance with the instructions and oath. Following our review of the record, we agree with this concession and conclude that the trial court did not abuse its discretion in determining that these prospective jurors satisfied the *Witt* standard and were properly excluded for cause. The record indicates that the trial court was appropriately focused throughout jury selection on the ability of veniremembers to follow the court’s instructions. Instead, Defendant complains about the exclusion of these prospective jurors from the guilt-innocence phase of the trial. Defendant contends that these seven jurors should have been permitted to sit on the jury during the guilt-innocence phase of the trial and then, following a verdict, be excused and replaced by alternate jurors for the sentencing phase. He contends that such a procedure is authorized by Rule 5-704(A) NMRA 2004 (prior to Apr. 19, 2004 amendment) (current version at Rule 5-704(E) NMRA 2005). This rule provides that

[i]f the defendant is charged with an offense which may be punished upon conviction by the penalty of death, alternate jurors shall not be discharged until the regular jurors are discharged. Such jurors may not attend or participate in the consideration of a verdict, but shall be treated in the same manner as other jurors and shall be called after a verdict is returned to act as alternate jurors to replace jurors who become or are found to be unable or disqualified to consider the sentence to be imposed. Defendant argues that we should interpret this rule to allow for “extra non-‘Witherspoon-excludable jurors’ to serve as alternates for members of the venire who would automatically vote against the death penalty in order to protect the right of citizens to serve on juries as protected by Article VII, Section 3. We reject this argument.

[12] We believe that Defendant misinterprets Rule 5-704(A). We did not promulgate this rule in order to permit members of the venire to participate in the guilt-innocence phase of the trial despite their inability to follow the juror’s oath to impose a sentence “according to the evidence and the law as contained in the instructions of the court.” UJI 14-123 NMRA 2005. Instead, we enacted this rule pursuant to the Legislature’s direction to this Court to “promulgate rules . . . to regulate the practice and procedure in capital felony cases for the selection and utilization of alternate jurors and substitute trial judges caused by the disability of any juror or trial judge before whom a capital felony sentencing proceeding has commenced pursuant to the” Capital Felony Sentencing Act, NMSA 1978, §§ 31-20A-1 to -6 (1979, as amended through 1991). 1979 N.M. Laws, ch. 150, § 11. In other words, Rule 5-704(A) is designed to effectuate the provisions of the Capital Felony Sentencing Act, and the Legislature expressly provided in the Act that, “[i]n a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury.” NMSA 1978, § 31-20A-1(B) (1979) (emphasis added). It is clear from this language that the Legislature intended for the original jurors, that is, those jurors who determine a defendant’s guilt or innocence, to determine the sentence. The Legislature’s provision for alternate jurors was designed only as a necessary contingency in the event that a juror’s disqualification or inability to serve becomes apparent after having been seated, and particularly after the jury reaches a verdict in the guilt-innocence phase, in order to avoid a second trial due to a juror’s excusal. It is not a method of permitting individuals to serve on one part of a trial who, prior to the empanelling of the jury, have expressed a bias and an inability to follow the law with respect to another part of the trial. To conclude otherwise would judicially create a two-jury procedure that would frustrate the Legislature’s policy decision that the “original jury” specify the sentence. *See Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (“[I]t is the particular domain of the legislature, as the voice of the people, to make public policy.”).

[13] Our Legislature is not alone in this policy choice. Courts have noted a number of reasons why legislatures have chosen to rely on a single jury to determine both guilt or innocence and the proper sentence in a capital case: (1) the questions before the jury at both phases are interwoven and require consideration of similar evidence, *Rector v. State*, 659 S.W.2d 168, 173 (Ark. 1983) (“[T]he possibility of a compromise in the jury room links the two issues inseparably together.”); (2) the jury hearing the guilt-innocence phase may harbor residual doubts about the defendant’s guilt, despite having been persuaded of guilt beyond a reasonable doubt, and may take those residual doubts into account in sentencing. *Lockhart v. McCree*, 476 U.S. 162, 181 (1986); and (3) the use of repetitive trials for the benefit of two juries is not likely to be fair to either party, *id.*; *Rector*, 659 S.W.2d at 173. The third of these reasons would not apply to Defendant’s proposed procedure of seating additional alternate jurors, because alternates would observe the guilt phase, but the first two reasons would still apply because alternates “may not attend or participate in the consideration of a verdict.” Rule 5-704(A). In *McCree*, the Supreme Court overturned an Eighth Circuit opinion that, similar to Defendant’s argument, suggested the alternative of “selecting enough alternate jurors at the outset to replace [Witherspoon-excludables] at the penalty phase.” *Grigsby v. Mabry*, 758 F.2d 226, 243 (8th Cir. 1985), rev’d sub nom. *McCree*, 476 U.S. at 184. The dissent in the Eighth Circuit noted that

placing the moral responsibility on the same group of jurors to decide both guilt and punishment is justified by the most significant policy considerations. When one jury hears both phases of the case, the jurors that comprise it cannot evade the heavy responsibility placed upon them of whether a
The convicted person should receive the death penalty. The court today would seem to require the replacement of some members of the guilt-phase jury with death-qualified jurors for the purpose of considering the death penalty. This division of responsibility between the two groups, even if only a few are replaced, would dilute accountability and disadvantage the accused.

Grigsby, 758 P.2d at 247 (Gibson, J., dissenting). For these reasons, “the removal for cause of ‘Witherspoon-excludables’ serves the State’s entirely proper interest in obtaining a single jury that could impartially decide all of the issues in [the defendant’s] case.” McCree, 476 U.S. at 180 (emphasis added). See generally People v. Johnson, 842 P.2d 1, 14 (Cal. 1992) (rejecting a similar proposal for using alternate jurors as an alternative to death qualification).

{14} Our interpretation of Rule 5-704(A) is supported by other rules relating to alternate jurors and death penalty procedures. For example, Rule 5-605(B) NMRA 2005 provides that “[i]n any criminal case, the district court may direct that not more than six jurors, in addition to the regular jury, be called and impanelled to sit as alternate jurors.” Under Defendant’s proposed procedure, there is no provision for seating more than six alternates in order to have “extra non-Witherspoon excludable jurors” if, as in this case, there are more than six Witherspoon-excludables. Cf. Hutchinson, 99 N.M. at 620, 661 P.2d at 1319 (stating that death qualification of jurors pre-trial “is the only reasonable manner in which voir dire can be conducted [because,] [o]therwise, there is no way of knowing how many jurors should be impaneled”). In addition, Rule 5-606(C) NMRA 2005 provides that the trial court “may excuse any juror for good cause” and does not contemplate the excusal of prospective jurors for only one part of a trial if they have an inability to follow the court’s instructions on a limited issue. Finally, UJI 14-121 NMRA 2005, which sets out appropriate voir dire questions in death penalty cases, states that “[t]he same jury is used for both phases” of a capital trial. In short, our rules, including Rule 5-704(A), reflect the Legislature’s decision to have a single jury, composed of the same jurors, decide both the question of guilt or innocence and the appropriate sentence in a death penalty case.

{15} Defendant contends that the process of death qualification results in a jury that is conviction-prone, and he argues that the procedure he outlines would cure this problem. We are not persuaded. Defendant contends that Rule 5-704(A) permits individuals to be seated on the jury despite expressing an automatic vote with regard to the sentence. However, under this formulation of the rule, those members of the venire who express an automatic vote for the death sentence would also be eligible to participate in the guilt-innocence phase of the trial.3 We believe it is significant that, in comparison to the seven veniremembers highlighted by Defendant, the trial court excused at least nineteen members of the venire who stated that they would automatically vote for the death penalty for all first degree murders accompanied by at least one aggravating circumstance. Thus, it would appear that in Defendant’s case the Witherspoon procedure of removing jurors who would automatically vote against the death penalty was offset by the Witherspoon/Morgan procedure for removing jurors who would automatically favor the death penalty. While “a state may not entrust the determination of whether a [person] should live or die to a tribunal organized to return a verdict of death,” Witherspoon, 391 U.S. at 521, it is also true that a defendant is not “entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his [or her] favor” “simply because [the] defendant is being tried for a capital crime.” Witt, 469 U.S. at 423. As the Supreme Court has stated, death qualified juries “represent[] a necessary balancing of the accused defendant’s right to a jury panel drawn from a ‘fair cross section of the community’ . . . against the traditional right of a party to challenge a juror for bias.” Witt, 469 U.S. at 424 n.5. Prospective jurors are excluded “in order to promote [the State’s] interest in having a jury that could properly find the facts and apply the law at both the guilt and sentencing phases of the . . . trial.” Buchanan v. Kentucky, 483 U.S. 402, 415 (1987). As shown by the exclusion of prospective jurors in this case with extreme views at both ends of the spectrum, we believe that the Witt/Witherspoon standard strikes the proper balance and assures a jury composed of individuals capable of applying the law to the facts and following the instructions of the court, without being predisposed in favor of either party. Cf. Morgan, 504 U.S. at 735 (“[T]he belief that death should be imposed ipso facto upon conviction of a capital offense reflects directly on that individual’s inability to follow the law. Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law.”) (citation omitted). “[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.” McCree, 476 U.S. at 184.

{16} Additionally, we note that several members of the venire who expressed either an opposition to the death penalty or an automatic vote in favor of the death penalty, including one of the prospective jurors highlighted by Defendant on appeal, indicated that their views on sentencing would also affect their ability to be fair in the determination of guilt or innocence. Considering that Witherspoon-excludables possess such strong views on the death penalty that they “cannot and will not

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3 Although Defendant frames the argument only in terms of members of the venire who express a religious opposition to the death penalty, there would be no basis within Rule 5-704(A) to distinguish such jurors from those who would automatically vote for the death penalty in terms of the prospective jurors’ ability to follow the instructions of the court during the guilt-innocence phase. We also note that the seven prospective jurors highlighted by Defendant were not the only individuals to rely on religious beliefs; some prospective jurors expressed an automatic vote for the death penalty based on the tenet of an-eye-for-an-eye, while other veniremembers described an ambivalence that resulted from the theological teaching of an-eye-for-an-eye in the Old Testament being in conflict with the teachings of the New Testament. Moreover, considering that prospective jurors expressing an automatic vote with respect to sentencing, either in favor of the death penalty or opposed to it, would be similarly situated in terms of their ability to follow the law, we could not allow those religiously opposed to the death penalty to sit on the guilt-innocence phase while excluding other prospective jurors from this phase based on their sentencing views without raising concerns about equal protection or creating an impermissible religiously-based preference. See N.M. Const. art. II, §§ 11, 18.
conscientiously obey the law with respect to one of the issues in a capital case,” McCree, 476 U.S. at 176, our Legislature, in setting out a single jury system, might have concluded that such prospective jurors could not reasonably be expected to set aside their beliefs about the death penalty during the guilt-innocence phase knowing that the sentence they vehemently oppose could, based on their vote, be considered by other jurors. See Rector, 659 S.W.2d at 174 (“[W]hat is to prevent a juror strongly opposed to capital punishment, in an effort to avoid feeling any responsibility for a death sentence, from choosing to hang the guilt-innocence jury by a vote for acquittal?”). Certainly, given our current statutory scheme and precedent, the parties did not have a meaningful opportunity to explore this issue with all of the veniremembers excluded for cause. In fact, in rejecting an argument that Witherspoon-excludables should be allowed to sit on the jury during the guilt-innocence phase, we stated in Simons

We are compelled to point out problems that may result by not excusing jurors pursuant to the questioning [set out in the Uniform Jury Instructions] and instead having a very large jury panel hearing all the evidence on the guilt phase only later to be excluded at the sentencing phase. If such a result occurred, the Uniform Jury Instructions] would have to be changed to ask the jurors if they could convict a defendant knowing that some other person could then impose a penalty of death based upon that conviction. There would also have to be new guidelines adopted to establish the manner in which the jurors for the sentencing phase. In addition, the matter of challenges, now set by statute, would have to be changed by court rule. These are only some of the potential problems that would be raised by the procedure [the defendant] suggests. As we have done in previous opinions, we again emphatically and unequivocally reject [this] argument.

100 N.M. at 300, 669 P.2d at 1095.

[17] For the above reasons, we conclude that Rule 5-704(A) does not allow Witherspoon-excludables to sit on the guilt-innocence phase of a capital trial and that such a procedure is precluded by Section 31-20A-1(B)’s requirement that sentencing be conducted before the original jury. We reiterate that “[t]he trial court may properly exclude prospective jurors who indicate that they could not vote to impose the death penalty under any circumstances.” Clark, 1999-NMSC-035, ¶ 7.

III. GENERAL VERDICT FORM FOR FIRST DEGREE MURDER

[18] Defendant next argues that the trial court erred in refusing to provide separate verdict forms for two different theories of first degree murder, deliberate intent murder and felony murder. Defendant contends that separate instructions were not required for a guilty verdict on the crime of first degree murder. This Court has previously held that first degree murder is a single crime, whether supported by a single theory or by multiple theories, and we have upheld a general verdict of first degree murder under two alternative theories on the basis that there is “no requirement that the jurors . . . unanimously agree on one of the alternative theories presented” and “[u]nanimity was only required with regard to the overall charge of first degree murder.” State v. Salazar, 1997-NMSC-044, ¶ 41-42, 123 N.M. 778, 945 P.2d 996. We also concluded in Salazar that a general verdict of first degree murder did not violate the right to due process in the New Mexico Constitution, relying upon the Supreme Court’s analysis in Schad v. Arizona, 501 U.S. 624, 641-44 (1991). Salazar, 1997-NMSC-044, ¶ 39. However, Defendant contends that this rule should be different for capital sentencing.

[19] Defendant first argues that, without a separate verdict form, it is possible that the jury convicted on a theory of felony murder. Defendant then makes two arguments based on this supposition. First, Defendant contends that felony murder is insufficient to support the death penalty. Defendant contends that “[r]ead New Mexico’s murderer statute together with the Capital Felony Sentencing Act, in fact, strongly suggests that the New Mexico legislature never intended the crime of felony murder to be death-eligible.” Second, Defendant contends that a conviction of felony murder “allows the state to avoid proving every element of the crime” of deliberate intent murder.

[20] Defendant’s argument, however, overlooks the plain language of the Legislature. Both felony murder and deliberate intent murder are different theories of a single crime, first degree murder. § 30-2-1(A). The Legislature has explicitly provided that “[w]hoever commits murder in the first degree is guilty of a capital felony.” Id. The Legislature further expressly provided that “[w]hen a defendant has been convicted of a capital felony, he [or she] shall be punished by life imprisonment or death.” § 31-18-14(A). It is the crime of first degree murder, and not any particular theory, that the Legislature has designated as eligible for capital sentencing when an aggravating circumstance is present. There is no ambiguity in this legislative scheme. Given this plain language, Defendant in fact acknowledges under a separate argument heading that “[f]elony murder is, by statute, a capital crime in New Mexico.” Because the Legislature included felony murder as a capital offense, Defendant’s missing elements argument is also without merit. When the State proves the elements of felony murder, it has proved all of the elements of the capital felony of first degree murder. There is no requirement that the State also prove the element of deliberate intent for the alternative theory of willful, deliberate, and premeditated murder in order for the jury to render a guilty verdict on the crime of first degree murder on the theory of felony murder.

[21] Defendant, relying on Tison v. Arizona, 481 U.S. 137 (1987) and Enmund v. Florida, 458 U.S. 782 (1982), also contends that allowing the death penalty for felony murder, particularly under an accomplice theory, does not properly narrow the field of potential defendants exposed to capital punishment as required by the United States Supreme Court. Defendant contends that felony murder “holds the felon strictly responsible for the fatal consequences that he may not have foreseen, committed, or even desired.” Defendant further argues that “[a] defendant may be found guilty of murder . . . if he participated in a crime that resulted in the killing of a person” and that “[w]hen a defendant is an accomplice, and the killing is a foreseeable consequence of the underlying crime, it is immaterial to his guilt whether he killed a person, attempted to kill a person, or even intended or knew that a killing would take place. As an accomplice, the killer’s state of mind is imputed to the defendant. See generally UJI 14-2821 NMRA [2005].” (emphasis added). However, Defendant misunderstands the crime of felony murder under New Mexico law. As stated in the very jury instruction and cases cited by...
Defendant, New Mexico law requires a greater mens rea showing for both felony murder and accomplice liability.

(22) For felony murder, the State must prove that the defendant either intended to kill or knew that his or her acts created a strong probability of death or great bodily harm. State v. Ortega, 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991). This Court has explained why New Mexico’s felony murder statute is unique. “The primary distinction between New Mexico’s felony-murder doctrine and those of other jurisdictions is that . . . this Court impose[s] a mens rea for felony murder.” State v. Campos, 1996-NMSC-043, ¶ 16, 122 N.M. 148, 921 P.2d 1266. “New Mexico does not abandon the mens rea requirement for murder, nor does it create a presumption that a defendant had intended to kill whenever a homicide occurs during the course of a felony.” Id. ¶ 17. “Accordingly, unlike other jurisdictions, New Mexico’s modernized felony-murder doctrine does not run the risk of circumventing the legislatively determined mens rea for murder.” Id. ¶ 18.

(23) For accomplice liability, the State must show not only, as Defendant suggests, aiding in the commission of the killing but also that the defendant intended that the underlying felony be committed and “intended the killing to occur or knew that [he] [she] was helping to create a strong probability of death or great bodily harm.” UJI 14-2821. New Mexico law therefore requires a significantly higher showing of mens rea for both accomplice liability and felony murder than described by Defendant. Because the United States Supreme Court has held that accomplices to felony murder may be subjected to capital punishment if the defendant actually killed, attempted to kill, intended to kill, knew that death was substantially certain to result, or had a culpable mental state of reckless indifference to life and was a major participant in the killing, Tison, 481 U.S. at 150-51, 157-58, Defendant’s argument that accomplice liability for felony murder in New Mexico does not sufficiently narrow the class of defendants subjected to capital punishment is without merit.4 Defendant’s contention that “[the only class that is clearly narrow enough is the class of only those who commit first-degree premeditated murder with an intent to kill]” is contrary to clearly established New Mexico and federal law.

(24) In any event, Defendant overlooks the fact that New Mexico also requires an aggravating circumstance, in addition to the commission of felony murder, in order to be eligible for the death penalty. § 31-20A-3 (requiring that “the jury unanimously find[] beyond a reasonable doubt and specify[] at least one of the aggravating circumstances enumerated in Section [31-20A-5]”). More particularly, Defendant overlooks the elements of the aggravating circumstance in this case. The aggravating circumstance of murder in the course of a kidnapping requires an “intention to kill.” § 31-20A-5(B). Defendant received a jury instruction during the sentencing phase that included this element. Thus, the jury found that Defendant intended to kill the victim, and the Supreme Court has unequivocally stated that a death sentence for felony murder supported by an intent to kill is not disproportional and does not violate the Eighth Amendment. Tison, 481 U.S. at 150 (stating that in Enmund “[t]he Court clearly held that the equally small minority of jurisdictions that limited the death penalty to [felony murderers who actually killed, attempted to kill, or intended to kill] could continue to exact it in accordance with local law when the circumstances warranted”). In fact, based on Section 31-20A-5’s requirement of an aggravating circumstance in addition to the commission of felony murder, and with almost all of the enumerated aggravating circumstances requiring an intent to kill, the Supreme Court has specifically characterized New Mexico as one of only eleven states authorizing capital punishment that “forbid imposition of the death penalty even though the defendant’s participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness.” Tison, 481 U.S. at 154 & n.10. Because New Mexico requires an intent to kill, the availability of the death penalty for felony murder in New Mexico is not disproportional and does not apply to an overly broad class of defendants.

(25) It is noteworthy that the case upon which we relied in Salazar to uphold a general verdict form, Schad, involved the presentation of the same two theories of first degree murder at issue in the present case, that is, felony murder and willful, deliberate, and premeditated murder. 501 U.S. at 630. The defendant in Schad was sentenced to death and, similar to Defendant’s argument, contended that the federal Constitution required jury unanimity on a particular theory of first degree murder in capital cases even if it did not so require in cases involving lesser penalties. Id. For reasons substantially similar to those we articulated in Salazar, the Supreme Court rejected this argument. Id. at 644-45. Therefore, for the

4 The State argues that we need not assess the validity of accomplice liability because the uncontroverted testimony supports a jury finding beyond a reasonable doubt that Defendant was the principal in the victim’s killing and that, in comparison, there is little to support a finding of complicity by Defendant. In response to this argument, Defendant contends that, absent an indication in the record of the basis for the jury’s verdict, we must assume that the jury relied on accomplice liability in order to ensure that this alternative of the crime is legally viable. For felony murder, the State must prove that the defendant either intended to kill or knew that his or her acts created a strong probability of death or great bodily harm. State v. Ortega, 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991). This Court has explained why New Mexico’s felony murder statute is unique. “The primary distinction between New Mexico’s felony-murder doctrine and those of other jurisdictions is that . . . this Court impose[s] a mens rea requirement for felony murder.” State v. Campos, 1996-NMSC-043, ¶ 16, 122 N.M. 148, 921 P.2d 1266. “New Mexico does not abandon the mens rea requirement for murder, nor does it create a presumption that a defendant had intended to kill whenever a homicide occurs during the course of a felony.” Id. ¶ 17. “Accordingly, unlike other jurisdictions, New Mexico’s modernized felony-murder doctrine does not run the risk of circumventing the legislatively determined mens rea for murder.” Id. ¶ 18.

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above reasons, we conclude that our holding in Salazar regarding general verdict forms on the crime of first degree murder applies equally in death penalty cases.

IV. THE AGGRAVATING CIRCUMSTANCE OF KIDNAPPING DURING THE COURSE OF THE MURDER

(26) Defendant raises a number of arguments relating to the aggravating circumstance of kidnapping during the course of a murder. Defendant argues that the felony of kidnapping cannot be used both as the underlying felony for felony murder and as the aggravating circumstance for capital sentencing. He contends that a sentencing scheme that permits the death penalty for “a broad range of felony murdneres” creates too broad a class of death-eligible crimes to survive constitutional scrutiny. Defendant relies on Zant v. Stephens, 462 U.S. 862, 877 (1983), in which the Supreme Court stated that “an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” See Gregg v. Georgia, 428 U.S. 153, 189 (1976) (“[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”) (opinion of Stewart, J.). The Supreme Court has also indicated more recently that “the death penalty is reserved for a narrow category of crimes and offenders.” Roper v. Simmons, 125 S. Ct. 1183, 1195 (2005). “States must give narrow and precise definition to the aggravating factors that can result in a capital sentence.” Id. at 1194.

(27) As with his previous argument, Defendant again fails to note the restricted application of felony murder in New Mexico and the substantial narrowing of felony murders eligible for the death penalty achieved by the requirement of one or more of a limited number of aggravating circumstances. In order to establish felony murder, the State must prove the culpable mental state of an intent to kill or knowledge of a substantial certainty of death or great bodily harm. Campos, 1996-NMSC-043, ¶ 17 (stating that New Mexico does not employ “a presumption that a defendant had intended to kill whenever a homicide occurs during the course of a felony”). In addition, the State must demonstrate “the commission of a first-degree felony or a lesser-degree felony that is itself inherently dangerous or is committed under circumstances that are inherently dangerous,” and the underlying felony cannot be a lesser-included offense of second degree murder. Id. ¶¶ 18-19. (28) Beyond these limitations on the crime itself, not all felony murders are eligible for the death penalty, and not all underlying felonies constitute an aggravating circumstance. In fact, the only underlying felonies for felony murder that can serve as an aggravating circumstance for capital sentencing are kidnapping, criminal sexual contact of a minor, and criminal sexual penetration. § 31-20A-5(B). For the use of each of these three felonies as an aggravating circumstance, the Legislature imposed the additional requirement of demonstrating beyond a reasonable doubt that the defendant had an intent to kill. Allen, 2000-NMSC-002, ¶ 74 (“Even if the jury has found the defendant guilty of a felony murder in the commission of a kidnapping, it must also find that the murder was committed with an intent to kill in order to find this aggravating circumstance.”) (quotation marks and quoted authority omitted). “[T]he aggravating circumstance of murder in the commission of kidnapping does not follow automatically from a guilty verdict on the underlying offenses of kidnapping and murder.” Id. ¶ 73. This additional requirement distinguishes the aggravating circumstance from the crime of felony murder, which requires only knowledge of a strong probability of death or great bodily harm. Compare UJI 14-7015 NMRA 2005, with UJI 14-202 NMRA 2005. Aggravating circumstances are not elements of capital murder, but are instead intended to explain the kinds of circumstances that our legislature has determined warrant the most severe punishment for capital murder. . . . Where the legislature believed that intent was an appropriate criteria upon which a death sentence could be based, it included the specific requirement of intent to kill in the given aggravating circumstance.

State v. Compton, 104 N.M. 683, 693, 726 P.2d 837, 847 (1986). Because New Mexico requires a separate mens rea showing for felony murder and also requires an even greater mens rea of an intent to kill for the limited number of particularly dangerous felonies that can serve as an aggravating circumstance, the Legislature has genuinely narrowed the class of crimes and defendants eligible for the death penalty consistent with precedent from the Supreme Court. See Lowenfield v. Phelps, 484 U.S. 231, 242, 243 & n.6, 246 (1988) (upholding a sentencing scheme that relied on the commission of aggravated kidnapping both in creating a narrow definition of first degree murder and as an aggravating circumstance); see also Berry v. State, 703 So. 2d 269, 285-86 (Miss. 1997) (rejecting a similar claim based on the Supreme Court’s holding in Lowenfield); People v. Seaton, 28 P.3d 175, 231 (Cal. 2001) (rejecting a similar argument regarding the underlying felony of robbery). Our statutory scheme ensures that capital sentencing in New Mexico is “limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” Simmons, 125 S. Ct. at 1194 (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

(29) Defendant also argues that there was insufficient evidence to instruct the jury on the aggravating circumstance of kidnapping, relying on State v. Henderson, 109 N.M. 655, 661, 789 P.2d 603, 609 (1990), overruled on other grounds by Clark v. Tansy, 118 N.M. 486, 493, 882 P.2d 527, 534 (1994). Defendant’s reliance on Henderson is misplaced. In that case, the trial court instructed the jury on three aggravating circumstances, murder of a witness, murder during the course of a kidnapping and murder during the course of criminal sexual penetration. Id. at 657, 789 P.2d at 609. This Court held that the instruction on murder during the course of a kidnapping was improper because the State argued that “in raping his victim [the defendant] simultaneously kidnapped her.” Id. at 661, 789 P.2d at 609 (emphasis added). The Court held that allowing aggravating factors for both the rape and the kidnapping would mean that “virtually every rape would be simultaneously a kidnapping, and . . . such reasoning does not suffice to establish the statutory aggravating circumstance.” Id. In Henderson, there was no evidence that the defendant “intended to kill his victim during the commission of a kidnapping.” Id. However, we were very careful to distinguish our analysis in State v. Guzman, 100 N.M. 756, 676 P.2d 1321 (1984). “[T]he kidnapping and rape in this case, unlike the kidnapping and rape in Guzman, are inseparable.” Henderson, 109 N.M. at 661, 789 P.2d at 609. “In Guzman it was obvious that the defendant intended to kill his kidnapped victim during the course of the kidnapping.” Id. “In Guzman, there was
a separate and distinct kidnapping, which took place a definite period of time before the murder occurred. . . . [T]he kidnapping already had been completed before the CSP and murder occurred.” *Id.* at 660 n.1, 789 P.2d at 608 n.1.

{30} In this case, there is no danger of multiplying a single aggravating factor into two aggravating factors. Although the State charged Defendant with attempted CSP, this case does not involve the aggravating circumstance of murder in the course of a CSP. The jury was instructed on a single aggravating circumstance. Further, as in *Guzman*, the kidnapping had already been completed, although continuing, before the attempted CSP and murder. The kidnapping was complete, though continuing, either at the convenience store or when the victim got out of the car on the dirt road and Defendant persuaded her to return to the vehicle. At both times, a rational jury could reasonably conclude from the evidence that Defendant lured the victim into his car by deception with the intent to inflict a sexual offense on the victim. See *Allen*, 2000-NMSC-002, ¶ 75; see also § 30-4-1(A)(4). When dealing with an already completed but continuing kidnapping, this Court has affirmed instructions on the aggravating circumstance of kidnapping on a number of occasions. E.g., *State v. Jacobs*, 2000-NMSC-026, ¶¶ 56-57, 129 N.M. 448, 10 P.3d 127; *Allen*, 2000-NMSC-002, ¶ 75. Applying “a degree of scrutiny that reflects ‘the qualitative difference of death from all other punishments,’” *Allen*, 2000-NMSC-002, ¶ 61 (quoting *California v. Ramos*, 463 U.S. 992, 998 (1983)), we conclude on the basis of our prior cases that there was sufficient evidence for the instruction, and we also conclude that *Henderson* is inapposite.

{31} Defendant finally contends with respect to the aggravating circumstance that the jury was not instructed properly because the instructions did not distinguish between evidence of kidnapping and evidence of sexual assault and murder. However, the jury instruction for the aggravating circumstance required a finding that the victim was killed during the course of a kidnapping and that Defendant had an intent to kill. In rejecting a nearly identical argument in *Allen*, we were “satisfied that the jury understood the factual distinctions necessary to find the aggravating circumstance of murder in the commission of a kidnapping without more precise definition from the court.” 2000-NMSC-002, ¶ 77. We reached a similar conclusion in *Jacobs*: “The standard instruction contained all the elements necessary to establish the aggravating circumstance of the murder in the commission of a kidnapping and the evidence established the occurrence of a separate and distinct kidnapping.” 2000-NMSC-026, ¶ 59. We conclude that this argument is without merit.

V. BALANCING THE AGGRAVATING CIRCUMSTANCES WITH THE MITIGATING CIRCUMSTANCES

{32} Under New Mexico’s capital sentencing scheme, the jury is required to find an aggravating circumstance beyond a reasonable doubt. § 31-20A-3. If the jury does so, the Legislature has provided that the jury then determine whether any mitigating circumstances exist and specify the sentence only “[a]fter weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime.” NMSA 1978, § 31-20A-2(B) (1979). The jury can sentence a defendant to death only if it unanimously determines that the aggravating circumstances outweigh the mitigating circumstances. UJI 14-7030 NMRA 2005. However, “[t]here is no requirement in the Capital Felony Sentencing Act or in the jury instructions which requires that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt.” *State v. Finnell*, 101 N.M. 732, 736, 688 P.2d 769, 773 (1984). Defendant argues that recent decisions from the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) require the jury to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. On the basis of these cases, he contends that his rights to trial by jury and due process and the prohibition against cruel and unusual punishment require that his sentence be reversed due to the failure of the Capital Felony Sentencing Act to apply the standard of beyond a reasonable doubt to this balancing process. See U.S. Const. amends. VI, VIII, XIV; N.M. Const. art. II, §§ 13, 14, 18.

{33} In *Apprendi*, the Supreme Court overturned a sentencing scheme that contemplated an increased penalty for a hate crime upon a finding by a judge, by a preponderance of evidence, that the crime was committed with the purpose of intimidating particular classes of individuals. 530 U.S. at 468-69. Relying on the constitutional right to due process and to a trial by jury, the Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490. The Court deemed unconstitutional “a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he [or she] would receive if punished according to the facts reflected in the jury verdict alone.” *Id.* at 482-83. The Supreme Court applied this holding from *Apprendi* to a death penalty proceeding in *Ring*. In that case, the Court determined that *Apprendi* precluded Arizona’s system of having the trial judge determine the presence or absence of aggravating factors following a jury verdict on the crime of first degree murder. *Ring*, 536 U.S. at 588-89. The Court observed that life imprisonment was the maximum punishment available for the crime of first degree felony murder based on the jury verdict alone because the existence of an aggravating circumstance was necessary to make a crime death-eligible. *Id.* at 597. As a result, the Court determined that “aggravating factors operate as ‘the functional equivalent of an element of a greater offense’” and must therefore be found by a jury beyond a reasonable doubt. *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). The Court noted that the vast majority of states authorizing capital

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5 In the alternative, Defendant contends that his counsel was ineffective for not requesting an instruction that required the jury to find a kidnapping separate and distinct from the sexual assault and the murder. However, we believe, consistent with *Allen* and *Jacobs*, that the instructions given to the jury adequately set out the elements of the offenses and the elements of the aggravating circumstance. Defendant has failed to make a prima facie showing of ineffective assistance. See *State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61 (stating that an ineffective assistance of counsel claim is more properly brought on collateral review); *Lytle v. Jordan*, 2001-NMSC-016, ¶¶ 25-26, 130 N.M. 198, 22 P.3d 666 (applying the two-part test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984) requiring a showing that counsel’s performance was deficient and that the deficiency prejudiced the defense and also applying the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance”) (quoting *Strickland*, 466 U.S. at 689).
punishment, including New Mexico, already placed the responsibility of finding aggravating circumstances with the jury, while only five states, including Arizona, entrusted both capital sentencing factfinding and the ultimate sentencing decision to judges. Ring, 536 U.S. at 607-08 & n.6. [34] More recently, the Supreme Court has had further opportunities to explore its holding in Apprendi. In Blakely v. Washington, 542 U.S. 296, 303-04 (2004), the Court overturned a sentence of nineteen months based on a judicial finding of deliberate cruelty because the maximum sentence allowable by the defendant’s guilty plea to the charged offense alone, absent additional factfinding, was fifty-three months. The Court held that such a sentence violates the rule announced in Apprendi. Id. at 305. In United States v. Booker, 125 S. Ct. 738, 746 (2005), the Court addressed the effect of Apprendi on the Federal Sentencing Guidelines. In a divided ruling, the Court held that the mandatory sentencing guidelines, based on judicial findings by a preponderance of the evidence and never submitted to the jury, violated the Sixth Amendment, id. at 749-51, and the Court reaffirmed its holding in Apprendi that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” Id. at 756. However, rather than striking down the Sentencing Guidelines as a whole, a different majority of the Court took an intermediate remedial approach by invalidating only the mandatory provisions of the Guidelines, “mak[ing] the Guidelines effectively advisory.” Id. at 757; see id. at 750 (“E]veryone agrees if the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted . . . the provisions that make the Guidelines binding on district judges . . . .”). [35] It is without question that these cases, and Ring in particular, require that an aggravating circumstance be found by a jury beyond a reasonable doubt. Even though, like the Arizona statute at issue in Ring, the Legislature has provided that the punishment for first degree murder is life imprisonment or death, § 31-18-14, “the relevant inquiry is one not of form, but of effect.” Apprendi, 530 U.S. at 494. As the Supreme Court determined with respect to Arizona’s statutory scheme in Ring, the requirement of an aggravating circumstance for the imposition of the death penalty in Section 31-20A-3 effectively limits the punishment available upon a guilty verdict of first degree murder alone. See Ring, 536 U.S. 603-04. As we have indicated, however, the Capital Felony Sentencing Act satisfied the requirement that a jury find an aggravating circumstance beyond a reasonable doubt long before Apprendi and Ring were decided. The question then is whether, under these recent Supreme Court cases, the jury must also find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. We conclude that this standard of proof in the weighing process is neither constitutionally nor statutorily required. [36] In Ring, the Court emphasized that the defendant did not “argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty” and noted that four states employ a hybrid system under which a jury recommends a sentence but a judge makes the ultimate sentencing determination. Ring, 536 U.S. at 597 n.4, 608 n.6. This limitation on the holding in Ring is important because it leaves intact the Court’s prior holding that “the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances.” Stephens, 462 U.S. at 890. We relied on this holding from Stephens to reject a similar argument about the standard of proof in the jury’s weighing of aggravating and mitigating circumstances in State v. Clark, 108 N.M. 288, 307-08, 772 P.2d 322, 341-42 (1988), overruled on other grounds by Henderson, 109 N.M. at 664, 789 P.2d at 612. In addition, Ring did not overrule the Court’s prior holding that “there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed.” Spaziano v. Florida, 468 U.S. 447, 465 (1984). Following Ring, states may continue to allow judges to make the ultimate sentencing determination as long as a jury has found the existence of an aggravating circumstance beyond a reasonable doubt. See Ring, 536 U.S. at 612 (Scalia, J., concurring) (“What today’s decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so . . . .”). In Harris v. Alabama, 513 U.S. 504, 506, 515 (1995), the Supreme Court upheld a sentencing scheme under which a judge determined the sentence by considering, much like the jury in New Mexico, whether the aggravating circumstances outweigh the mitigating circumstances, taking into account a jury’s advisory verdict based on the jury’s balancing of aggravating and mitigating factors. In reaching this decision, the Supreme Court noted that no “specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.” Equally settled is the corollary that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentence.” Id. at 512 (citation omitted) (quoting Franklin v. Lynaugh, 487 U.S. 164, 179 (1988)). These observations remain unchanged by Apprendi and its progeny. Because the Supreme Court continues to allow judges to make the final sentencing determination, following the judge’s consideration of aggravating and mitigating circumstances, it is clear that the Court did not intend to apply Apprendi’s requirement of a jury determination beyond a reasonable doubt to the balancing of aggravating and mitigating circumstances in capital cases. [37] “[T]he pivotal inquiry under Ring and Apprendi is whether exposure to punishment is increased, not whether the punishment should or should not be imposed in a given case.” Ritchie v. State, 809 N.E.2d 258, 265 (Ind. 2004). In New Mexico, once the jury finds an aggravating circumstance beyond a reasonable doubt, the jury is presented with two sentencing options, life imprisonment or death, and it must exercise its discretion, as guided by the Legislature and the instructions of the court, in choosing between these two statutorily authorized penalties. As part of this exercise of discretion, the jury considers the defendant and the crime and weighs the aggravating and mitigating circumstances. § 31-20A-2. Unlike the existence of an aggravating circumstance, the weighing of aggravating and mitigating circumstances is thus not a “fact that increases the penalty for a crime beyond the prescribed statutory maximum.” Apprendi, 530 U.S. at 490. A jury’s finding of guilt on the crime of first degree murder and the presence of at least one aggravating circumstance establishes “all facts legally essential to the punishment.” Blakely, 542 U.S. at 313. The process of weighing the aggravating and mitigating circumstances is designed to assist the jury in deciding which sentence is proper, not which sentence is available. See Oken v. State, 835 A.2d 1105, 1123 (Md. 2003) (“[U]nder the Supreme Court’s post-Apprendi jurispru-
dence, in both weighing and non-weighing schemes, it is the finding of an aggravating circumstance which makes the defendant death-eligible.”), cert. denied, 541 U.S. 1017 (2004). As a result, the balancing process is not a “fact necessary to constitute the crime with which [the defendant] is charged” such that it would invoke the constitutional requirement of proof beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). Therefore, we agree with the State that the balancing of the aggravating and mitigating circumstances, much like the jury’s consideration of “the defendant” in Section 31-20A-2(B), is not susceptible to an Apprendi/Blakely analysis. Apprendi rests on the notion that the “truth of every accusation” should be decided by the jury under a reasonable doubt standard. Apprendi, 530 U.S. at 477 (quotation marks and quoted authority omitted). However, there is no “truth” in the balancing of the proper sentence for the crime and the defendant. It is instead a matter of guided discretion and judgment within the range of permissible punishments of death and life imprisonment, which is the jury’s ultimate purpose in capital sentencing in New Mexico. The balancing process does not contemplate the finding of a “fact” that increases a defendant’s maximum possible sentence within the meaning of Apprendi. See Ex parte Waldrop, 859 So. 2d 1181, 1189 (Ala. 2002) (“[T]he weighing process is not a factual determination . . . .”); Commonwealth v. Roney, 866 A.2d 351, 360 (Pa. 2005) (“[B]ecause the weighing of the evidence is a function distinct from fact-finding, Apprendi does not apply here.”). The “fact” that makes a defendant eligible for the death penalty is the aggravating circumstance, combined with a guilty verdict on the crime of first degree murder. See Ritchie, 809 N.E.2d at 268 (“The outcome of weighing does not increase eligibility.”).

(38) The jury’s exercise of discretion in selecting the penalty is equivalent to “a judgment that [aggravating circumstances] present a compelling ground for departure” from a basic sentence to which the Supreme Court referred in Blakely, 542 U.S. 305 n.8. While the Court required that the aggravating circumstances underlying this “judgment” be found by a jury beyond a reasonable doubt, it did not interfere with or impose a heightened standard on this traditional sentencing judgment by a sentencing authority:

We should be clear that nothing in this history [of requiring juries to find all facts essential to a higher degree of punishment than the verdict alone would support] suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute.

Apprendi, 530 U.S. at 481. As indicated by the direction to the jury in Section 31-20A-2 to consider both the defendant and the crime, in addition to weighing the aggravating and mitigating circumstances, it is precisely this type of guided sentencing discretion that is contemplated once the jury finds an aggravating circumstance beyond a reasonable doubt. Indeed, in Booker, the Court stressed that,

[i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range . . . . For when a trial judge exercises his [or her] discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

125 S. Ct. at 750. Under the Capital Felony Sentencing Act, the weighing of aggravating and mitigating circumstances is designed to assist the jury in “select[ing] a specific sentence within a defined range.” Id.; see Spaziano, 468 U.S. at 459 (“[D]espite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual.”).

(39) Moreover, it is significant following the Supreme Court’s ruling in Booker that the jury’s decision after the process of weighing is discretionary rather than mandatory. Even if the jury finds that the aggravating circumstances outweigh the mitigating circumstances, the jury “may still decide not to impose the death penalty.” UJI 14-7030.

[T]he jury is instructed that even if aggravating circumstances outweigh mitigating circumstances the jury is free to not impose the penalty of death. The jury is directed to consider both the defendant and the crime. We have recognized that a subjective standard must be used for this review. These instructions adequately focus[] the jury’s attention on the particularized nature of the crime and the unique characteristics of the individual defendant, as required by the Constitution.

Clark, 108 N.M. at 307-08, 772 P.2d at 341-42 (citations omitted). As the Supreme Court held in Booker, Apprendi’s requirement of a jury finding beyond a reasonable doubt does not apply to a discretionary sentencing judgment between two statutory penalties that are available on the basis of an existing jury verdict, which in this case includes the verdict of guilt on the crime of first degree murder and the determination that an aggravating circumstance exists beyond a reasonable doubt. “[T]he federal constitution requires that eligibility for the death penalty be determined by the jury beyond a reasonable doubt, but it does not require that the decision whether to impose death be made by the jury, and it does not require the weighing, whether by judge or jury, to be under a reasonable doubt standard.” Ritchie, 809 N.E.2d at 266; accord Oken, 835 A.2d at 1122 (“[W]hen taken in the context of the Supreme Court’s death penalty jurisprudence, Ring only implicates the finding of aggravating circumstances, and not the process of weighing aggravating against mitigating factors.”); Roney, 866 A.2d at 36 (“[A]s evident in Ring, Apprendi narrowly focused on a jury’s fact-finding responsibility and did not involve any question concerning whether the ‘beyond a reasonable doubt’ standard applies to a jury’s weighing of the aggravating and mitigating circumstances after the defendant has been found eligible for the death penalty.”).

(40) The Supreme Court’s intention that Apprendi not apply to a discretionary sentencing judgment, such as the balancing of aggravating and mitigating factors, is further revealed by the Court’s continued adherence to Williams v. New York, 337 U.S. 241 (1949), which was cited with approval in Apprendi, 530 U.S. at 481, and distinguished in Blakely, 542 U.S. at 304-05. In Williams, the Supreme Court allowed a judge to consider facts outside the record in a pre-sentence investigation report in de-
terminating whether to sentence a defendant to death under an indeterminate sentencing scheme. 337 U.S. at 242-43. The judge considered the defendant’s criminal history and some material facts from a pre-sentence investigation concerning the defendant’s background that he believed relevant to the question of punishment but that could not have been properly introduced during the guilt phase of the trial. Id. at 244. The Court stated,

"[T]ribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him [or her] in determining the kind and extent of punishment to be imposed within limits fixed by law.

*Id.* at 246 (footnote omitted). “Highly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.” *Id.* at 247. These principles reflect “a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.” *Id.* As with the information considered by the judge in *Williams*, the weighing of aggravating and mitigating circumstances assists the jury in its discretionary task of selecting between two sentences authorized by law in order to ensure that the penalty imposed fits both the offender and the crime. For the above reasons, we believe that the Supreme Court did not intend for its opinions in *Apprendi* and *Blakely* to apply to a decision of the type at issue in this case.

{41} Defendant alternatively argues that, in light of these Supreme Court cases, we should as a matter of statutory construction interpret Section 31-20A-2 to require that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. We have previously rejected this argument. “If the Legislature had intended for this burden to be beyond a reasonable doubt in death penalty cases, it would have so stated in the Capital Felony Sentencing Act.” *Finnell*, 101 N.M. at 736, 688 P.2d at 773. This interpretation of Section 31-20A-2 has been in force without legislative change for over twenty years. We do not believe that there is a compelling reason to reconsider this precedent. See *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 24, 135 N.M. 375, 89 P.3d 47 (“Based on the importance of stare decisis, we require a compelling reason to overrule one of our prior cases.”) (quotation marks and quoted authority omitted); see also *Paterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.”). We conclude that the jury is not required to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt in order to specify a sentence of death.

VI. PROPORATIONALITY

{42} Defendant next argues that his sentence is disproportionate to the penalty imposed in similar crimes. “[P]roportionality review is a post-sentence inquiry, undertaken to identify disparities in capital sentencing and to prevent the death penalty from being administered in an arbitrary, capricious, or freakish manner.” *State v. Wroystek*, 117 N.M. 514, 522, 873 P.2d 260, 268 (1994). In undertaking a proportionality review, this Court has long applied a “precedent-seeking approach.” *Clark*, 1999-NMSC-035, ¶ 74; see *State v. Garcia*, 99 N.M. 771, 780, 664 P.2d 969, 978 (1983). Under this approach, we compare the facts of the offense and all other aggravating or mitigating evidence with “only New Mexico cases in which a defendant has been convicted of capital murder under the *same aggravating circumstance(s)*” and “[o]nly those New Mexico cases in which a defendant was convicted under the same aggravating circumstance(s) and then received either the death penalty or life imprisonment and whose conviction and sentence have been upheld previously by this Court.” *Garcia*, 99 N.M. at 780, 664 P.2d at 978.

{43} From our review of New Mexico capital cases, it appears that only one case fits this criteria exactly, *Gilbert*, 100 N.M. 392, 671 P.2d 640. In *Gilbert*, the defendant was convicted of two murders. *Id.* at 395, 671 P.2d at 643. For one murder, the jury found the aggravating circumstances of kidnapp-
tionality, we also consider “both the crime and the defendant.” § 31-20A-4(C)(4); see Clark, 1999-NMSC-035, ¶ 81; Wyrosteak, 117 N.M. at 519, 873 P.2d at 265 (“The determination of whether a death sentence is excessive or disproportionate requires review of the facts in the trial record pertaining to the crime, including evidence of aggravation and mitigation.”). Comparing this case to those mentioned above, Allen, Clark, McGuire, Gilbert, Guzman, and Hutchinson, and considering the crime and Defendant, we do not believe that the jury’s specification of the death penalty is freakish, capricious, or arbitrary. Defendant killed the victim in a particularly brutal fashion by striking her in the head three to five times with a sledgehammer. This occurred after Defendant kidnapped the victim by deception, chased her as she attempted to escape and stabbed her two inches deep in the chest with a knife when she struggled, and completely disrobed the victim in an attempt to rape her. Of the comparison cases, the facts in this case are most similar to those in Allen, 2000-NMSC-002, ¶¶ 2-14, a case in which we affirmed a sentence of death. We reiterate that “[p]roportionality review in New Mexico is first and foremost directed to the particular circumstances of a crime and the specific character of the defendant.” Garcia, 99 N.M. at 781, 664 P.2d at 979. We conclude that the sentence is not excessive or disproportionate.

{45} Defendant argues that this Court should overrule our earlier case law and compare his sentence to all first degree murder charges that were death-eligible, regardless of whether the death penalty was actually sought. Defendant, however, misunderstands the purpose of proportionality review. As this Court has explained, it is not to ensure perfect symmetry in sentencing but only to ensure that a death sentence is not “freakish, arbitrary, or capricious.” Clark, 1999-NMSC-035, ¶ 80. The precedent-seeking approach is narrowly tailored for this purpose, and this Court has twice recently rejected similar claims to abandon this approach. See Allen, 2000-NMSC-002, ¶ 111; Clark, 1999-NMSC-035, ¶¶ 75-76. We adhere to the precedent-seeking approach from Garcia.

VII. REMAINING PENALTY-PHASE ISSUES

{46} Although not raised by Defendant, we also review the record to determine whether the evidence supports the finding that the mitigating circumstances outweighed the aggravating circumstances and whether the sentence was the product of passion, prejudice, or another arbitrary factor. See § 31-20A-4(C)(2), (3); see also Allen, 2000-NMSC-002, ¶ 81. At the sentencing hearing, Defendant presented the testimony of four witnesses. A psychologist testified that it was his opinion that there was less than a ten percent likelihood that Defendant would commit violence against other prisoners and a less than one percent likelihood of violence against prison guards while serving a life sentence in prison. A pastor testified that Defendant had grown spiritually while in prison and also read letters from two of Defendant’s sisters describing Defendant’s childhood. Defendant’s mother and father also testified about Defendant’s childhood and indicated a desire to continue seeing their son while he was in prison. Defendant’s mother testified that he was a volunteer firefighter and had been in the Navy. Defendant also offered a videotape depicting the conditions in the maximum security section of the prison, and the trial judge informed the jury that, based on a life sentence for first degree murder and the sentences he received for the other crimes of which the jury found him guilty, Defendant would not be eligible for release from prison for sixty-seven years. Following our thorough review of the record, we conclude that the evidence from the trial and sentencing proceeding supports the jury’s determination that the aggravating factor outweighs the evidence offered in mitigation.

{47} We also conclude that the sentence was not the product of passion, prejudice, or any other arbitrary factor. Although the State introduced victim impact evidence, its presentation was limited to only four witnesses, the victim’s brother, two sisters, and daughter, and was “brief in nature and narrow in scope and purpose.” Clark, 1999-NMSC-035, ¶ 45. We have explicitly allowed “‘evidence about the victim and about the impact of the murder on the victim’s family [that] is relevant to the jury’s decision as to whether or not the death penalty should be imposed.’” Allen, 2000-NMSC-002, ¶ 55 (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)); accord Jacobs, 2000-NMSC-026, ¶ 64; Clark, 1999-NMSC-035, ¶¶ 35-45.

VIII. GUILT-PHASE ISSUES

{48} Defendant first argues that the trial court erred in not granting a mistrial based on a comment by the prosecutor in closing argument. During the trial, the State sought to admit several photographs of the victim’s body as reference material for the testimony of the medical investigator, and the prosecutor indicated an attempt to be “very conservative” in selecting the photographs for the jury, indicating that those offered were the “least bloody” available. In the course of an extended bench conference on the subject, the trial judge expressed concern about the graphic nature of some of the photographs and also about minimizing the amount of nudity shown in the photographs. The prosecutor offered to withdraw some pictures, either based on the availability of other means to demonstrate the wounds to the jury or out of respect for the victim and the victim’s family, and the trial judge ordered that some of the photographs be cropped. After the prosecutor cut the photographs, the trial judge indicated that the prosecutor “actually . . . took out more than [he] had to,” and the judge admitted two full photographs and three slivers of photographs that had been cropped. The trial judge warned the jury.

{49} We’re going to be dealing with some issues at this point that as far as the medical investigator’s testimony, some is going to be a little like we’ve used the term graphic, okay. There will be some photographs and some diagrams but the photographs will only come at the end of [the witness’s] testimony and then we’re going to take a break, . . . and we have worked—we’ve been working on those photographs so that they will show what they are supposed to show and nothing more and we’ve tried to minimize the graphicness as much as possible.

The medical investigator testified in detail about the numerous wounds to the victim’s body. During closing argument, the prosecutor referred to Defendant’s statement to the police on the day following the murder that he had a great night up until the time that his car got stuck and described the sequence of events leading up to the victim’s death to place that statement in context. In the course of this recitation, the prosecutor described the victim’s physical state as “so grotesque you could not be allowed to see it.” The judge denied defense counsel’s oral motion for a mistrial following closing argument, and Defendant later filed a
written motion for mistrial. The prosecutor informed the court that he did not show or describe the excised portions of the photographs, that the medical investigator’s testimony had demonstrated the graphic nature of the injuries, that the statement in closing had resembled the judge’s own explanation of the cropped photographs to the jury, and that the closing argument had been intended to show Defendant’s demeanor following the crime rather than to evoke an emotional response by the jury. The trial court denied the motion.


51] We agree with the State that the prosecutor did no more than repeat what the judge had already said to the jury, that is, that the photographs contained more graphic material than the jurors were allowed to see, and rely on reasonable inferences from the medical investigator’s testimony about the graphic nature of the wounds. Thus, the prosecutor did not introduce any new information to the jury. Viewing this isolated remark in context with the judge’s comments to the jury, with the testimony of the medical investigator, and with the overwhelming evidence of guilt, we conclude that the remark did not result in a verdict based on passion or prejudice or otherwise deprive Defendant of a fair trial.7 “The general rule is that an isolated comment made during closing argument is not sufficient to warrant reversal.” State v. Brown, 1997-NMSC-029, ¶ 23, 123 N.M. 413, 941 P.2d 494; accord Smith, 2001-NMSC-004, ¶ 38. See generally State v. Sellers, 117 N.M. 644, 650, 875 P.2d 400, 406 (Ct. App. 1994) (“Appellate review provides a very limited opportunity for relief from poorly worded remarks . . . .”). We conclude that the trial court did not abuse its discretion in denying the motion for mistrial.

52] Defendant also argues that the judge should have granted a mistrial due to a witness’s remark about Defendant’s character of meanness. “We review a trial court’s denial of a motion for mistrial under an abuse of discretion standard.” State v. Gonzales, 2000-NMSC-028, ¶ 35, 129 N.M. 556, 11 P.3d 131. The witness’s remark referenced by Defendant, that Defendant had always “seemed a little mean,” was in response to a question about Defendant’s behavior on the night of the murder, and the prosecutor promptly told the witness after the remark that he was asking only about the night in question. Thus, this remark was not elicited by the prosecutor. Defendant did not object to the remark at the time but moved for a mistrial at the end of the witness’s testimony, following cross-examination. The judge denied the motion for mistrial but offered to give a curative instruction, which Defendant refused.

53] “We have previously distinguished between inadvertent remarks made by a witness about a defendant’s inadmissible prior crime or wrong and similar testimony intentionally elicited by the prosecutor.” Gonzales, 2000-NMSC-028, ¶ 39. For an inadvertent remark of the type at issue in this case, we have held that the trial court’s offer to give a curative instruction, even if refused by the defendant, is sufficient to cure any prejudicial effect. See id. ¶ 37; State v. Simonson, 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983). We conclude that Defendant has failed to show an abuse of discretion.

54] Defendant finally argues that the trial court erred in admitting expert testimony on blood spatter analysis. Our Rules of Evidence provide, “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.” Rule 11-702 NMRA 2005. “The purpose of Rule 11-702 is to assist the trier of fact to understand the evidence and to determine the issues of fact.” Lee v. Martinez, 2004-NMSC-027, ¶ 15, 136 N.M. 166, 96 P.3d 291 (quotation marks and quoted authority omitted). We have explained that Rule 11-702 creates three prerequisites for the admission of expert testimony: (1) the expert must be qualified; (2) the testimony must assist the trier of fact; and, “closely related” to the second requirement, (3) the expert may testify only as to “scientific, technical or other specialized knowledge.” State v. Alberico, 116 N.M. 156, 166, 861 P.2d 192, 202 (1993). With respect to the latter two prerequisites, we have rejected the overly restrictive test from Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) that had required general acceptance in the field in order for opinion testimony to be considered scientific knowledge that will assist the trier of fact in favor of a more flexible test that focuses on “the validity and the soundness of the scientific method used to generate the evidence.” Alberico, 116 N.M. at 167, 861 P.2d at 203. We relied on the analysis of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) to specify “[s]everal factors [that] could be considered by a trial court in assessing the validity of a particular technique to determine if it is ’scientific knowledge’ under Rule 11-702.” Alberico, 116 N.M. at 168, 861 P.2d at 204. These factors include, but are not limited to, the following:

(1) whether a theory or technique “can be (and has been) tested”; (2) “whether the theory or technique has been subjected to peer review and publication”; (3) “the known potential rate of error” in using a particular scientific technique “and the existence and maintenance of standards controlling the technique’s operation”; . . . (4) whether the theory or technique has been generally accepted in the particular scientific field . . . ; and (5) “whether the scientific technique is based upon well-recognized scientific principle and whether it is capable of

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7 For similar reasons, we reject Defendant’s argument that this remark in closing argument during the guilt-phase of the trial resulted in a sentence based on passion or prejudice. Cf. Clark, 1999-NMSC-035, ¶¶ 51-55.
supporting opinions based upon reasonable probability rather than
conjecture.”’


{55} We review Defendant’s claim in this case for an abuse of discretion. See Alberico, 116 N.M. at 169, 861 P.2d at 205 (“The rule in this State has consistently been that the admission of expert testimony or other scientific evidence is peculiarly within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion.”). “Given the capabilities of jurors and the liberal thrust of the rules of evidence, we believe any doubt regarding the admissibility of scientific evidence should be resolved in favor of admission, rather than exclusion.” Lee, 2004-NMSC-027, ¶ 16.

{56} Defendant filed a motion in limine to exclude the expert testimony prior to trial. During a hearing on the motion, the State’s expert testified that he had been admitted as an expert on bloodstain pattern analysis in twenty-five jurisdictions and had testified approximately 300 times. He testified that bloodstain pattern analysis has existed since 1895 and is in widespread practice today throughout the world. He testified that blood spatter analysis has been tested for accuracy and can produce accurate results. He also testified that it is based on the underlying science of physics, as well as mathematics. He further testified that it is based upon a set of standards that are accepted across the nation and even worldwide. The expert indicated that there are a number of organizations that monitor the field and assist in the management of standards and in education. He also stated that there is a body of literature on the subject, including journals and treatises. Finally, he testified that bloodstain pattern analysis is generally accepted in the scientific community. The State also introduced the testimony of another expert who assisted the State’s primary expert and who did not testify at trial. This expert also testified that blood spatter analysis is generally accepted in the scientific community and subjected to peer review. Following this testimony, defense counsel conceded that there were many aspects of blood spatter analysis that were beyond the common understanding of average jurors and that the testimony could be helpful to jurors, but requested that the trial court limit the testimony with respect to making conclusions about the specific evidence in the case or about Defendant’s guilt. The trial court determined that blood spatter analysis is a discipline recognizable under this Court’s prior cases and admissible under Rule 11-702, and the court determined that both of the State’s witnesses at the hearing were qualified as experts in blood spatter analysis. The court indicated that it would resolve the limits of the expert’s testimony during the trial if necessary.

{57} Prior to hearing the experts’ testimony at the hearing, the trial judge indicated that he had researched the issue and learned that approximately twenty-six states permit expert testimony on blood spatter analysis. Defendant highlights this remark by the trial judge and contends that it demonstrates that the court’s ruling is inconsistent with our admonition that “[i]t is improper to look for scientific acceptance only from reported case law.” Alberico, 116 N.M. at 167, 861 P.2d 203; accord State v. Torres, 1999-NMSC-010, ¶ 38, 127 N.M. 20, 976 P.2d 20. However, the trial court conducted a full Daubert/Alberico hearing and concluded that the evidence met the requirements of Rule 11-702 under Alberico and Torres. The trial court did not rely solely on the acceptance of the evidence in other jurisdictions but also on the testimony establishing that blood spatter analysis can be and has been tested, has been subjected to peer review and publication, is conducted under a set of standards that are maintained in order to control the technique’s operations, is generally accepted in the particular scientific field, is based on well established scientific principles, and is capable of producing opinions based on reasonable probability rather than speculation or conjecture. In fact, Defendant also offered his own expert testimony on blood spatter evidence, which the trial court similarly admitted. The trial court’s ruling fully satisfies the requirements we set out in Alberico and subsequent cases. Defendant thus fails to demonstrate an abuse of discretion by the trial court. Because Defendant has failed to demonstrate error, we also reject Defendant’s cumulative error argument. See State v. Nieto, 2000-NMSC-031, ¶ 31, 129 N.M. 688, 12 P.3d 442.

IX. CONCLUSION

{58} This Court has previously rejected similar challenges to the excusal of jurors due to their religious opposition to the death penalty because the excuses were not based on the prospective jurors’ religious beliefs but instead based on a lack of impartiality and a failure to follow the law. Death-qualified juries represent a necessary balance between the right to a jury panel composed of a fair cross-section of the community and the right of each party to challenge a juror for bias. In accordance with the Legislature’s decision to have the original jury determine sentencing in capital cases, jurors who are biased with respect to one part of a case are properly excused from all parts of the case due to an inability to follow the court’s instructions.

{59} The general verdict form did not prejudice the sentencing phase because the jury had to find an intent to kill as an element of the aggravating circumstance. This element, combined with New Mexico’s strict construction of felony murder, properly narrows the class of defendants eligible for the death penalty, and the Legislature has explicitly provided that felony murder is a capital felony eligible for the death sentence if one of the aggravating circumstances is present.

{60} As in Allen, there was sufficient evidence of the aggravating circumstance of kidnapping as having been completed, though continuing, from the time that Defendant lured the victim into his car by deception with the intent to commit a sexual assault. Because the aggravating circumstance of kidnapping requires an intent to kill, there is no double use of kidnapping for both felony murder and an aggravating circumstance.

{61} Apprendi, Ring, and Blakely do not apply because a balancing of aggravating and mitigating circumstances, like consideration of the defendant and the crime, is a matter within the discretion and judgment of the jury in its decision of which of two prescribed penalties should be imposed. Unlike the fact of the existence of an aggravating circumstance, this balancing is not a fact that increases the possible maximum penalty.

{62} The death penalty is not disproportionate considering the comparison case of State v. Gilbert and the nature of the offense. Defendant brutally and repeatedly struck the victim in the back of the head with a sledgehammer after kidnapping her, removed her to an isolated location and attempted to rape her.

{63} The isolated remark in closing argument did not inform the jury of any information that the jurors did not already know and did not, in the context of the argument as a whole, create reversible error. The trial court did not abuse its discretion in denying Defendant’s motion for mistrial on the basis of the introduction of improper character
evidence because the witness’s remark was inadvertent and the trial court offered to cure the error with a curative instruction. Finally, the trial court properly applied Daubert and the rulings of this Court in its application of Rule 11-702 to admit the expert testimony, and Defendant has failed to show an abuse of discretion in the trial court’s admission of the expert testimony.

{64} We conclude that Defendant’s arguments are without merit. We therefore affirm Defendant’s convictions and sentence.

{65} IT IS SO ORDERED.

PATRICIO M. SERNA, Justice

WE CONCUR:
PAMELA B. MINZNER, Justice
PETRA JIMÉNEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
RICHARD C. BOSSON, Chief Justice (concurring in part and dissenting in part)

BOSSON, Chief Justice (concurring in part, dissenting in part).

{66} This case is not just about Robert Fry. It is also about the State and whether the State has to live up to its own rules when it sentences a man to death. Because I am convinced that the State did not do it right, I would remand for a new sentencing hearing before a properly instructed jury, fully informed in the law. I concur in the remainder of the majority opinion and concur particularly in the decision to uphold the guilty verdict.

{67} Before imposing the most severe sentence our society permits, death, the constitution requires us to limit the sentence to only the most egregious crimes under the most egregious circumstances. See generally Zant v. Stephens, 462 U.S. 862 (1983); Furman v. Georgia, 408 U.S. 238 (1972). To impose the death penalty, the United States Supreme Court requires the states to create a sentencing scheme that guides the discretion of the jury, insuring that the punishment of death is only applied to “materially more depraved” murderers, a narrowly tailored class of the worst offenders. Godfrey v. Georgia, 446 U.S. 420, 433 (1980). As Justice Stewart stated, “where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” Gregg v. Georgia, 428 U.S. 153, 189 (1976) (Stewart, J., Powell, J., and Stevens, J., concurring). The narrowing factors are called aggravators, which must be scrupulously applied to determine whether a defendant falls within the narrow class of the worst offenders eligible for the death penalty.

{68} The United States Supreme Court has determined that to avoid the arbitrary imposition of capital punishment the State must ensure that the aggravating factors “justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” Zant, 462 U.S. at 877; see also McCleskey v. Kemp, 481 U.S. 279, 305 (1987); Gregg, 428 U.S. at 197. The Court has also found that, “[i]f a state uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer’s discretion.” Stringer v. Black, 503 U.S. 222, 236 (1992) (emphasis added).

{69} In New Mexico, our Legislature has adopted statutory aggravating factors to aid the jury in discerning the worst types of homicide and in narrowing the class eligible for the death penalty. NMSA 1978, § 31-20A-5 (1981). At issue in this appeal is the statutory aggravating factor of a “murder . . . committed with intent to kill in the commission of or attempt to commit kidnapping.” Section 31-20A-5(B). The State has the burden of persuasion and the jury must be adequately instructed on what it must find, in addition to first-degree murder, to sentence the defendant to death.

{70} Defendant Fry was convicted of first-degree murder under a general verdict not specifying upon which theory the jury based its decision. The State presented three different theories to support a finding of first-degree murder: felony murder during the commission of a kidnapping, felony murder during the attempt to commit criminal sexual penetration, and willful and deliberate murder. Because we do not know under which theory the jury based its decision, we must assume for constitutional purposes that the verdict could have been based upon a finding of felony murder during the commission of a kidnapping. See State v. Foster, 1999-NMSC-007, ¶¶ 26-28, 126 N.M. 646, 974 P.2d 140; State v. Crain, 1997-NMCA-101, 124 N.M. 84, 946 P.2d 1095; State v. Rodriguez, 113 N.M. 767, 772, 833 P.2d 244, 249 (Ct. App. 1992). Certainly, the evidence supports such a verdict.

{71} At the sentencing phase of the trial, the State used only one statutory aggravator, kidnapping. The language of the two uniform jury instructions are very similar. The instruction for felony murder requires that the jury find the following: (1) the defendant committed the crime of kidnapping, (2) the defendant caused the death of victim during the commission of kidnapping, and (3) the defendant intended to kill or knew that his acts created a strong probability of death or great bodily harm. See UJI 14-202 NMRA 2005. The Uniform Jury Instructions for the statutory aggravating factor of kidnapping are as follows: (1) the crime of kidnapping was committed, (2) the victim was murdered while the defendant was committing kidnapping, and (3) the defendant had the intent to kill. See UJI 14-7015 NMRA 2005.

{72} The jury instructions immediately reveal a problem. If the State used the same kidnapping, both to define first-degree felony murder and then to aggravate that same conviction to make it death eligible, how then has the State truly narrowed the death penalty to only those most heinous offenses? If the jury was not asked to find something significantly more about Defendant than what it had already found in convicting him, then we have a constitutional dilemma on our hands.

{73} The State acknowledges the problem but argues that the “intent to kill” in the statutory aggravating factor is different from, and more exacting than, the lesser intent required for felony murder. See UJI 14-7015(3) (“intended to kill or knew that his acts created a strong probability of death”). That may be so, but it is a subtle point at best. This Court has previously construed the felony murder statute, NSMA 1978, § 30-2-1(A)(2) (1994), as “requiring proof that the defendant intended to kill the victim (or was knowingly heedless that his or her acts created a strong probability of death or great bodily harm).” State v. Ortega, 112 N.M. 554, 562-63, 817 P.2d 1196, 1204-05 (1991). The jury instructions for felony murder contain the same language. See UJI 14-202 (“[Defendant] intended to kill or knew that his acts created a strong probability of death or great bodily harm.”). The language of the statutory aggravating factor requires that “the Defendant had the intent to kill.” UJI 14-7015(3).

{74} The language in both our case law and our jury instructions for felony murder utilize an intent to kill and a lesser form of second-degree-murder intent based on knowledge, while the instructions for aggravating circumstances that warrant the death penalty use solely the higher intent to kill standard. How can we be so confident the jury was aware or able to discern the
difference between the two? More to the point, it does not appear from my reading of the two instructions that the jury was asked to find anything significantly different between the intent necessary to convict Defendant and the intent necessary to execute him. And that omission goes to the heart of the constitutional problem.

{75} Notably, the jury instructions for felony murder include both the intent to kill and the lesser, second-degree-murder intent: “[Defendant] intended to kill or knew that his acts created a strong probability of death or great bodily harm.” UJI 14-202; see also Ortega, 112 N.M. at 566, 817 P.2d at 1208. To survive Furman/Zant scrutiny, the majority opinion assumes that the jury did not find a clear intent to kill during the guilt phase, otherwise the aggravating factor would duplicate the elements of felony murder. Compare UJI 14-202 with UJI 14-7015(3).

{76} That assumption is fraught with risk. Because the jury instructions group the two intents together, without additional clarification it would be natural for the jury to assume the two intents are similar, if not the same. The distinction is a fine one that would not immediately be apparent to the average juror, unless brought to the jury’s attention. Moreover, assuming, as we must, the jury found Defendant guilty of first-degree murder under a felony murder theory based on the lower of the two felony-murder intents, the risk the jury mistakenly believed this intent was consonant with the intent required to satisfy the aggravating circumstance is unacceptable when a person’s life hangs in the balance. Cf. State v. Allen, 2000-NMSC-002, ¶ 75, 128 N.M. 482, 994 P.2d 728 (an intent to kill can be inferred from the same evidence upon which the jury relied to find the defendant guilty of the willful, deliberate variety of first-degree murder). And that segues into what I conclude to be the fatal error at trial.

{77} At trial, the prosecutor failed to point out this distinction to the jury. During argument to the jury at the sentencing phase, the State never distinguished between the aggregated intent for sentencing purposes (“intent to kill”), and the lesser felony-murder intent necessary for conviction (“knew that his acts created a strong probability of death”). Thus, the jury was never told that it had to find something different about Defendant than what it had already found during the conviction phase. The jury was never told it had to find a different, more aggravated form of intent before it could sentence Defendant to death. Essentially, the jury was left with the impression that it could decide to execute Defendant based on no more than what it had previously found, and in this instance that one fatal omission puts this proceeding squarely in conflict with Furman and Zant.

{78} The State points to the jury instructions as adequately informing the jury, but the State’s own performance at trial effectively confused any such distinction. The State presented no additional evidence during the sentencing phase, nor was the jury instructed to consider anything more, anything that would narrow the jury’s focus as it considered the death penalty. Far from clarifying the distinction, the prosecutor told the jury nothing more than, “[t]here are three elements . . . [t]he kidnapping was committed. Betty Lee was murdered while Robert Fry was committing the kidnapping. And he had the intent to kill. There’s no new evidence. You are to rely on the evidence that you have heard during the trial.” In other words, the jury was led to believe it could sentence Defendant to death based on nothing more than what it had already heard and already decided.

{79} The State did discuss that Defendant’s actions evinced an intent to kill, a point with which I wholeheartedly agree. Importantly, however, the State did not distinguish the intent to kill in the aggravating factor from the intent necessary for felony murder, or tell the jury that it must find anything different from what it had already found in the guilt phase. Not being informed that it had to find anything different about Defendant, it is purely conjectural to conclude that the jury in fact found anything different about Defendant.

{80} The failure to instruct the jury that it must find intent to kill separately and apart from the intent necessary to establish felony murder, combined with the prosecutor’s misleading argument to the jury, contaminated what followed. In the course of reviewing the most important decision any jury can render, life or death, the jury was left to guess at what it had to find. Absent a true narrowing instruction, and appropriate argument by counsel, we are left with the very tangible possibility that the jury sentenced Defendant to die based on factors that were “aggravating” in name only. Although academicians might understand the fine distinctions between possessing an intent to kill and knowing that certain actions create a strong probability of death or great bodily harm, a reasonable juror, left uninformed by an appropriate jury instruction, may easily confuse the two or consider them one in the same. It defies logic to assume that a jury, presented with many different jury instructions, levels of intent, and theories of the case over the course of capital trial, should be left to discern the intent to kill under the aggravating factor as being a different or higher standard than the intent necessary under felony murder, without proper instruction.

{81} This error is not resolved by this Court’s decision in Allen. In that case, this Court stated the intent to kill for purposes of the kidnapping aggravating circumstance could be inferred from the same evidence the jury used to convict Allen of first-degree deliberate murder under Section 30-2-1(A)(1). Allen, 2000-NMSC-002, ¶ 75. By contrast, as discussed above, if the jury found Defendant guilty of felony murder under Section 30-2-1(A)(2), utilizing the lower, second-degree-murder type of intent, it cannot be said an intent to kill can be inferred. Further, the Legislature has made clear in felony murder cases where kidnapping serves as the predicate felony, the second-degree-murder type of intent is insufficient to establish an aggravating circumstance to warrant imposition of the death penalty.

{82} The narrowing function of the aggravating factor of kidnapping purports to limit the imposition of the death penalty to only the most heinous of crimes. However, when used with the felony murder statute, the elements overlap. It does not narrow the type of murders, nor does it genuinely distinguish all felony murders from only the felony murder deserving of the death penalty. Today’s opinion undermines the very complaint the United States Supreme Court sought to remedy in Furman, which is to insure the death penalty is imposed fairly and reserved for only the worst crimes.

{83} We should remand for a new sentencing hearing so that the jury, properly instructed, can make an honest, fully informed decision, consistent with constitutional norms, as to whether to take Defendant’s life. If a fully informed jury proceeds to sentence Defendant to death, then based on the record before us I would vote to concur for the reasons so ably discussed in the majority opinion.

RICHARD C. BOSSON,
Chief Justice
From the New Mexico Supreme Court

Opinion Number: 2006-NMSC-002

KIRK A. JUNEAU,
Plaintiff-Appellant,
versus
INTEL CORPORATION,
Defendant-Appellee.

No. 29,093 (filed: December 23, 2005)

APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY
KENNETH G. BROWN, District Judge

HANNAH B. BEST
HANNAH BEST & ASSOCIATES
Albuquerque, New Mexico
for Appellant

DUANE C. GILKEY
GILKEY & STEPHENSON, P.A.
Albuquerque, New Mexico
for Appellee

OPINION

RICHARD C. BOSSON, CHIEF JUSTICE

[1] In this retaliation claim under the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -15 (1969) (as amended through 2004), Plaintiff Kirk Juneaue appeals from a summary judgment entered by the district court against him. The court also rejected Plaintiff’s request for a jury trial. We conclude that Plaintiff presented sufficient evidence below to create genuine issues of material fact. We also hold that Plaintiff is entitled to a jury trial on his claim of retaliation. Accordingly, we reverse and remand.

BACKGROUND

[2] Plaintiff was employed at Intel as an equipment engineering technician. In June of 2001 Stephanie Cannaday, a co-worker of Plaintiff, reported to her superior, Judy Russell, that over the last few months she had been bothered by inappropriate conversations of a sexual nature that she had overheard around her work cubicle. Cannaday asked only that the conversations be stopped or that she be moved. After she complained, the conversations ceased.

[3] Intel’s Human Resources Department launched a sexual harassment investigation into the allegations. Plaintiff was one of the people implicated by Cannaday. Plaintiff denies participation in the alleged conversations, and claims that he was included in the allegations only because Cannaday suspected him of having an extramarital affair of which she did not approve. Earlier, Cannaday had complained about a screen saver featuring women in bikinis on Plaintiff’s work computer.

[4] Despite requests from his superiors during the course of the investigation that he admit to sexual harassment, Plaintiff steadfastly maintained his innocence. Although Plaintiff was present during some of the conversations in question, no one alleged that Plaintiff actually made any inappropriate remarks. According to Plaintiff, the Intel investigators prejudged him as guilty, and incorrectly interpreted his protestations of innocence as evidence of being uncooperative with the investigation and displaying a bad attitude. Additionally, Plaintiff argues that the investigators had contemplated his termination from the beginning, as a means of sending a strong message to other employees regarding the evils of sexual harassment. In essence, Plaintiff claims that Intel was out to make an example of him.

[5] During the course of the investigation, Lin Harris, a Human Resources supervisor who knew Plaintiff from church, initiated a meeting with Plaintiff outside of work. Harris was a superior of the employees who were investigating the claim against Plaintiff. During the meeting, Harris allegedly threatened Plaintiff with repercussions if he continued to contest the allegations against him and pursued litigation. Harris denied these statements and claims the meeting was to discuss the two men’s personal relationship. On the day after the meeting with Harris, August 14, 2001, Plaintiff received a permanent written warning regarding sexual harassment and attendance problems. Instead of accepting the warning, Plaintiff followed procedure and requested an open door investigation of the manner in which the Human Resources Department had conducted the sexual harassment investigation.

[6] Two weeks later, on August 30, 2001, despite the alleged threat from Harris, Plaintiff filed the present claim with the Equal Employment Opportunity Commission (EEOC). Shortly thereafter, beginning on September 6, Plaintiff’s supervisor, Russell, began documenting claims of substandard performance on Plaintiff’s part. On September 13, Russell was mistakenly advised that the EEOC complaint was specifically against her, and she immediately canceled her supervisory meetings with Plaintiff. A day later, on September 14, and acting against the advice of the Human Resources Department, Russell initiated the process for a second written warning regarding Plaintiff’s work performance. Russell based the need for the warning on multiple alleged inadequacies including inconsistent performance, missed completion dates and lack of accountability. On December 4, Russell initiated a third warning, which according to Intel’s established policy, would result in Plaintiff’s termination. On January 23, the third written warning actually issued, and Plaintiff was terminated.

[7] On February 28, 2002, Plaintiff exhausted his administrative remedies with the New Mexico Human Rights Division and filed the present action in state court, claiming that Intel had retaliated unlawfully against him for having filed his complaint with the EEOC, among other reasons. Ultimately, Intel moved for summary judgment on Plaintiff’s retaliation claim which the district court granted. Earlier, the district court had rejected Plaintiff’s request for a jury trial as being untimely. Plaintiff appeals both rulings directly to this Court pursuant to Section 28-1-13(C) (1987) (amended 2005) (prior to 2005 appeals made directly to Supreme Court).

DISCUSSION

Summary Judgment

[8] “Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582; see also Rule 1-056(C) NMRA 2004. All reasonable inferences from the record should be made in favor of the nonmoving party. Celaya v. Hall, 2004-NMSC-005, ¶ 7, 135 N.M. 115, 85 P.3d 239. Summary judgment is reviewed on appeal de novo. Id.

[9] When considering a violation of the
NMHRA, we have previously considered helpful federal burden-shifting methodology under Title VII of the Civil Rights Act of 1964. See Smith v. FDC Corp., 109 N.M. 514, 517, 787 P.2d 433, 436 (1990). For a claim of unlawful discrimination, this Court has used the methodology from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). See Gonzales v. N.M. Dept’t of Health, 2000-NMSC-029, ¶¶ 20-22, 129 N.M. 586, 11 P.3d 550. Under the McDonnell Douglas framework, an employee bears the initial burden of demonstrating a prima facie case of discrimination, which then shifts the burden to the employer to provide a legitimate, non-discriminatory reason for the adverse employment action. Gonzales, 2000-NMSC-029, ¶ 21; see also McDonnell Douglas 411 U.S. at 802-05 (same). The employee then has the opportunity to rebut the employer’s proffered reason as pretextual or otherwise inadequate. Gonzales, 2000-NMSC-029, ¶ 21.

{10} On appeal, Intel defines summary judgment on the basis that Plaintiff failed to establish a prima facie case of discrimination, and even if he did, Intel then demonstrated legitimate, non-discriminatory reasons for all its actions. As we shall see, the core question before us is not whether Intel is ultimately proven correct on the merits, but whether the district court could make that determination on summary judgment without affording Plaintiff the benefit of a trial. The answer to that question depends on whether Plaintiff sufficiently presented evidence to the district court to establish “genuine issues of material fact” for resolution by a jury. Self, 1998-NMSC-046, ¶ 6; see also Rule 1-056.

{11} Plaintiff’s claim of discrimination is linked, in turn, to his allegations of unlawful retaliation. The NMHRA, Section 28-1-7(1)(2), declares it an unlawful discriminatory practice for “any person or employer to . . . engage in any form of threats, reprisal or discrimination against any person who has opposed any unlawful discriminatory practice or has filed a complaint . . . under the Human Rights Act.” Prohibited acts of “threats, reprisal or discrimination” are considered together under the general label of unlawful retaliation. To establish a prima facie case of retaliation, Plaintiff must show that (1) he engaged in protected activity, (2) he was subject to adverse employment action subsequent to, or contemporaneous with the protected activity, and (3) a causal connection exists between the protected activity and the adverse employment action. Gonzales, 2000-NMSC-029, ¶ 22.

{12} On appeal, Intel challenges the first and third elements of the prima facie case: both protected activity and causal connection. However, when Intel filed its motion for summary judgment in the district court, it did not adequately raise a challenge to the first element, whether Plaintiff was engaged in protected activity. Intel only made a passing reference in a footnote to concerns about whether protected activity had been shown, specifically arguing that “[i]t is doubtful that Plaintiff engaged in ‘protected activity’ because his discrimination charge was frivolous.” However, Intel did not ask the court to take any action on the issue or award Intel any relief on that basis. To preserve an issue for appeal, a party must clearly raise the issue in the lower court “by invoking a ruling from the court on the question.” Ciup v. Chevron U.S.A., Inc., 1996-NMSC-062, ¶ 22, 122 N.M. 537, 928 P.2d 263 (quoting State v. Hodge, 118 N.M. 410, 418, 882 P.2d 1, 9 (1994)). Not having requested or received a ruling on the question of protected activity, Intel failed to preserve any such challenge for consideration by this Court.

{13} We assume, therefore, for purposes of summary judgment that Plaintiff has sufficiently demonstrated two out of the three elements of a prima facie case of retaliation. We assume that Plaintiff has shown protected activity, which includes his claim filed with the EEOC. And it is undisputed that Plaintiff has demonstrated a subsequent adverse employment action, namely Intel’s termination of his employment. The remaining question is whether Plaintiff has made a prima facie case of the third element, which requires a causal connection between the two.

{14} According to Plaintiff, any retaliation began at the very inception of the sexual harassment investigation when Intel prejudged the allegations against him, and when Plaintiff refused to confess, Intel began looking for ways to make an example of him. Taken alone, these early events would not give rise to a Human Rights Act claim. The NMHRA protects against discriminatory treatment, not against general claims of employer unfairness. However, these early events can be considered as context for what followed. For example, Lin Harris’ alleged threats of retaliation take on a new relevance once Plaintiff filed his formal complaint with the EEOC. After Plaintiff’s complaint was filed, his supervisors allegedly made good on those threats by refusing to rate the quality of Plaintiff’s work and his completion of tasks in a fair and objective manner. In effect, Plaintiff claims he was set up for termination.

{15} Intel denies any causal connection, denying any retaliation against Plaintiff when he maintained his innocence or when he filed with the EEOC. Intel claims legitimate, non-discriminatory reasons for its actions, including its decision to terminate him. On summary judgment, the non-movant may not rest on the pleadings, but must demonstrate genuine issues of material fact by way of sworn affidavits, depositions, and similar evidence. Dow v. Chilli Coop. Ass’n, 105 N.M. 52, 54-55, 728 P.2d 462, 464-65 (1986). Accordingly, we examine whether Plaintiff came forward with sufficient evidence in response to Intel’s motion for summary judgment to create genuine issues of material fact that can only be resolved at trial.

Plaintiff’s Case Against Summary Judgment

{16} On summary judgment, Plaintiff did not rest on his pleadings but presented evidence against Intel’s motion. Plaintiff produced evidence showing, at least arguably, that some people at Intel contemplated terminating Plaintiff even before the sexual harassment investigation was completed. On August 8, 2001, Peg Feibig, who was investigating the sexual harassment charge, wrote in her notes: “How can we make the environment safe for Stephanie Cannady-the accused? Terminate K[jir]k Juneau? He is showing no ownership/accountability.” Plaintiff offers this statement as evidence that the Human Resources Department was contemplating termination even before its investigation was complete. Plaintiff further bolstered his position that the alleged harassment was only an excuse for his termination when he submitted to the district court Cannaday’s testimony that all she wanted was for the conversations to stop or to be moved and that Plaintiff never made any sexual statements directly. Despite Intel’s more benign explanation of the Feibig notations, we conclude that at trial a fact-finder could reasonably infer from this evidence that Intel’s investigators may have prejudged Plaintiff, concluding that he had to show “accountability” for acts he denied committing.

{17} Plaintiff also demonstrated that Harris, a supervisor in the Human Resources Department and a member of Plaintiff’s church, involved himself in the investigation. Harris arranged a meeting with Plaintiff at a local restaurant where, according to Plaintiff, he urged him to admit to being part of the harassment. Plaintiff testified
that he was told to seek forgiveness for what he had done and that if he continued to pursue litigation and be defiant, “no rock would be left unturned.” Harris acknowledged the meeting, but claimed it was only to see if he and Plaintiff were able to separate their friendship from what was going on at work and that he specifically refused to talk about what was going on at Intel. Again, a reasonable fact-finder could infer from this meeting, including its timing and its context, that Plaintiff was being threatened with retaliation if he continued to contest the allegations against him and filed a claim.

[18] After Plaintiff did file with the EEOC, the alleged retaliation only became more intense and continued over the ensuing months. When Plaintiff’s supervisor found out about the EEOC claim, she was ready to issue him another written warning but was told to hold off at that point. Although Plaintiff had received critical work evaluations prior to his supervisor’s discovery of the EEOC claim, the timing, frequency, and degree of criticism increased significantly after Plaintiff filed with the EEOC. Plaintiff testified on deposition that a co-worker, Mike Alo, told him that Russell instructed Plaintiff’s immediate supervisor, Jim Graff, to revise Plaintiff’s task assignments to show them as incomplete, and thereby set Plaintiff up for termination. If admissible at trial, these statements would be clear evidence of retaliation.

[19] In addition to what Russell may have told third-parties, Plaintiff also testified that Russell complained directly to him, showing her hostility toward Plaintiff and his EEOC claim. In his deposition, Plaintiff testified that Russell stated the EEOC claim was “nonsense,” and it was “such a headache,” and she wished she did not have to deal with it. Russell showed her hostility by telling Plaintiff that he “created an extra workload for her,” and that she had to “babysit” Plaintiff and spend an extra workload for her,” and that he also threatened to deal with it. Russell showed her hostility by telling Plaintiff that he “created an extra workload for her,” and that she had to “babysit” Plaintiff and spend an extra workload for her, “and that he specifically refused to talk about what was going on at Intel. Again, a reasonable fact-finder could infer from this meeting, including its timing and its context, that Plaintiff was being threatened with retaliation if he continued to contest the allegations against him and filed a claim.

Intel’s Response: A Temporal Standard

[20] In addition to denying any causal connection between protected activity and Plaintiff’s termination, Intel argues based on federal precedent that the time between Plaintiff’s EEOC complaint and his termination, nearly five months, precludes a finding of causation. Intel also argues that the seven-week period between the complaint and Plaintiff’s second written warning is insufficient by itself to establish causation. The United States Court of Appeals for the Tenth Circuit has held that if the adverse employment action has occurred within a short time after the protected activity, causation may be inferred from this evidence alone. See Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999) (discussing case law establishing that one and one-half months between the protected activity and the adverse employment action may, by itself, establish causation, but three months is too long). Thus, when no other evidence of causation is available, a plaintiff in the Tenth Circuit may rely on an inference of causation arising from a short time period between the protected activity and the adverse employment action. See, e.g., Meiners v. Univ. of Kansas, 359 F.3d 1222, 1231 (10th Cir. 2004) (holding that three months and one week was too long to establish causation by temporal proximity alone); Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997) (a three-month period without additional facts would not be sufficient to establish causation); Ramirez v. Okla. Dep’t of Mental Health, 41 F.3d 584, 596 (10th Cir. 1994) (finding that one and one-half month period may be enough to show causation), overruled on other grounds by Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1194 (10th Cir. 1998).

[21] In response, Plaintiff argues that the temporal proximity of each of Intel’s adverse actions, as opposed to his ultimate termination, establishes sufficient temporal proximity. See Marx v. Schnuck Mkt., Inc., 76 F.3d 324, 329 (10th Cir. 1996) (noting that the “close temporal proximity” standard should not be interpreted too narrowly where retaliatory actions began quickly after the employee filed his Fair Labor Standards claim). From the time Plaintiff filed his claim with the EEOC until the time he was terminated, Plaintiff argues that no more than six weeks passed without some type of adverse employment action. See id. at 329 (finding a causal connection when the original write up occurred shortly after filing the claim, but the termination occurred much later). Given the overall context of employer hostility that continued unabated during the entire five-month period, Plaintiff also argues the temporal standard is not relevant because there is other evidence of causation.

[22] We have not been asked in this case to adopt the Tenth Circuit’s standards where temporal proximity is the only evidence of causation. In this case, Plaintiff presented other direct evidence of causation, and did not rely on temporal proximity alone. Thus, we decline to apply any temporal proximity analysis in this case or adopt a specific time period for inferring facts related to causation. In this case and unlike certain of the cases cited to us, temporal proximity is only one piece of the evidentiary formulation offered by Plaintiff. See Meiners, 359 F.3d at 1231; Richmond, 120 F.3d at 209. The fact-finder should be free to consider timing and proximity, along with all the other facts and circumstances, in deciding the ultimate issue of causation. We leave for another day the question of when the time between the employee engaging in protected activity and the employer taking adverse action might be sufficient to allow an inference of a causal connection between the two.

Justification and Pretext

[23] Since Plaintiff has made a prima facie case for retaliation under the McDonnell Douglas formulation, the burden then shifts to Intel to come forward with a valid justification for the adverse treatment. See McDonnell Douglas, 411 U.S. at 802-03. Once Intel provides a justification, the burden shifts back to Plaintiff to show the justification is merely pretext for a retaliatory motive. See id. at 804-05. At the outset, we note that whether a proffered justification is legitimate, or is merely an excuse to cover up illegal conduct, is largely a credibility issue and often requires the use of circumstantial evidence. It is rare a defendant keeps documents or makes statements that directly indicate a retaliatory motive for terminating an employee. Issues such as this should normally be left exclusively to the province of the jury. Judges should not make credibility determinations or weigh circumstantial evidence at the summary judgment stage.

[24] Intel claims Plaintiff was terminated pursuant to its guidelines that provide for termination of an employee upon the receipt of three written warnings in a rolling twelve-month period. It argues Plaintiff received three written warnings within this
Plaintiff is not required to show disputed issues of fact for every element of the claim, Bartlett v. Mirabal, 2000-NMCA-036, ¶ 17, 128 N.M. 830, 999 P.2d 1062, and, in any case, Plaintiff has provided evidence from which a jury could conclude Intel’s justification was pretext. Indeed, much of the evidence that establishes a genuine issue of fact for causation also demonstrates a factual dispute as to pretext. The record on summary judgment indicates Plaintiff received no discipline for performance issues until after his EEOC complaint was filed. Furthermore, Plaintiff argues the first written warning for sexual harassment was issued because he refused to admit guilt and insisted on pursuing the issue when confronted by Lin Harris. It will be for the factfinder to determine who to believe, Plaintiff or Harris, to determine if the written warning was valid or just retaliation for Plaintiff’s actions. In regard to the other two warnings, the record reflects that his coworkers would disagree with the assessments made by his supervisors because they found Plaintiff to be a hard worker. Plaintiff argues this disagreement shows the warnings were merely pretext. Again, the jury must determine whether Plaintiff and his coworkers or Intel and its supervisors are to be believed. Finally, Plaintiff points to Russell’s notes regarding the letter from Plaintiff’s attorney concerning a potential lawsuit and referring to it as “disgusting.” Intel argues, Russell was merely reacting to hyperbole in the letter. It is the province of the jury, not the judge, to interpret Russell’s reaction as indicative of a retaliatory motive or not. Plaintiff has satisfied his burden to show there are disputed factual issues regarding Intel’s justification.

Plaintiff Raises Genuine Issues of Material Fact

For the reasons stated, we conclude that Plaintiff put forward sufficient evidence below to create genuine issues of material fact with respect to his retaliation claim against Intel. Bartlett, 2000-NMCA-036, ¶ 17 (stating that the nonmoving party does not need to present enough evidence to support all elements of the case, only that one or two factual issues are contested). Construing, as we must, Plaintiff’s allegations and proffered evidence in a light most favorable to Plaintiff, we conclude that a reasonable fact-finder could draw certain inferences and come to certain conclusions favorable to Plaintiff’s claim. A reasonable fact-finder could conclude that Intel, acting unfairly, was out to make an example of Plaintiff almost from the very beginning, and that this contributed to Intel’s negative reaction when Plaintiff filed his complaint with the EEOC. A fact-finder could then conclude that the EEOC complaint caused Intel to intensify its criticism of Plaintiff’s work immediately after the claim was filed, setting him up for an eventual termination that had become preordained and inevitable.

Of course, at trial a reasonable fact-finder could side with Intel and conclude just the opposite. We must not lose sight of the fact that Intel proclaims its innocence just as forcefully as Plaintiff did when faced initially with charges of sexual harassment. Trial is the only sure way to test these conflicting allegations, at which time the fact-finder can weigh the evidence and judge the credibility of the principal witnesses. It is well-settled in New Mexico that summary judgment is not an appropriate vehicle for courts to do either. Bartlett, 2000-NMCA-036, ¶ 38.

Jury Trial

Plaintiff filed his Human Rights Act complaint in state court on February 28, 2002, and it was served on Intel on May 1, 2002. Without filing an answer in state court, Intel removed the case to federal court and then filed its answer. Plaintiff’s complaint did not request a jury, nor did he file a separate request in federal court.

While the Human Rights Act complaint was pending in federal court, Plaintiff filed a separate federal action under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (2000), in which Plaintiff did request a jury. The federal magistrate consolidated the two complaints and placed them both on the federal docket for jury trials. Hereafter, the Human Rights Act complaint remained pending for jury trial, until November 5, 2002, when the federal court dismissed the EEOC case and remanded the Human Rights Act claim back to state court. Approximately six weeks after the remand, Plaintiff filed his jury demand in state court on December 16, 2002. The district court denied the request stating, “Plaintiff had ample opportunity to request a trial by jury, but failed to do so.”

The New Mexico Rules of Civil Procedure, Rule 1-038(A) NMRA 2005, requires that a demand for a jury trial be made within ten days after service of the last responsive pleading. Plaintiff failed to file a jury request in either state or federal court within the ten day rule. Notwithstanding that omission, Plaintiff points out that Intel’s answer was never filed in state court, and that, while pending in federal court, the case was in fact scheduled for a jury trial, thereby rendering a jury demand superfluous. Upon remand to state court, Plaintiff argues that he filed his jury request within a reasonable period of time, and that Intel suffered no surprise or prejudice by the short six-week delay.
for the delay and whether prejudice will result, must be considered in order to constitute the proper exercise of discretion. Cf. Carlile v. Cont’l Oil Co., 81 N.M. 484, 486, 468 P.2d 885, 887 (Ct. App. 1970) (district court may abuse its discretion in failing to grant jury trial where opposing party is not prejudiced, the court is not delayed, and business of the court is not inconvenienced). Looking to these other factors, it is evident the district court should have granted the motion.

[35] In reality, during much of the procedural history of this case, Plaintiff had the opportunity to file but no real need. When the case was filed initially in state court, Intel removed the case before filing its answer, and therefore never triggered the ten-day limitation period in state court. During its pendency in federal court, the matter was already set for jury trial. A jury demand would have been perfunctory and unnecessary. It was only upon remand to state court, that Plaintiff had both the opportunity and the need.

[36] A delay of just under six weeks does not seem unreasonable, especially considering that discovery was just unfolding and no trial date had been set. Intel suffered no prejudice and appears to have been aware all along that a jury trial was not only anticipated but in fact scheduled, at least while the case remained in federal court. Cf. Bates v. Bd. of Regents, 122 F.R.D. 586, 589 (D.N.M. 1987) (where no prejudice would result to defendant and both parties assumed case was set for jury trial, plaintiff’s motion was granted); Aspen Landscaping, Inc. v. Longford Homes of N.M., Inc., 2004-NMCA-063, ¶ 12, 135 N.M. 607, 92 P.3d 53 (distinguishing Bates because both parties assumed case was to be tried before a judge, not a jury, until plaintiff belatedly requested a jury).

[37] On balance, given the fundamental importance of a jury trial in our jurisprudence, it appears arbitrary and unfair to Plaintiff for the district court to deny his jury request under these rather special circumstances. See Hernandez v. Power Constr. Co., 382 N.E.2d 1201, 1204 (Ill. 1978) (stating the court abused its discretion denying late jury demand, when, under the special circumstances of the case, it failed to “give proper recognition to the need to protect the ‘jealously guarded right of trial by jury’” (quoted authority omitted)). Under these circumstances, the court abused its discretion. To rectify that abuse and in the overarching interest of fairness to both sides, we reverse this decision of the district court and remand for a jury trial.

CONCLUSION

[38] We reverse the summary judgment. We reverse the district court’s ruling to deny Plaintiff’s demand for a trial by jury, and we remand for further proceedings.

[39] IT IS SO ORDERED.

RICHARD C. BOSSON,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA, Justice
EDWARD L. CHÁVEZ, Justice
PAMELA B. MINZNER, Justice (specially concurring)
PETRA JIMENEZ MAES, Justice (specially concurring)

MINZNER, Justice (specially concurring).

[40] Although I concur in the result the Majority Opinion reaches, I believe the facts merit a somewhat different analysis. I do agree that there is sufficient evidence of a causal connection between the protected activity of filing a complaint and an adverse employment action to preclude summary judgment. I also agree that the trial court erred in denying Plaintiff’s request for a jury trial. I am not persuaded that Plaintiff is entitled to rely on his actions prior to filing a complaint with the Equal Employment Opportunity Commission as evidence of protected activity nor that his employer should be viewed as having waived the right to challenge Plaintiff’s reliance on those actions. My reasons for believing that Plaintiff is not entitled to rely on his actions prior to filing the complaint are as follows.

[41] Intel did not wave its protected activity arguments. Intel initially argued in its motion for summary judgment that there was no evidence showing a causal connection between the EEOC claim and Plaintiff’s termination or any other adverse employment action. With this motion, I believe Intel conceded only that filing a complaint with the EEOC was protected activity. In response, Plaintiff argued that Intel retaliated, not only because he filed an EEOC complaint, but also because he denied involvement in harassment. In its reply, Intel clearly stated that the only issue before the court was whether Plaintiff was terminated “as a result of a discrimination charge he filed with the EEOC.” Intel specifically argued that “Plaintiff’s request for an open door investigation on August 7, 2001 was not ‘protected activity.’” Intel also argued that even if Plaintiff had been terminated for refusing to admit he was involved in sexual harassment, this was “not impermissible retaliation in violation of the NMHRA and therefore not subject to the Court’s review.”

[42] I am not persuaded that Plaintiff’s actions prior to filing the complaint with the EEOC were protected activity under the New Mexico Human Rights Act. The NMHRA prohibits discrimination in employment on specific grounds including race, age, religion, sex, physical or mental handicap, sexual orientation or gender identity. NMSA 1978, § 28-1-7(A) (2004). The Act also prohibits discrimination against any person who has “‘opposed any unlawful discriminatory practice or has filed a complaint, testified or participated in any proceeding under the Human Rights Act.” § 28-1-7(I). Thus, the Act prohibits only certain types of discrimination; it does not prohibit all unfair or unreasonable employment actions. Cf. Feliciano de la Cruz v. El Conquistador Resort and Country Club, 218 F.3d 1, 8 (1st Cir. 2000) (holding that proof that termination was “unfair” is not sufficient to state a claim under Title VII; courts do not assess the merits or even rationality of employers’ non-discriminatory business decisions); Morrow v. Wal-Mart Stores, Inc., 152 F.3d 559, 564 (7th Cir. 1998) (“Title VII prohibits discriminatory employment actions, not hasty or ill-considered ones.”).

[43] There is no indication in the record that Plaintiff was protesting discriminatory treatment. He simply asserted that he had not had any inappropriate conversations, and any discipline would therefore be unfair. Similarly, Plaintiff’s internal complaint regarding the sexual harassment investigation alleges that the investigators “prejudged” his case, and reached their conclusions without adequate evidence. Plaintiff did not assert that the investigators were biased because of his membership in a protected class. He simply claims that the investigation was unfair. The NMHRA ought not be construed to protect such a general claim.

[44] By including such a general claim within the scope of protected activity, we seem to me to create a troublesome and unnecessary difficulty for employers dealing with sexual harassment complaints. If an employer fails to take corrective action, that employer may be held responsible for a hostile work environment. If an employee suspected of involvement in sexual harassment is unhappy with the corrective action taken, that employee may perceive the
employer to be retaliating for what the employee considers just criticism. I believe we ought not construe the NMHRA to protect resistance to a non-discriminatory investigation of a sexual harassment claim.

{45} However, even if Plaintiff’s only protected activity was filing a complaint with the EEOC, Plaintiff appears to have met his prima facie burden by presenting some evidence suggesting that his EEOC complaint caused Intel’s adverse employment action. Plaintiff offered evidence that he started receiving poor reviews and feedback after filing his complaint. He also provided direct evidence that his supervisors were aware of his complaint and were upset that it had been filed. A plaintiff can provide direct evidence of discrimination if he or she can demonstrate that there is a nexus between discriminatory comments, and the disputed employment decision. Stover v. Martinez, 382 F.3d 1064, 1077-78 (10th Cir. 2004).

The record shows that the same supervisor commented on the complaint, complained about having to “babysit” Plaintiff, and made the ultimate decision that resulted in Plaintiff’s termination. She initiated disciplinary action shortly after the complaint was filed. Plaintiff has shown a nexus between the retaliatory comments and the adverse employment action.

{46} Intel has offered a legitimate, non-discriminatory reason for Plaintiff’s termination, showing that Plaintiff had a record of poor cooperation and communication skills, and had failed to complete many of the tasks he was assigned in a timely manner. The showing was not sufficient to support summary judgment as a matter of law because Plaintiff has presented sufficient evidence to allow a reasonable factfinder to conclude that concerns about Plaintiff’s performance were a pretext for retaliation. While far from overwhelming, the evidence supporting Plaintiff’s prima facie case would also allow a jury to conclude that Intel did not actually believe that Plaintiff’s performance had deteriorated. For example, the evidence that Plaintiff’s supervisor was aware of the complaint, considered it “disgusting,” changed Plaintiff’s review process, and initiated disciplinary proceedings shortly after learning of the complaint, could support the jury’s conclusion that the complaint was the true motivation for disciplinary action. See Stacks v. Southwest Bell Yellow Pages, Inc., 27 F.3d 1316, 1323-24 (8th Cir.1994). Because I conclude that Plaintiff has made a sufficient showing to survive summary judgment, I concur in the result reached by the majority.

PAMELA B. MINZNER, Justice

I CONCUR:
PETRA JIMENEZ MAES, Justice

Certiorari Granted, No. 29,529, January 5, 2006

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-001

STATE OF NEW MEXICO,
Plaintiff-Appellee,

versus

JUSTIN PHILLIPS,
Defendant-Appellant.

No. 25,147 (filed: October 19, 2005)

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
KAREN L. PARSONS, District Judge

PATRICIA A. MADRID
Attorney General
Santa Fe, New Mexico

MAX SHEPHERD
Assistant Attorney General
Albuquerque, New Mexico

TIMOTHY L. ROSE
GARY C. MITCHELL, P.C.
Ruidoso, New Mexico

for Appellant

for Appellee

OPINION

RODERICK T. KENNEDY, JUDGE

{1} This case presents questions of the admisibility and sufficiency of evidence presented at a probation revocation hearing. The State’s only witness at the hearing was a probation officer who relied solely upon statements made in unauthenticated documents in her file. This probation officer read into the record an annotation prepared and given to her by other persons without any showing or finding of good cause for not calling those people as witnesses. We further hold that there was insufficient evidence presented to sustain a finding that Defendant had violated the conditions of his probation. We reverse the district court.

BACKGROUND

{2} We hold that Defendant’s right to confront the witnesses against him was violated when the district court allowed a probation officer to read documents prepared and given to her by other persons without any showing or finding of good cause for not calling those people as witnesses. We further hold that there was insufficient evidence presented to sustain a finding that Defendant had violated the conditions of his probation. We reverse the district court.

{3} Defendant was indicted and ultimately pleaded no contest to various drug offenses and contributing to the delinquency of a minor. The district court suspended Defendant’s sentence and placed Defendant on probation. Among other conditions, Defendant was ordered to complete two years in an in-patient treatment program. On November 20, 2002, Defendant was accepted into and completed one six-month New Mexico treatment program. Defendant’s probation was then transferred to Arizona, where he entered another treatment program on July 1, 2003. The State filed a petition to revoke Defendant’s probation on March 4, 2004. It alleged that Defendant had violated his probation by leaving his treatment center without permission, by violating Arizona’s probation requirements, and by “fail[ing] to enroll [in] and successfully complete a long term
treatment program.”

4. At the probation revocation hearing, the only witness was Officer Wadley of the New Mexico Adult Probation and Parole Office. Wadley had never met or supervised Defendant, and was only familiar with him from previous court appearances. Wadley asserted that Defendant had failed to comply with the conditions of his probation in Arizona, and that she had received documentation to this effect. Over objection, Wadley testified to the substantive contents of her file, including reading aloud the notations of another New Mexico probation officer. She repeatedly testified to what her file was “showing.”

5. The district court initially found the testimony relevant. When Wadley continued to read from her file, Defendant again objected, stating, “I don’t know what she’s really reading from, just because they’re in a folder that she possesses.” The district court allowed the testimony to continue in this vein, subject to “lay[ing] a foundation as to what she’s reading from.”

6. Wadley continued to read from a document titled “Discharge Summary.” She stated that the document had been sent to her along with “the interstate compact supervision notice of preliminary probable cause hearing that was submitted by the Pima County office in Arizona.” The State asked whether “this also was another document kept in the ordinary course of supervising a probationer,” and Wadley agreed that it was. The district court allowed her to read from this document as well after Wadley agreed that it was kept in the ordinary course of her business.

7. Wadley testified that the discharge summary said that Defendant was discharged for non-compliance. She testified that Arizona had found that Defendant had violated his probation. She continued, “I’m showing a signed document by . . . [D]efendant. I’m showing a signature of February 10, 2003[,] that’s titled, Notice of Preliminary Probable Cause Hearing.”

8. In closing, Defendant again argued that Wadley’s testimony was hearsay and lacked a valid foundation under the business records exception. The district court asserted that Wadley had testified that she was the custodian of records, that the records were “kept in the ordinary course of business,” and asked what else was necessary. Defendant asserted that there had been no testimony as to who had prepared the documents, but the district court disagreed because “[s]he gave the name of the individual that signed it.” Defendant stated that the evidence had not been verified and that there were confrontation concerns. The district court replied that to require the out-of-state witnesses to personally come into court would be too burdensome and “open the flood gates.” The court stated:

I don’t think the confrontation clause requires that. Under these circumstances where we’ve got testimony as to the fact an individual that was named by the officer here, signed a document, sent it to her, it’s a business record that’s kept in the ordinary course of business. I think that they complied, I mean, have testimony as to all of that.

So, I don’t think it’s hearsay, number one. But, I don’t think it’s in violation of the confrontation clause, because we have an individual here that is the records custodian as required by her job description to keep all of those records[.] Defendant and the district court discussed the issue at length before the district court again stated that it would not “open that gate.” Defendant then pointed out that the district court had never actually introduced the records. The district court agreed, but stated: “I can accept her reference [to] them . . . and what her understanding of what those records are, I mean, I can mix up that as evidence and I didn’t hear anything rebutted about that.” The district court then concluded that it was a verified fact that Defendant did not get his travel permit until mid-July, that he was already in custody for non-compliance by the following February, and that, as a result, he had been in his program for less than the requisite six months. It found that Defendant had violated his probation by failing to complete the Arizona program. Defendant appeals.

DISCUSSION

The Arguments

9. Defendant argues that Wadley’s testimony was inadmissible, violated his confrontation and due process rights, and was insufficient to form the basis for finding that he had violated his probation. The State argues that Wadley’s testimony was admissible under the business records exception. It further claims that the district court found a violation of Defendant’s probation based on verified facts. It further states that Defendant both admitted to the violation and waived his right to confront the witnesses against him.

Standard of Review


The Confrontation Clause and Admissibility of Evidence

11. Probation revocation proceedings are by nature informal. See NMSA 1978, § 31-21-15(B) (1989); State v. Murray, 81 N.M. 445, 447, 468 P.2d 416, 418 (Ct. App. 1970); see also Morrissey v. Brewer, 408 U.S. 471, 487 (1972) (“No interest would be served by formalism in this process; informality will not lessen the utility of this inquiry in reducing the risk of error.”). The formal rules of evidence thus do not apply to probation revocation hearings. See Rule 11-1101(D)(2) NMRA; State v. Vigil, 97 N.M. 749, 751, 643 P.2d 616, 620 (Ct. App. 1982). So the question before us is not so much whether the testimony fell under the business records exception, Rule 11-803(F) NMRA, but whether, in this informal environment, Defendant was afforded minimum due process. See State v. Sanchez, 109 N.M. 718, 719, 790 P.2d 515, 516 (Ct. App. 1990) (stating that because probation revocation hearings are not criminal prosecutions or trials, “the full rights owed a criminal defendant in a criminal prosecution do not apply in probation revocation proceedings, and only minimum due process requirements must be met”).

12. Even at a probation revocation hearing, defendants have “a right to confront and cross-examine an adverse witness unless the trial court specifically finds good cause for not allowing confrontation.” Vigil, 97 N.M. at 751, 643 P.2d at 620 (internal quotation marks omitted). Here, Wadley testified that an “Officer Riggs” had made certain notations within Wadley’s file. Wadley then testified as to the contents of these notations. The district court allowed this testimony after the prosecutor asserted that the rules of evidence do not strictly apply at probation revocation hearings, and that the notations were made in the file by Riggs “[a]t the time that they occurred.” These arguments do not establish any cause for not calling Riggs. See State v. Cochran, 112 N.M. 190, 192, 812 P.2d 1338, 1340
(Ct. App. 1991) (“Argument of counsel is not evidence.”). There was no evidence and no finding that the State attempted, but was unable, to obtain the testimony of Riggs. “There being neither showing nor finding of cause for not allowing confrontation, defendant’s due process rights of confrontation and cross-examination were violated[.]” Vigil, 97 N.M. at 751, 643 P.2d at 620. We therefore reverse the district court’s allowing Wadley to read the notes of Riggs as a violation of Defendant’s minimum due process rights under Morrissey, 408 U.S. at 489. See Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (stating that the Morrissey requirements are applicable to probation revocation proceedings).

{13} The district court also allowed Wadley to read from certain documents and, according to Wadley, “from what Myrna has written in her statement.” Other portions of the record indicate that “Myrna” apparently refers to the first name of Myrna Garcia. There was no other testimony at the probation revocation hearing about who “Myrna” was, her relationship to the case, why she submitted documents to Wadley, or how Wadley received those documents. See State v. DeBorde, 1996-NMCA-042, ¶ 9, 121 N.M. 601, 915 P.2d 906 (stating that the termination of probation “calls for a reasonably orderly process”). For example, there was no indication that the State attempted to, but could not, obtain the testimony of “Myrna.” See Gagnon, 411 U.S. at 786. There was no reason on the record for the district court to accept the documents from “Myrna” as true.

{14} We have previously expressed our concern over the “mere submission” of documents to support a finding of a violation of probation. See State v. Sanchez, 2001-NMCA-060, ¶ 17, 130 N.M. 602, 28 P.3d 1143 (hereinafter Sanchez). Where, as here, documents from sources only identified by a first name are read by a witness whose primary purpose is as a vessel for the testimony of another, Defendant’s right to confront the witnesses against him is violated. A defendant is unable to contradict or otherwise dispute the testimony of those who, with little identification and no explanation, are not called to testify. See Gagnon, 411 U.S. at 785 (“Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion.”). As in Vigil, Defendant has a right to confront and cross-examine an adverse witness unless the trial court “specifically finds good cause for not allowing confrontation.” There was no effort by the trial prosecutor to provide a factual predicate for this “good cause” exception to confrontation. There was no specific finding by the trial court that there was good cause for not allowing confrontation.

97 N.M. at 751, 643 P.2d at 620. Here, no specific finding of good cause was made or any factual basis asserted for the absence of “Myrna,” although this person was the real witness against Defendant. The district court therefore abused its discretion in allowing Wadley to simply read from her file. The issues revolving around the actual probity of this evidence and its sufficiency are discussed in the next section of this opinion.

{15} The district court also posited that when the “record keeper” was available, it was unnecessary under the Confrontation Clause to call the people who had written and prepared the documents. There was no evidence presented in the hearing as to how Wadley obtained the “records” from which she was allowed to read. However, we do not address whether Wadley’s testimony was permissible under the business records exception, Rule 11-803(F), because the presence of one characterized as a “record keeper,” without more, is insufficient to establish good cause for not calling the witness who submitted the record. See Vigil, 97 N.M. at 751, 643 P.2d at 620.

{16} Finally, although the district court said that the potential cost to the State in procuring witnesses was “tremendous,” merely theoretical difficulties in obtaining a witness’s testimony are not a factual basis establishing good cause for failing to call that witness. See id. Gagnon noted the argument that “the Morrissey hearing requirements impose serious practical problems in cases such as the present one in which a probationer or parolee is allowed to leave the convicting State for supervision in another State.” 411 U.S. at 782 n.5. The Gagnon Court then expressed its confidence that the States could modify their interstate compacts in order to comply with constitutional requirements at probation revocation hearings. Id. at 782-83 n.5.

An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. [The State’s] greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in Morrissey intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the Morrissey requirements.

Id. at 783 n.5. Here, no “conventional substitutes” or “creative solutions” were utilized. We therefore reverse the district court’s allowing Wadley to read the documents from “Myrna” as evidence that Defendant had violated his probation in Arizona. We hold that Defendant’s due process rights were violated. Where, as here, the real witness against Defendant is allowed to testify via another without identification, verification, confrontation, i.e., with a complete lack of demonstration or even discussion of good cause for not calling the real witness, Defendant’s due process rights have been stripped from him. A lack of formality should not excuse a lack of due process. We therefore reverse.

**Sufficiency of Evidence**

{17} The burden is on the State to establish that a violation of probation occurred with a “reasonable certainty.” See Sanchez, 2001-NMCA-060, ¶ 13. While the rules of evidence do not apply to probation revocation hearings, the district court’s finding must be “based on verified facts.” Vigil, 97 N.M. at 751, 643 P.2d at 620 (internal quotation marks and citation omitted). While some hearsay is permissible in a probation revocation hearing, when that hearsay is “untested for accuracy or reliability, [it] lacks probative value; the result is that the revocation of probation does not rest on a verified fact.” Id. at 753, 643 P.2d at 622.

{18} The district court found that Defendant violated his probation because of the “verified facts” that Defendant “didn’t get a travel permit until sometime in mid-July, and he was already in custody for not completing the program in February, which is less than six months is what he’s required to be there for [sic].” The district court then revoked Defendant’s probation for his failure to complete the treatment program in Arizona. However, Wadley stated that she did not know how long the
Arizona treatment program was supposed to last. She stated that she assumed Defendant had started the Arizona program after July 14, 2003, when his travel permit was issued. Even the Discharge Summary that Wadley read from states that Defendant was discharged on February 5, 2004. There was therefore no evidence that Defendant was in the Arizona program for less than six months.

[19] Finally, there were no other “verified facts” showing that Defendant did not comply with the Arizona program other than the fact that he was before the district court in New Mexico, and hence, no longer in Arizona. Wadley merely testified that she “received documentation” from the “Pima County office in Arizona” that Defendant had not complied with the conditions of his probation in Arizona. She stated three times that, based on her file, Defendant did not successfully complete the Arizona treatment program. This is not sufficient evidence.

[20] Only the Discharge Summary in Wadley’s file might support a finding that Defendant had violated his probation. The Discharge Summary states that “Justine [sic] left the [Arizona treatment program] campus without permission and has been non-compliant to treatment thus far and is being discharged for such.” It stated that “Myrna Garcia, CAC” was “Primary Counselor” and had a signature at the bottom.

[21] First, Defendant’s name is not “Justine.” Second, this document is not a sworn affidavit, a self-authenticated public document, see Rule 11-902 NMRA, or in any way tested for reliability or accuracy. See Vigil, 97 N.M. at 752-53, 643 P.2d at 621-22. “An item does not have the effect of proof, that is, it is lacking in rational persuasive power, absent some basis for accepting the item as reliable.” Id. at 753, 643 P.2d at 622. The document is not on letterhead and there is not any indication of how Wadley obtained it other than that it was “submitted” to her. See Sanchez, 2001-NMCA-060, ¶ 17 (expressing concern over the “mere submission” of documents being the basis for finding a violation of probation). Wadley, in turn, merely read from this document. There is little functional difference between the triple hearsay testimony in State v. Romero, 67 N.M. 82, 86, 352 P.2d 781, 784 (1960) (noting that the witness testified as to what “somebody told” the witness’s husband), the hearsay in Vigil, 97 N.M. at 751, 643 P.2d at 620 (describing the officer’s testimony as to what an unidentified confidential informer had told him), and this case, where a probation officer reads what “Myrna” or “the Pima County office in Arizona” has written and submitted to her. Therefore, the finding that Defendant had violated his probation was not “based on verified facts.” See id. (internal quotation marks and citation omitted).

[22] Finally, the State asserts that Defendant admitted to violating his probation both in the notice and in the hearing. We are unpersuaded. In this case, Defendant’s hearing was based on his denial of any violation of probation. The notice purports to be from the Adult Probation Department in Pima County, Arizona. It has Defendant’s name on it and several signatures. No evidence was presented that any of those signatures was Defendant’s, or if so, the circumstances under which it may have been signed. See id. at 753, 643 P.2d at 622 (requiring that facts be tested for reliability in order to have probative value). The “mere submission” of documents is insufficient to establish a violation of probation. Sanchez, 2001-NMCA-060, ¶ 17. As for the hearing, the State has not directed our attention to a cite in the transcript where Defendant made this alleged admission. See Cochran, 112 N.M. at 192, 812 P.2d at 1340 (stating that the arguments of counsel are not evidence); In re Estate of Heeter, 113 N.M. 691, 694, 831 P.2d 990, 993 (Ct. App. 1992) (stating that this Court will not comb the record to find support for a party’s arguments).

We believe that the State may be referring to Defendant’s statements at sentencing, which would be too late to support the district court’s finding of a violation. We hold that there is insufficient evidence to support the district court’s finding that Defendant violated his probation, and the district court abused its discretion in so acting.

CONCLUSION

[23] We hold that there was insufficient evidence presented to support the district court’s finding that Defendant violated his probation. We further hold that the probation officer in this case was impermissibly allowed to read from documents in her file where: (1) it is unclear where, when, or from whom she obtained such documents; and (2) there was no factual showing or finding of good cause for not calling the persons who submitted the documents to testify as required by due process. We therefore reverse.

IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

MICHAEL E. VIGIL, Judge
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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.

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(Restrictive Covenants/Association Assessments)  
Newly Reported at 2005-NMCA-115  
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Santa Fe, NM 87505  
FAX (505) 992-8378  
E-mail: jphays@chflaw.com

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Special expertise in premise liability, security training and security procedures. Authored four security textbooks, 33 years’ combined experience in security and law enforcement. Contact Ron Vause, 1-800-728-0191.
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*CIVIL APPEALS*

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**POSITIONS**

**Litigation Attorney**

Sutin Thayer & Browne is seeking an attorney with 3 to 5 years litigation experience to concentrate in domestic relations work in our Santa Fe office. Applicants must be licensed in New Mexico. All replies will be kept confidential. Please send a letter of interest, resume, writing sample and transcript to Recruiting Coordinator, Sutin Thayer & Browne, P. O. Box 1945, Albuquerque, NM 87103, or email to dsh@sutinfirm.com or fax to 505-888-6565.

**Part-Time Litigator**

Santa Fe general practice litigation firm needs litigator on part-time basis. Position may grow to be full-time. Five years experience preferred. Send resume to Administrative Attorney, 2019 Galisteo, Suite C-3, Santa Fe, NM 87508.

**Deputy District Attorney**

Opening for Deputy District Attorney. Salary range DOE within limits of New Mexico DA Personnel Plan and depending on ultimate responsibilities. Flexible start date, within reason. Submit cover letter, resume, references, and salary requirements to District Attorney, P.O. Box 1025, Silver City, New Mexico 88062; fax: 505-388-5184, or email mnewell@da.state.nm.us.

**Part Time Attorney Position**

Flexible work schedule, 20-35 hours per week. Job involves helping people with consumer bankruptcy cases including discussing with clients available options, reviewing bankruptcy schedules and attending creditor meeting. Please email resumes to Lori Bailey at loril@billgordon.com.

**University Of New Mexico School of Law**

Adjunct Faculty Positions

On occasion, the Law School hires adjunct faculty members to teach specialized courses that are not taught by full-time members of the faculty. Persons interested in teaching as adjuncts during Summer Session 2006, Fall 2006 or Spring 2007 should send resumes, teaching interests and course proposals to Peggy Lovato, UNM School of Law, 1117 Stanford, NE, Albuquerque, NM 87131-1431. The school’s course needs may include, but are not limited to, mediation/ADR, patent law, trial practice, moot court competitions, and civil and criminal practice. J.D. or equivalent legal degree required. Previous teaching experience preferred. Compensation is based on credit hours for the course. Applications will be accepted year-round; however, for best consideration, they must be received by February 28, 2006. Prior applicants must reapply in order to be considered. UNM is an equal opportunity, affirmative action employer and educator.

**January 2006**

27 Simms/Alumni Lecture
Harold Koh, Dean Yale Law School
“The Supreme Court and Globalization” Is the new Supreme Court ready for the age of globalization? What are the cases 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
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*CIVIL APPEALS*

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**Full-Time, Regular**
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**Open until filled**
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**EDUCATION:** Juris Doctor Degree. **EXPERIENCE:** One (1) year as a law clerk or practicing lawyer or a combination of both.

**LICENSES/CERTIFICATION:** Member of the New Mexico State Bar Association and licensed to practice law in the state of New Mexico; valid NM Class D drivers license desirable.

**ESSENTIAL JOB FUNCTIONS:** Primarily acts as a prosecutor in petty misdemeanor prosecutions in the City of Las Cruces’ Municipal Court. Represents the City of Las Cruces in a variety of legal proceedings at the local, state and federal levels. Attends meetings of municipal bodies and provides legal advice to City staff by interpreting laws, rules, and regulations.

**KNOWLEDGE, SKILLS, ABILITIES:** Demonstrates excellent communication and prosecutorial skills necessary when interacting with customers, which must be conducted with courtesy and respect at all times. Excellent organizational skills. Technical level reading and writing skills. Working knowledge of personal computer with word processing and Legal Research software programs, copier, and dictating device.

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

**Legal Secretary**
Two-attorney general-practice firm seeks experienced legal secretary with upbeat, professional attitude, people skills, and energy to run front desk while performing various secretarial and legal assistant duties using Windows XP, Word 2003 and Outlook. Knowledge of Excel and New Hope Bankruptcy programs desirable. Must be well-organized and possess good written language skills. To obtain a job description or to send resume and salary requirements to Law Offices of Mel B. O’Reilly, LLC, 7125 Prospect Place, NE, Albuquerque, NM 87113 or email to fruiz@ylawfirm.com. No phone calls please.

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**Paralegal/Admin. Assistant**
The Gallegos Law Offices is looking for an entry level paralegal/administrative assistant with a minimum of 2 years’ experience to work in the area of collections and replevins. This is a small busy firm just west of the downtown area. Must be a self-starter, able to work independently, and organized. Must be willing to do other duties around the office as needed. Good benefits and a very pleasant work environment. Knowledge of WordPerfect a must. Salary D.O.E. Please fax resume with references to Office Manager at 842-8200, or mail to Office Manager 116 14th Street S.W., Albuquerque, NM 87102.

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**Associate**
Well-established AV-rated firm in Santa Fe seeks full-time associate with 3 – 5+ years’ experience for medical malpractice defense and general civil litigation practice. Med mal litigation experience is strongly preferred but not required. Salary will be commensurate with experience. Please send cover letter and resume to PO Box 92860, Albuquerque, NM 87119 Attn: Box F. All inquiries will be kept confidential.

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**Full Time Legal Assistant**
Established medium-sized law firm seeks full-time legal assistant. Applicants should have 3 years experience in civil litigation. Must be a team player who can perform multi-tasks in a high volume, fast paced practice. Experience in Word is helpful. Please submit cover letter, resume and salary requirements to Office Manager, YLAW, 4908 Alameda Blvd. NE, Albuquerque, NM 87113 or email to fruiz@ylawfirm.com. No phone calls please.

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**Part-Time/flexible Hours Paralegal/Legal Assistant**
Professional, self-starter with excellent computer and organizational skills needed for sole practitioner in downtown office, assisting clients, court and office filings, drafting correspondence, billing and some light bookkeeping. Minimum of 2 years experience in law firm setting required; Bi-lingual/Spanish and knowledge of litigation/court procedures desirable. Salary DOE. Please submit cover letter, resume and references in confidence to Hiring Attorney, P.O. Box 7247, Albuquerque, NM 87194.

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**Legal Assistant**
Experienced full-time legal assistant needed for small law firm. Applicant must have extensive experience in Microsoft Word, Microsoft Outlook, and Windows XP. Organizational skills and ability to draft legal documents required. A minimum of 2 years in medical malpractice, and/or insurance defense experience preferred. Now interviewing for position available immediately. E-mail resume and salary requirements to joshua@sharpattorneys.com.
Paralegal
The Santa Fe office of Hinkle, Hensley, Shanor & Martin, L.L.P. is seeking a paralegal. Experience in general civil practice, including employment, environmental, insurance defense, professional malpractice defense, regulatory and commercial law is preferred. Candidates should have excellent writing and research skills, and the ability to work with little supervision. A paralegal certificate or degree is necessary. All inquiries kept confidential. Resume can be faxed to Office Manager, 505-982-8623 or mailed to P.O. Box 2068, Santa Fe, NM 87504-2068.

OFFICE SPACE

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

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Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $300 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

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Office space for rent with secretarial area for up to two secretaries in beautiful building with seven other attorneys. Rent includes reception services and use of conference rooms. Space is available immediately. Contact Cathy Davis of Hunt & Davis, P.C. at 881-3191 for more information.

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Conference room tables and chairs; secretarial desks; lateral filing cabinets; attorney and secretarial chairs; visitor chairs; and more. Please contact Becky at 228-6219.

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Thursday March 2 - Saturday, March 4, 2006
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Co-Sponsored by the Center for Legal Education of the New Mexico State Bar Foundation and the
American Bar Association Young Lawyers Division (ABA/YLD)

Conference Registration Fees
Standard Fee $219 • YLD Member $159

Thursday, March 2, 2006
6:00 – 7:30 p.m. Conference Registration and Ski Sign-Up
8:00 p.m. Welcome Reception (Inn and Spa at Loretto) (included in Registration Fee)

Friday, March 3, 2006
7:00 a.m. Continental Breakfast (included in Registration Fee)
8:00 a.m. ‘Royal Tour’ of New Mexico Supreme Court (Limited to first 25 tour registrants)
Hon. Patricio M. Serna
8:30 a.m. CLE Session with Members of the New Mexico Supreme Court and Court of Appeals
• Territorial Justice in New Mexico, 1846-1912
• Judicial Administration and the Appellate Courts Today
• Attorney Discipline: Process and Pointers (1.0 Ethics)
11:30 a.m. Adjourn
11:45 a.m. Box Lunch for Ski Slopes (included in Registration Fee)
Noon Depart for Santa Fe Ski Basin*
12:30-4:30 p.m. Santa Fe Ski Basin
6:30 p.m. Dinner at Inn & Spa at Loretto (included in Registration Fee)
Roundtable Discussion with ABA/YLD Affiliate Assistance Team
8:30 p.m. Group Outing (not included in Registration Fee)

* Nearby Santa Fe Plaza shopping, sight-seeing and spa activities also available for non-skiers.
Saturday, March 4, 2006

7:45 a.m. Continental Breakfast (included in Registration Fee)
8:30 a.m. **Overview of Federal Environmental Laws**
            Stephen L. Hattenbach, Roddy Law Firm
9:30 a.m. Break
9:40 a.m. **Are You Ready for Your Day In Court?:**
            **Practice Pointers for the Young Litigator**
            Craig Orraj, Law Offices of Craig A. Orraj
10:40 a.m. Break
10:50 a.m. **Professional Lawyering for Success (Professionalism)** - see ** below
            Arturo Jaramillo, NM General Services Department Secretary
11:50 a.m. Box Lunch for Ski Slopes (included in Registration Fee)
Noon Depart for Santa Fe Ski Basin
12:30-4:30 p.m. Santa Fe Ski Basin
6:30 p.m. Dinner / Networking (not included in Registration Fee)

**PLEASE NOTE:** Hotel accommodations and skiing are not included. For hotel accommodations, call Inn and Spa at Loretto. Ask for special rate for Rocky Mountain Regional Young Lawyers Conference of $106.00. A ski representative will be available for sign-ups at registration on Thursday, March 2, 2006 from 6:00-7:30 p.m. Sign-up on Thursday evening is strongly encouraged due to start time for skiing on Friday.

**REGARDING CLE PORTION OF CONFERENCE:** State CLE accreditation has been sought by the Young Lawyers Division of the State Bar of New Mexico for the following states: New Mexico. Attendees seeking CLE accreditation for other states must pursue such accreditation on their own. General CLE accreditation through the American Bar Association will not be sought.

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**REGISTRATION – Rocky Mountain Regional Young Lawyers Conference**
Thursday, March 2 - Saturday, March 4, 2006 • Inn and Spa at Loretto, Santa Fe, NM
4.0 General and 1.0 Ethics CLE Credits
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**Conference Registration Fees:** □ Standard $219 | □ YLD Member $ 159
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Register Online at www.nmbar.org
Please join us in supporting the Honorable Carl J. Butkus as he runs for election in 2006. Judge Butkus was appointed to the District Court bench in the Second Judicial District by Governor Bill Richardson following the submission of his name by the Judicial Selection Commission. We look forward to many years of devoted service by him to the people of New Mexico.

HONORABLE CARL J. BUTKUS
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