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2007 License and Dues
- The 2007 License and Dues forms have been mailed.
- License and dues fees are due on or before Feb. 1, 2007.
- Members who have not received the form by the end of December should notify the State Bar, (505) 797-6092 or (505) 797-6035.
- For members’ convenience, dues may also be paid online through secured e-commerce at www.nmbar.org.
- License and disciplinary fees are mandatory and must be paid to maintain license status.
- Without exception, fees are due regardless of whether members receive a form.
  Late fees may be assessed if payment is not postmarked by Feb. 1, 2007.

2007 License and Dues

Mission Chapel by Helen Gwinn
Weems Gallery, Albuquerque

Special Insert:

CLE At-A-Glance

www.nmbar.org
ABA Retirement Funds has been providing tax qualified plans for over 40 years. Today our program offers full service solutions including plan administration, investment flexibility and advice. Now we also offer our new Retirement Date Funds that regularly rebalance the fund’s assets based on your selected target retirement date. Plus, our program now accepts Roth 401(k) contributions from profit sharing plans that currently offer a 401(k) feature. Isn’t it time to start growing your future with the ABA Retirement Funds?

Legal professionals know that growing a future begins now. A good start is selecting the right resource for a retirement plan for your firm. Your best option may be the cost-effective program that was created by lawyers for lawyers, and run by experts.

**ABA Retirement Funds** has been providing tax qualified plans for over 40 years. Today our program offers full service solutions including plan administration, investment flexibility, and advice. Now we also offer our new Retirement Date Funds that regularly rebalance the fund’s assets based on your selected target retirement date. Plus, our program now accepts Roth 401(k) contributions from profit sharing plans that currently offer a 401(k) feature. Isn’t it time to start growing your future with the ABA Retirement Funds?

**LEARN HOW YOU CAN GROW YOUR FUTURE WISELY**
Call an ABA Retirement Funds Consultant at 1-877-947-2272 or visit www.abaretirement.com

**GET A FREE PLAN COST COMPARISON**
Is your plan as cost-effective as it could be?
Just call 1-877-947-2272 for a custom cost comparison

For a copy of the Prospectus with more complete information, including charges and expenses associated with the Program, or to speak to a Program consultant, call 1-877-947-2272, or visit www.abaretirement.com or write ABA Retirement Funds, P.O. Box 5142, Boston, MA 02206-5142. abaretirement@citistreetonline.com. Be sure to read the Prospectus carefully before you invest or send money. The Program is available through the State Bar of New Mexico as a member benefit. However, this does not constitute, and is in no way a recommendation with respect to any security that is available through the Program.
KOB LAWLINE 4
2007 SIGN-UP

The KOB LawLine 4 Call-In is regularly scheduled for the third Wednesday of each month. The hours are 5:00 p.m. until 7:00 p.m. Please note that the November 14 date is the second Wednesday of the month, also, there will be no sessions in January or December.

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

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

- **February 21** 5:00 – 7:00 p.m.  
- **July 18** 5:00 – 7:00 p.m.  
- **March 21** 5:00 – 7:00 p.m.  
- **August 15** 5:00 – 7:00 p.m.  
- **April 18** 5:00 – 7:00 p.m.  
- **September 19** 5:00 – 7:00 p.m.  
- **May 16** 5:00 – 7:00 p.m.  
- **October 17** 5:00 – 7:00 p.m.  
- **June 20** 5:00 – 7:00 p.m.  
- **November 14** 5:00 – 7:00 p.m.

NAME: _____________________________________ PHONE: _____________________________

I have some questions. Please call me at: _____________________________________________

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

(Name)     (Telephone Number)

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

If you have any questions, please call Chris at 797-6054.

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

**OR FAX TO:** 505 797-6074
JANUARY 30TH VIDEO REPLAYS - STATE BAR CENTER

**Pro Se Can You See**  
January 30 • 8 – 10 a.m.  
State Bar Center  
1.0 Ethics & 1.0 Professionalism CLE Credits  
$79

**Diversity Why Bother?**  
January 30 • 10:30 a.m. – 12:30 p.m.  
State Bar Center  
1.0 Ethics & 1.0 Professionalism CLE Credits  
$79

**Negotiation Ethics: Winning Without Selling Your Soul with Marty Latz**  
January 30 • 1 – 4 p.m.  
State Bar Center  
3.0 Ethics CLE Credits  
$130

**2006 Employment and Labor Law Institute**  
January 30 • 9 a.m. – 3:30 p.m.  
State Bar Center  
6.0 General CLE Credits  
$189

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**FOUR WAYS TO REGISTER**

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

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Program Title:  
Program Location:  
Program Date:  
Program Cost:  

- [ ] Purchase Order (Must be attached to be registered)  
- [ ] Check enclosed $ ____________ Make check payable to: CLE  
- [ ] VISA  
- [ ] MC  
- [ ] American Express  
- [ ] Discover  

Credit Card #:  
Exp. Date:  
Authorized Signature:

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Professionalism Tip

Lawyer’s Preamble
As a lawyer, I will strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, I will comply with the letter and spirit of the disciplinary standards applicable to all lawyers, and I will also conduct myself in accordance with the Creed of Professionalism when dealing with my client, opposing parties, their counsel, the courts, and any other person involved in the legal system, including the general public.

Meetings

January
22 Committee for Delivery of Legal Services to People with Disabilities, noon, State Bar Center
24 Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 10th floor conference room
24 Membership Services Committee and Technology Committee, noon, via teleconference
24 International and Immigration Law Section Board of Directors, 1:30 p.m., State Bar Center

State Bar Workshops

January
24 Consumer Debt/Bankruptcy Workshop 6:00 p.m., State Bar Center
25 Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

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

Cover Artist: Helen Gwinn works in acrylics on wooden panels and water media on paper with collage. She often embellishes her works with handmade paper packets—stuffed, folded, tied, painted and incorporated into each composition. Her full resume, an artist statement and selected images are located at www.HGWINN.com. In addition to the Weems Galleries, Gwinn’s works are represented by The Artist Gallery and Old Pecos Gallery in Carlsbad.
NOTICES

COURT NEWS

N.M. Supreme Court Board of Legal Specialization Comments Solicited

The following attorney is applying for recertification as a specialist 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 93070, Albuquerque, NM 87199. Rita G. Siegel Employment & Labor Law

Law Library
Open Monday–Friday, 8 a.m.–6 p.m. Closed Saturdays and Sundays Phone: (505) 827-4850; fax: (505) 827-4852; e-mail: libref@nmcourts.com; Web site: www.supremecourtlawlibrary.com.

Proposed Revisions to the Rules of Criminal Procedure for the Metropolitan Courts (7-504 and 7-606)
The Metropolitan Court Rules Committee is considering whether to recommend proposed amendments to the Rules of Criminal Procedure for the Metropolitan Courts for the Supreme Court’s consideration. To comment on the proposed amendments set forth before they are submitted to the Court for final consideration, send written comments to:
Kathleen J. Gibson, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, New Mexico 87504-0848
Comments must be received by the clerk on or before Jan. 29 to be considered by the Court. See the Jan. 8 (Vol. 46, #2) issue of the Bar Bulletin for reference.

First Judicial District Court

Destruction of Exhibits
Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st Judicial District Court will destroy exhibits filed with the Court, in criminal, civil, children’s court, domestic, incompetency/mental health, adoption and probate cases for years 1975 to 1989, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved through Jan. 26. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 827-4687, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Fifth Judicial District

Nominating Commission Notice of Meeting
The 5th Judicial District Nominating Commission will reconvene at 9 a.m., Jan. 29, at the Eddy County Courthouse, 102 N. Canal, Carlsbad, to consider Governor Richardson’s request for additional names to fill the vacancy on the 5th Judicial District Court which exists due to the retirement of the Honorable Jay Forbes.
The name of James Richard Brown was forwarded to the Governor after the 5th Judicial District Nominating Commission met on Jan. 8.

Judicial Nominating Commission information is available at http://lawschool.unm.edu/judsel/commissions/index.php. The links will only be viable when a vacancy exists and a commission meeting is pending in the respective court. Information will be updated on the Web site as it becomes available.

U.S. District Court for the District of New Mexico Replacement of the Initial Pretrial Report (IPTR)
At U.S. District Court, the Initial Pretrial Report in all civil cases is being replaced by a Joint Status Report and Provisional Discovery Plan (JSR). The Court will soon be ordering JSRs, rather than Initial Pretrial Reports, in all civil cases. For more information, including the JSR form, visit the Court’s Web site at www.nmcourt.fed.us.

STATE BAR NEWS

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

Casemaker
Online Legal Research Free Training Available
Casemaker, the State Bar’s newest membership service, is free online legal research that includes New Mexico and federal materials as well as access to 25 other state libraries.

Trainings on how to use Casemaker will be held:
Las Vegas Workshop: Feb. 2, noon to 1 p.m., Las Vegas Courthouse, 500 W. National, Las Vegas, N.M. R.S.V.P. to (505) 425-3900.
State Bar Center, Albuquerque: Feb. 16 and March 26, 3 to 4 p.m. R.S.V.P. to (505) 797-6000.
Farmington Workshop: Feb. 20, 12:30 to 1:30 p.m., San Juan Country Club, Farmington. Lunch is $12 and will be served from noon to 12:30 p.m. R.S.V.P. to Doug Echols, (505) 334-4301.

Seating is limited. The training is approved for 1.0 CLE general credit.
Anyone who has problems with access should contact the Casemaker helpline at (505) 797-6039 or e-mail vcordova@nmbar.org.
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 on the first Wednesday of each month. The next meeting will be held at noon, Feb. 7, at the State Bar Center. Lunch is not provided. For information about the section, visit the State Bar Web site, www.nmbar.org, or call Charles Archuleta, section chair, (505) 346-4646.

Pro Hac Vice Fund
2007 Grant Application and Guidelines
The State Bar of New Mexico seeks grant applications from non-profit organizations that provide civil legal services to poor New Mexicans within the scope of the state plan for delivery of civil legal services as designated by Rule 24-106 NMRA. Pursuant to the rule, the State Bar of New Mexico collects a registration fee of $250 from non-admitted attorneys intending to appear in civil actions before New Mexico courts. The State Bar holds these fees in the State Bar Pro Hac Vice Fund which is distributed annually to nonprofit organizations providing or supporting the provision of civil legal services to the poor. The 2007 Grant Application and Guidelines are now available online at www.nmbar.org. The deadline for the 2007 grant application is 5 p.m., Feb. 5.

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. McNerny, Gerald Bruce Richardson, Peter T. White, Robert M. White, Paul L. Biderman and Frank D. Weissbarth.

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/advisor and/or advocate;
3. training or education of the public or State 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; and
10. a lawyer whose personal character and dedication to public law and public service further the integrity and repute of the legal profession.

Send nominations by 5 p.m., March 1, to Doug Meiklejohn, dmeiklejohn@nmelc.org or by mail to New Mexico Environmental Law Center, 1405 Luisa St. #5, Santa Fe 87505-4074. The selection committee will consider all nominated candidates and may nominate candidates on its own.

Young Lawyers Division
Dismas House Project
The Young Lawyers Division (YLD) is sponsoring the Second Annual Tools for Success Program for Dismas House, a transitional home with a family atmosphere for nonviolent parolees who are transitioning back into society.

YLD is seeking volunteer attorneys to provide training sessions to Dismas House residents on the following dates and topics:
- March 28: Child Custody/Divorce
- May 23: Criminal Law Issues
- Aug. 29: Landlord/Tenant Law
- October 17: Restoration of Drivers License

Contact Briana Zamora, bhzamora@bblaw.com, to volunteer.

Other Bars
Albuquerque Bar Association
Membership Luncheon
The Albuquerque Bar Association’s membership luncheon will be held at noon, Feb. 6, at the Albuquerque Petroleum Club. Mayor Martin Chavez will present the luncheon program on the State of the City.

The CLE (3.0 general CLE credits) will be from 1:30 to 4:30 p.m. Collaborative Law: What It Is and What You Need to Know will be presented by Gretchen Walther and David Walther, Walther Family Law PA; Tom Burrage, CPA, Meyner and Company; Jan Gilman-Teppe, Little & Gilman-Teppe PA; and Max August, LL.M., Children First, Santa Fe.

Collaborative law is rapidly becoming the chosen method of alternate dispute resolution in legal disputes, especially family law cases. It acknowledges that in a majority of legal disputes there is an emotional component as well as a financial and legal component. Until the emotional component is effectively addressed, parties to a lawsuit cannot make effective legal and financial decisions. In addition, collaborative law embraces the concept that parties’ legal disputes are better resolved by the parties, as opposed to third-party decision makers. Because of this, lawyers to a collaborative case are disqualified if the case proceeds to litigation. This disqualification clause is the sine qua non of a collaborative case, and if an impasse arises, it creates the ability for creative problem solving. This CLE will...
touch upon the various professionals’ roles in collaborative law cases.

Lunch only: $20 members/$25 non-members with reservations; $5 additional at the door. Lunch and CLE: $80 members/$105 non-members; $5 additional at the door. CLE only: $60 members/$90 non-members.

Register for lunch by noon, Feb. 2. Register online at www.abqbar.com; by e-mail at abqbar@abqbar.com; by mail to ABA, 400 Gold SW, Suite 620, Albuquerque, NM 87102; by fax to (505) 842-0287; or call (505) 842-1151 or (505) 243-2615.

UNM School of Law
Library Spring Hours
Building and Circulation
Monday–Thursday 8 a.m. to 11 p.m.
Friday 8 a.m. to 6 p.m.
Saturday 9 a.m. to 6 p.m.
Sunday Noon to 11 p.m.
Mar. 12–16, Spring Break 8 a.m. to 6 p.m.

Reference
Monday–Friday 9 a.m. to 6 p.m.
Saturday Closed
Sunday Noon to 4 p.m.
Phone: (505) 277-6236

School of Medicine
Institute for Ethics
Health Care Ethics Program
UNM’s School of Medicine is continuing its interdisciplinary Health Care Ethics Certificate Program. Space is limited and will be filled on a first-come/first-served basis.

The first session focuses on basic ethical, legal and cultural issues in health care and begins Saturday Feb. 3, and will continue Tuesdays from 4:30–6:30 p.m.

The second session, which tackles more advanced topics, will begin Feb. 1, 2007 and be held from 4:30–6:30 p.m. every other Thursday. Tuition is $800 for each module. Call (505) 272-4635 for more information and to register. This program is open to both professionals (lawyers, doctors, nurses, and social workers) as well as non-professionals and those in the community who are interested in learning more about today’s ethical issues.

OTHER NEWS
Mock Trial Program
Attorney Volunteers Needed
Pojoaque High School needs three attorneys to provide legal expertise and coaching for their three teams that are registered for the 2007 New Mexico High School Mock Trial program. The amount of time invested will be decided by the volunteer and the teacher advisor, but teams usually meet at least once each week. Regionals are Feb. 16 and 17, state finals are March 16 and 17 and nationals are May 10 –13. Interested attorneys should contact Michelle Giger, (505) 764-9417, ext. 11.

We’re Looking for a Few Good Writers.

Have you an idea for a Bar Bulletin article? We encourage submissions for consideration. The primary purpose of articles is to educate or inform the reader on issues of substantive law and practical concern to lawyers. Analysis, opinion and criticism of the current state of the law are also encouraged and should be clearly identified by sufficient legal authority on all sides of an issue to enable the reader to assess the validity of the opinion. Criticism should be directed to issues only.

Submitted articles should be e-mailed to the editor at dseago@nmbar.org. Articles should be no longer than 1500 words, including endnotes, and will be reviewed by the board of editors. For more information on submission guidelines, contact Dorma Seago, (505) 797-6030, or dseago@nmbar.org.
LEGAL EDUCATION

JANUARY

30  2006 Employment and Labor Law Institute
   VR
   State Bar Center
   Center for Legal Education of NMSBF
   6.0 G
   (505) 797-6020
   www.nmbar.org

30  Negotiation Ethics: Winning Without Selling Your Soul with Marty Latz
   VR
   State Bar Center
   Center for Legal Education of NMSBF
   3.0 E
   (505) 797-6020
   www.nmbar.org

30  Pro Se Can You See
   VR
   State Bar Center
   Center for Legal Education of NMSBF
   1.0 E, 1.0 P
   (505) 797-6020
   www.nmbar.org

30  Diversity Why Bother?
   VR
   State Bar Center
   Center for Legal Education of NMSBF
   1.0 E, 1.0 P
   (505) 797-6020
   www.nmbar.org

FEBRUARY

6  Climate Change Impacts, Laws and Policies
   VR
   State Bar Center
   Center for Legal Education of NMSBF
   4.8 G, 1.0 P
   (505) 797-6020
   www.nmbar.org

6  New Challenges on Professional Liability Insurance
   VR
   State Bar Center
   Center for Legal Education of NMSBF
   1.0 G
   (505) 797-6020
   www.nmbar.org

6  Professionalism: All the World is a Stage
   VR
   State Bar Center
   Center for Legal Education of NMSBF
   1.0 P
   (505) 797-6020
   www.nmbar.org

6  Santa Clara Pueblo v. Martinez: Past and Present Day Consequences
   VR
   State Bar Center
   Center for Legal Education of NMSBF
   2.7 G
   (505) 797-6020
   www.nmbar.org

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

8  Employee Discharge and Documentation
   Albuquerque
   Lorman Education Services
   6.6 G
   (715) 833-3940
   www.lorman.com

8  New Challenges on Professional Liability Insurance
   VR
   Las Cruces
   Center for Legal Education of NMSBF
   1.0 G
   (505) 797-6020
   www.nmbar.org

8  Pro Se Can You See
   VR
   Las Cruces
   Center for Legal Education of NMSBF
   1.0 E, 1.0 P
   (505) 797-6020
   www.nmbar.org

Land Use Law: Current Issues in Subdivision Annexation and Zoning
   Albuquerque
   National Business Institute
   6.0 G
   (800) 930-6182
   www.nbi-sems.com

Programs have various sponsors; contact appropriate sponsor for more information.
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<td>Advanced ADR Training</td>
<td>Albuquerque</td>
<td>Construction Dispute Resolution Services, L.L.C.</td>
<td>(505) 474-9050</td>
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<td>Drafting Effective Wills and Trusts</td>
<td>Albuquerque</td>
<td>National Business Institute</td>
<td>(717) 835-8525</td>
<td><a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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<td>Employment Laws Made Simple</td>
<td>Albuquerque</td>
<td>National Business Institute</td>
<td>(800) 930-6182</td>
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<td>Legislative Process Review in New Mexico</td>
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<td>Access to Justice Programs Overview</td>
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<td>Paralegal Division</td>
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<td>Pro Se Can You See</td>
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**MARCH**

| 2 | Drafting Effective Wills and Trusts | Albuquerque | National Business Institute | (717) 835-8525 | www.nbi-sems.com |
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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 22, 2007**

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Program Title

Program Date

Program Location

Program Cost

Payment Method

Check

Money Order

Cash

Credit Card

Exp. Date

Credit Card #

Register early! Advance registration is recommended as it guarantees admittance and course materials. If space and materials are
available, registrations will be accepted at the door.

CANCELLATIONS & REFUNDS: If you find 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. A refund, less a $50 processing charge will be issued. Registrants who fail to notify CLE by
the date and time indicated will receive a set of course materials via mail following the program.

MCLE CREDIT INFORMATION: Courses have been approved by the New Mexico MCLE Board. CLE of 80HN will provide attorneys with
necessary forms to file for MCLE credit in other states. A separate MCLE filing fee may be required.

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

PROGRAM CANCELLATION: Pre-registration is recommended. Program will be cancelled one week prior to scheduled date if atten-
dance is insufficient. Pre-registered 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 $1.00, space
permitting, Course materials, books and/or handouts, if available, may be provided at an additional cost of $.75. Auditors should contact
the CLE office in advance and notify staff of their intent to audit. "Walk-in" auditors will also be permitted on a space available basis.

Auditors will not receive CLE credits for the audit fee if an auditor chooses to receive CLE credit for attending the course, the request
and payment must be made to CLE staff on the day of the program. Attendees who request 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.

SCHOLARSHIPS: Please note, scholarships are available on an as-needed basis for up to 10% of any given seminar. The amount of the
scholarship is equivalent to a 50% reduction of the standard fee for each seminar. To qualify, recipients are required to sign a financial
assistance form available from the CLE department. For further information, please call (505) 797-6062.

EQUIPMENT ISSUE: Equipment must be returned to the CLE department in readable condition on the day the program is completed
or $25 will be charged. Refunds will not be issued for equipment returned in reading condition on the day the program is completed.

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

NOTE: Programs subject to change without notice.

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Pre-Register for CLE Courses Online

• Go to www.nmbarcle.org
• Browse by Topic, Type of Credit, or Media
• Choose a program of interest
• Choose the educational format you prefer (Live Seminar, Video Webcast, etc)
• Click on Purchase Program (login required), (if you have not previously created an account directly through www.nmbarcle.org, you must do so with ID being your bar ID and password being your last name).
• View the Program by clicking on Launch Streaming Media
• Click on the Submit button (Please note: If you do not complete the following steps, your credits will not be filed).
• Click on Evaluate Program and complete information request
• Click on Submit For Credit

Submit For Credit

Evaluate Program

Purchase Program

Register for CLE

April

Your Largest Asset: An Estate Planning Guide to Your Personal Residence For most individuals their personal residences constitute their single largest asset. The wealth contained within the home’s equity often far surpasses the individual’s liquid assets. The illiquid nature of the home and certain tax benefits accruing to real provide certain planning opportunities to minimize the taxation of the individual’s estate. This program will analyze the use of trusts to transfer a personal residence and minimize federal estate taxation. 1.0 General CLE Credit • $67

May

Uses of Life Insurance in Business Planning It is commonplace for many businesses to purchase “key man” insurance on the lives of employees who are vital to the success of the entity. This program will examine the several uses of insurance in business planning, the types of policies best used for different purposes, and the integration of those policies into the entity’s governing documents. 1.0 General CLE Credit • $67

June

ADR in Estate Planning Disputes Disputes in estate litigation can be particularly bitter and protracted. Often the litigation involves family members and long-standing rivalries and resentments that present timely distribution of an estate’s assets or severely

naggers its regular administration. In order to combat this problem, many jurisdictions have begun to mandate the use of ADR in estate litigation. This program provides a guide to effective uses of ADR to timely settle estate and trust disputes before litigation or to settle litigation. 1.0 General CLE Credit • $67

July

Choice of Entity for Nonprofits Non-profits can be large organizations providing vital services to large communities. They may have extensive investments and business operations related or unrelated to their core charitable mission. These operations and other priorities of the organization will have a direct impact on the non-profit’s choice of entity. This program is a rare examination of the various types of entity available to non-profits and a review of their respective advantages and disadvantages. 1.0 General CLE Credit • $67

August

Ethical Issues in ADR Widespread acceptance and use of various methods of Alternative Dispute Resolution has focused attention on the ethical obligations of attorneys participating in ADR. Do attorneys have the same obligations as in litigation? What are the sources of ethical rules in this area? What are the most common areas of liability for attorneys? These and other questions will be addressed in this program focusing on attorney ethics in the new frontier of ADR. 1.0 General CLE Credit • $67

September

The Law of Religious Organizations, Parts 1 & 2 Many federal and state laws of general application spare exceptions for churches and other religious organizations. From employment and non-discrimination laws to land use regulations and taxation, religious organizations often benefit from a flexibility afforded to them because of their special status. This program discusses the exceptions and how they together form a unique law for religious organizations. 2.0 General CLE Credit • $129

October

Corporate Governance for Family Businesses Although the principles of good corporate governance apply universally without regard to the size of the business, family and privately held businesses pose challenges unique to them. This program will cover board of director, voting, management and buy-out issues of corporate governance as they apply specifically to the context of family-owned and closely-held businesses, with a emphasis on practical techniques avoiding paralyzing internal disputes. 1.0 General CLE Credit • $67

November

Divorce Settlements in ADR Although the number of divorces in the United States continues to increase, divorce settlements have become more amicable in recent years. This program addresses the potential benefits of ADR in divorce settlements and strategies for successful ADR. 1.0 General CLE Credit • $67

December

The Right to an Education - An Overview of Educational Law This program will address the history and current issues in public education law and will review the significant cases of the past year. This program is intended for attorneys who are new to the area of education law or who wish to refresh their knowledge of the major issues. 1.0 General CLE Credit • $67

CLE AT-A-GLANCE

NATIONAL TELESEMINARS

11 a.m. via telephone

January

Corporate Governance for Family Businesses

Although the principles of good corporate governance apply universally without regard to the size of the business, family and privately held businesses pose challenges unique to them. This program will cover board of director, voting, management and buy-out issues of corporate governance as they apply specifically to the context of family-owned and closely-held businesses, with a emphasis on practical techniques avoiding paralyzing internal disputes. 1.0 General CLE Credit • $67

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ATTENTION: Programs subject to change without notice.
### January 30
Pro Se Can You See
- 8 – 10 a.m.
  - 1.0 Ethics & 1.0 Professionalism CLE Credits
  - $79

Diversity Why Bother?
- 10:30 a.m. – 12:30 p.m.
  - 1.0 Ethics & 1.0 Professionalism CLE Credits
  - $79

Negotiation Ethics:
Winning Without Selling Your Soul with Marty Latz
- 1 – 4 p.m.
  - 3.0 Ethics CLE Credits
  - $130

2006 Employment and Labor Law Institute
- 9 a.m. – 3:30 p.m.
  - 6.0 General CLE Credits
  - $189

### February 6
Pro Se Can You See
- 8 – 10 a.m.
  - 1.0 Ethics & 1.0 Professionalism CLE Credits
  - $79

Professionalism: All the World is a Stage
- 10:30 a.m. – 11:30 a.m.
  - 1.0 Professionalism CLE Credits
  - $49

New Challenges on Professional Liability Insurance
- 11:30 a.m. – 12:30 p.m.
  - 1.0 General CLE Credits
  - $49

### February 10
Pro Se Can You See
- 8 – 10 a.m.
  - 1.0 Ethics & 1.0 Professionalism CLE Credits
  - $79

Professionalism: All the World is a Stage
- 10:30 a.m. – 11:30 a.m.
  - 1.0 Professionalism CLE Credits
  - $49

New Challenges on Professional Liability Insurance
- 11:30 a.m. – 12:30 p.m.
  - 1.0 General CLE Credits
  - $49

### February 20
Pro Se Can You See
- 8 – 10 a.m.
  - 1.0 Ethics & 1.0 Professionalism CLE Credits
  - $79

### Video Replays
State Bar Center - Albuquerque

#### January 30
Santa Clara Pueblo v. Martinez:
Past and Present Day Consequences
- 1 – 3:45 p.m.
  - 2.7 General CLE Credits
  - $109

Climate Change Impacts, Laws and Policies
- 8:30 a.m. – 3:30 p.m.
  - 4.8 General, 1.0 Ethics & 1.0 Professionalism CLE Credits
  - $209

#### February 20
MGM Grand
Las Vegas, Nevada
March 7-10, 2007

**In conjunction with the Men’s & Women’s Mountain West Conference Basketball Tournament at Thomas & Mack Center**

**Hoop It Up! CLE in Vegas 2007**

**MGM Grand**

**Las Vegas, Nevada**

**March 7-10, 2007**

**Only 15 Rooms Left!**

Go Lobos!

**Call CLE for details at (505) 797-6020**

**Reservation Deadline: February 7, 2007**

**4.0 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits**

**(CLE programs subject to change)**

MGM Grand (March 7-9) $577

CLE $199

#### CLE - On the Road
3rd Judicial District Courthouse, 200 W. Picacho, Las Cruces, NM

#### February 8
Pro Se Can You See
- 10 a.m. – Noon
  - 1.0 Ethics & 1.0 Professionalism CLE Credits
  - $79

Professionalism: All the World is a Stage
- 1:30 p.m. – 2:30 p.m.
  - 1.0 Professionalism CLE Credits
  - $49

Search and Seizure
- 2:45 p.m. – 3:45 p.m.
  - 1.0 General CLE Credits
  - $49

#### February 9
Pro Se Can You See
- 8:30 a.m. – 4 p.m.
  - 6.5 General CLE Credits
  - $199

**Coming in March**

**Bankruptcy Year-in-Review**

Friday, March 9, 2007

State Bar Center, Albuquerque

Co-Sponsor:
Bankruptcy Section

Call CLE for details at (505) 797-6020
IN THE MATTER OF THE AMENDMENTS OF RULES 6-304, 7-304, AND 8-304 FOR COURTS OF LIMITED JURISDICTION

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Courts of Limited Jurisdiction Rules Committee to approve amendments to Rules 6-304, 7-304, and 8-304 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 6-304, 7-304, and 8-304 NMRA of the Rules for Courts of Limited Jurisdiction hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 6-304, 7-304, and 8-304 NMRA of the Rules for Courts of Limited Jurisdiction shall be effective for cases filed on and after March 1, 2007, and

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

IT IS SO ORDERED.

DONE at Santa Fe, New Mexico, this 26th day of December, 2006.

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

6-304. Motions.
   A. Defenses and objections which may be raised. Any matter that is capable of determination without trial of the general issue, including defenses and objections, may be raised before trial by motion.
   B. Suppression of evidence. In cases within the trial court’s jurisdiction:
      (1) a person aggrieved by a search and seizure may move for the return of the property and to suppress its use as evidence;
      (2) a person aggrieved by a confession, admission or other evidence may move to suppress such evidence.
   C. Motions and other papers. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions shall be served on each party as provided by Rule 6-209 NMRA.
   D. Unopposed motions. The moving party shall determine whether or not a motion will be opposed. If the motion will not be opposed, an order initialed by opposing counsel shall accompany the motion. The motion is not granted until the order is approved by the court.
   E. Opposed motions. The motion shall recite that concurrence of opposing counsel was requested or shall specify why no such request was made. The moving party shall request concurrence from opposing counsel unless the motion is a:
      (1) motion to dismiss;
      (2) motion regarding bonds and conditions of release;
      (3) motion for new trial;
      (4) motion to suppress evidence; or
      (5) motion to modify a sentence pursuant to Rule 6-801 NMRA.

Notwithstanding the provisions of any other rule, counsel may file with any opposed motion a brief or supporting points with citations or authorities. Affidavits, statements, depositions or other documentary evidence in support of the motion may be filed with the motion.

F. Response. Unless otherwise specifically provided in these rules, any written response shall be filed within fifteen (15) days after service of the motion. Affidavits, statements, depositions or other documentary evidence in support of the response may be filed with the response.

7-304. Motions.
   A. Defenses and objections which may be raised. Any matter that is capable of determination without trial of the general issue, including defenses and objections, may be raised before trial by motion.
   B. Suppression of evidence. In cases within the trial court’s jurisdiction:
      (1) a person aggrieved by a search and seizure may move for the return of the property and to suppress its use as evidence;
      (2) a person aggrieved by a confession, admission or other evidence may move to suppress such evidence.
   C. Motions and other papers. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions shall be served on each party as provided by Rule 7-209 NMRA.
   D. Unopposed motions. The moving party shall determine whether or not a motion will be opposed. If the motion will not be opposed, an order initialed by opposing counsel shall accompany the motion. The motion is not granted until the order is approved by the court.
   E. Opposed motions. The motion shall recite that concurrence of opposing counsel was requested or shall specify why no such request was made. The moving party shall request concurrence from opposing counsel unless the motion is a:
      (1) motion to dismiss;
      (2) motion regarding bonds and conditions of release;
      (3) motion for new trial;
(4) motion to suppress evidence; or
(5) motion to modify a sentence pursuant to Rule 7-801 NMRA.

Notwithstanding the provisions of any other rule, counsel may file with any opposed motion a brief or supporting points with citations or authorities. Affidavits, statements, depositions or other documentary evidence in support of the motion may be filed with the motion.

F. Response. Unless otherwise specifically provided in these rules, any written response shall be filed within fifteen (15) days after service of the motion. Affidavits, statements, depositions or other documentary evidence in support of the response may be filed with the response.

8-304. Motions.

A. Defenses and objections which may be raised. Any matter that is capable of determination without trial of the general issue, including defenses and objections, may be raised before trial by motion.

B. Suppression of evidence. In cases within the trial court’s jurisdiction:

(1) a person aggrieved by a search and seizure may move for the return of the property and to suppress its use as evidence;

(2) a person aggrieved by a confession, admission or other evidence may move to suppress such evidence.

C. Motions and other papers. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions shall be served on each party as provided by Rule 8-208 NMRA.

D. Unopposed motions. The moving party shall determine whether or not a motion will be opposed. If the motion will not be opposed, an order initialed by opposing counsel shall accompany the motion. The motion is not granted until the order is approved by the court.

E. Opposed motions. The motion shall recite that concurrence of opposing counsel was requested or shall specify why no such request was made. The moving party shall request concurrence from opposing counsel unless the motion is a:

(1) motion to dismiss;
(2) motion regarding bonds and conditions of release;
(3) motion for new trial;
(4) motion to suppress evidence; or
(5) motion to modify a sentence pursuant to Rule 8-801 NMRA.

Notwithstanding the provisions of any other rule, counsel may file with any opposed motion a brief or supporting points with citations or authorities. Affidavits, statements, depositions or other documentary evidence in support of the motion may be filed with the motion.

F. Response. Unless otherwise specifically provided in these rules, any written response shall be filed within fifteen (15) days after service of the motion. Affidavits, statements, depositions or other documentary evidence in support of the response may be filed with the response.
From the New Mexico Supreme Court

Opinion Number: 2007-NMSC-001

STATE OF NEW MEXICO,

Plaintiff-Respondent,

versus

CHARLES MAESTAS,

Defendant-Petitioner.

Defendant-Respondent/Cross-Petitioner.

No. 29,178 (filed: December 13, 2006)

ORIGINAL PROCEEDING ON CERTIORARI

MICHAEL E. VIGIL, District Judge

C. DAVID HENDERSON

DOWNING & HENDERSON, P.C.

Santa Fe, New Mexico

for Petitioner

PATRICIA A. MADRID

Attorney General

ARTHUR W. PEPIN

Assistant Attorney General

JACQUELINE R. MEDINA

Assistant Attorney General

Santa Fe, New Mexico

for Respondent

OPINION

EDWARD L. CHÁVEZ, JUSTICE

{1} Defendant, a municipal judge, was convicted of five felony counts of official acts prohibited in violation of the New Mexico Governmental Conduct Act, NMSA 1978, § 10-16-3(D) (1993), and five counts of criminal sexual penetration during the commission of the felony of violating official acts prohibited, NMSA 1978, § 30-9-11(D)(5) (2003). The Governmental Conduct Act prohibits legislators and public officers from requesting or receiving something of value in exchange for the promised performance by the public officer of an official act. Section 10-16-3(D). Defendant’s convictions arose out of six sexual encounters between Defendant and a woman who was a criminal defendant in Defendant’s courtroom. Defendant contends the encounters were purely consensual and at the suggestion of the woman. The State contends Defendant requested the woman perform sexual favors in exchange for leniency or under the threat of harsher punishment which could have resulted in her not seeing her children.

{2} In an impressive display of professionalism and strict adherence to prosecutorial integrity to see that a defendant has a fair trial and that justice is done, Assistant Attorney General Arthur Pepin, in a supplemental brief to this Court, raised an issue not previously raised by any attorney in this case: whether Defendant in his capacity as a judge is subject to the crimes enumerated in the Governmental Conduct Act. The issue arises because the Act expressly excludes judges from the definition of public officer. NMSA 1978, § 10-16-2(G) (1993). Applying the plain meaning rule and mindful of the statutory construction rule that prohibits courts from questioning the wisdom of legislation, see U.S. Xpress, Inc. v. N.M. Taxation & Revenue Dep’t, 2006-NMSC-017, ¶ 11, 139 N.M. 589, 136 P.3d 999, we conclude that the legislature expressly chose to exclude judges from application of the Governmental Conduct Act. Therefore, Defendant could not be convicted of violating official acts prohibited under Section 10-16-3(D), and violating official acts prohibited could not be used as the predicate felony to support Defendant’s conviction of criminal sexual penetration during the commission of a felony. Accordingly, we hold that it was fundamental error to convict Defendant under the Governmental Conduct Act and, therefore, reverse all of Defendant’s convictions.

I. FACTS

{3} Both the State and Defendant interpret the pertinent facts of this case differently. What is undisputed is that Defendant, while a municipal court judge, on several occasions accepted sexual favors from a female who was a criminal defendant in his court. At trial, Defendant contended that the sexual encounters were entirely consensual, but that the woman and her boyfriend concocted a scheme to set up Defendant so that she could bring a civil rights lawsuit against the municipality where Defendant served as a municipal judge. Defendant asserted that the scheme involved the woman seducing Defendant, then claiming that Defendant coerced her into sex. Defendant argued that as part of the alleged scheme, the woman secretly tape recorded one of the sexual encounters.

{4} In contrast, the State argued that the woman was forced into performing sexual favors so that Defendant would lower her traffic fines, keep her out of jail, and not separate her from her children. The woman testified that after she appeared in Defendant’s courtroom regarding traffic citations, Defendant requested her to engage in sexual acts with him in exchange for Defendant lowering her fines and keeping her from serving up to ninety days in jail. The woman further testified that she initially denied Defendant’s requests, but that Defendant then threatened her that if she did not comply, he would not lower her fines, which would result in her going to jail, losing her job, and not being able to see her children. She also testified that she believed Defendant had the power to take her children away from her because Defendant was a judge. The State contended that Defendant did not reduce the woman’s fines and refused to sentence her, causing her to be rescheduled fourteen times, so that Defendant could continue to coerce her into performing additional sexual acts. The woman testified that she eventually grew tired of Defendant not following through on his promise to reduce her fines, so she decided to tape record a sexual encounter with Defendant. An investigation into the audiotapes resulted in three more women coming forward with similar allegations against Defendant, although Defendant was
acquitted of all of the latter charges.

II. PROCEDURAL BACKGROUND

{5} Defendant was charged with committing forty-four different crimes, including criminal sexual penetration (CSP) during the commission of a felony, CSP with the use of force or coercion, criminal sexual contact, extortion, violating official acts prohibited, and stalking. The predicate felonies for the charges of CSP during the commission of a felony were extortion and violating official acts prohibited under the Governmental Conduct Act. CSP during the commission of a felony is one of six categories of CSP in the second degree enumerated in the CSP statute. Section 30-9-11(D). The CSP statute makes CSP perpetrated through the use of force or coercion a third degree felony. Section 30-9-11(E). Defendant was only convicted of five counts of official acts prohibited, and five counts of CSP during the commission of the felony violating official acts prohibited.

{6} Defendant appealed his convictions to the New Mexico Court of Appeals, arguing three grounds for reversal: (1) the trial court erred in failing to instruct the jury that coercion was an essential element of criminal sexual penetration during the commission of a felony, State v. Maestas, 2005-NMCA-062, ¶ 13, 137 N.M. 477, 112 P.3d 1134; (2) the trial court erred in admitting certain expert witness testimony, id. ¶ 29; (3) the trial court erred in excluding evidence that Defendant’s accuser operated a house of prostitution, id. ¶ 34. The Court of Appeals affirmed Defendant’s convictions, holding that coercion was not an essential element of criminal sexual penetration during the commission of a felony. Id. ¶ 26. Additionally, the court held that the trial court did not abuse its discretion either in admitting the State expert’s testimony or in excluding the evidence of Defendant’s accuser’s alleged prostitution. Id. ¶¶ 33, 37.

{7} We granted Defendant’s petition for certiorari on all three issues. After the parties filed their briefs, the State filed a supplemental brief alerting this Court that the Governmental Conduct Act, under which Defendant was convicted, appeared to expressly exclude judges from prosecution under the Act. See § 10-16-2(G). Although Defendant did not preserve this argument, we review the issue under a fundamental error analysis. See Rule 12-216(B)(2) NMRA; State v. Barber, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633 (providing a fundamental error exception to rule preventing review of issues not properly preserved).

III. FUNDAMENTAL ERROR ANALYSIS

{8} The doctrine of fundamental error is applied only under extraordinary circumstances to prevent the miscarriage of justice. Barber, 2004-NMSC-019, ¶ 8. The doctrine applies if the circumstances “implicate a fundamental unfaithfulness within the system that would undermine judicial integrity if left unchecked.” State v. Cunningham, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176. For example, if a defendant appears indisputably innocent of the crimes for which he was charged, or where it would shock the conscience to permit the conviction to stand, the convictions may be reversed under a fundamental error analysis. Id. ¶ 13.

{9} It is fundamental error to convict a defendant of a crime that does not exist. State v. Johnson, 103 N.M. 364, 371, 707 P.2d 1174, 1181 (Ct. App. 1985). The question in this case is whether Defendant could lawfully be convicted of violating Section 10-16-3(D) of the Governmental Conduct Act. If not, then his convictions must be reversed under the fundamental error doctrine. In determining whether the Governmental Conduct Act applies to judges, we look first to the words the legislature chose and the plain meaning of that language. See State v. Davis, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. “Under the plain meaning rule[,] statutes are to be given effect as written without room for construction unless the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, in which case the statute is to be construed according to its obvious spirit or reason.” Id. Thus, we look to the plain language of the statute to determine if it is ambiguous, and if not ambiguous, whether following the language would lead to an absurd result.

{10} Section 10-16-3(D) of the Governmental Conduct Act states that “[n]o legislator, public officer or employee may request or receive, and no person may offer a legislator, public officer or employee, any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official act.” A violation of Section 10-16-3(D) is a fourth degree felony punishable by eighteen months imprisonment. See NMSA 1978, § 31-18-15(A)(9) (2005). Because the language of Section 10-16-3(D) does not specifically include judges, we must determine whether a judge is considered to be a “public officer or employee.”

{11} The legislature defined “public officer or employee” as “any person who has been elected to, appointed to or hired for any state office or who receives compensation in the form of salary or is eligible for per diem or mileage, but excludes legislators and judges.” Section 10-16-2(G). As persons appointed or elected to office who receive a salary, had the legislature not expressly excluded judges from the public officer or employee definition, judges would clearly be subject to the provisions of the Governmental Conduct Act. Moreover, as discussed below, the legislature could have applied any provision of the Governmental Conduct Act to judges by specifically including the word “judges” within any provision of the Act, similar to how they included legislators. See NMSA 1978, §§ 10-16-3(D), -4, -1, -6, -9, -11, -14 (1967, as amended through 2003). Nevertheless, the plain meaning of the language indicates that the legislature intended to specifically exclude judges from the definition of public officer and from the Act’s application.

{12} Despite the express exclusion of judges in the Act, the State urges us to look beyond the plain meaning of the language, arguing that the Act is ambiguous. The State contends that the ambiguity arises out of the Act’s express exclusion of judges and legislators in the general definition of public officer, but inclusion of only legislators within the section of the statute that addresses official acts prohibited. The State theorizes that a legislative oversight resulted in the legislature mistakenly omitting judges when it included legislators in Section 10-16-3(D). The State supports its theory by arguing that excluding judges from the criminal provisions of the Act is against public policy because excluding judges from criminal prosecution under the Governmental Conduct Act would lead to injustice and absurdity.

{13} As to any alleged ambiguity, we disagree with the State that the Governmental Conduct Act is unclear with respect to its application to judges. The statute clearly defines a “public officer or employee” and expressly excludes “judges” from that definition. Section 10-16-2(G). The exclusion of legislators from the definition of “public officer or employee” simply means that a legislator is subject to the provisions of the Act, not as a public officer or employee, but as a legislator. Why the legislature drew such a distinction is not clear. To the extent there is ambiguity, it arises only with respect to legislators due to the legislature’s express exclusion of
legislators from the definition of “public officer or employee,” and then the inclusion of legislators in official acts prohibited and other sections. See §§ 10-16-3, -4.1, -6, -9, -11, -14. However, this inconsistency does not exist with respect to judges since the only mention of judges in the Act is the exclusion of judges in the definitions section. See § 10-16-2(G). Indeed, the legislature’s selective incorporation of legislators into some sections of the Act indicates that the legislature was aware of how to apply some sections of the Act to only certain categories of public officers or employees. If the legislature wanted some sections of the Act to also apply to judges, it certainly knew how to do so.

{14} Unless ambiguity exists, this Court must adhere to the plain meaning of the language. Davis, 2003-NMSC-022, ¶ 6. Our role is to construe statutes as written and we should not second guess the legislature’s policy decisions. See State ex rel. Helman v. Gallegos, 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994); State v. Ortega, 112 N.M. 554, 564, 817 P.2d 1196, 1206 (1991). We adhere to the principle that “[a] statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration.” Gallegos, 117 N.M. at 352, 871 P.2d at 1358 (quoting Perea v. Baca, 94 N.M. 624, 627, 614 P.2d 541, 544 (1980)).

{15} Interpreting the Governmental Conduct Act to apply to judges would require us to add language to Section 10-16-3(D), official acts prohibited, since the statute only specifically names legislators and public officers or employees. We may only add words to a statute where it is necessary to make the statute conform to the legislature’s clear intent, or to prevent the statute from being absurd. State v. Nance, 77 N.M. 39, 46, 419 P.2d 242, 247 (1966). If we determine that the legislature clearly intended to apply Section 10-16-3(D) to judges, then this Court may substitute, disregard, eliminate, insert, or add words to a statute. See Nat’l Council on Comp. Ins. v. N.M. State Corp. Comm’n, 103 N.M. 707, 708, 712 P.2d 1369, 1370 (1986). As such, any divergence from the plain meaning of a statute must be done in conformity with clear legislative intent.

{16} Although we look to the plain meaning of a statute in determining legislative intent, we agree with the State that we must exercise caution in applying the plain meaning rule. See Gallegos, 117 N.M. at 353, 871 P.2d at 1359. If adherence to the plain meaning of a statute would lead to absurdity, we must reject that meaning and construe the statute according to the obvious intent of the legislature. Nance, 77 N.M. at 46, 419 P.2d at 247. The State contends that exempting judges from the Governmental Conduct Act would result in absurdity contrary to legislative intent because it would insulate judges from punishment for abuse of power to obtain sex from defendants and urges us to construe Section 10-16-3(D) to include judges. Therefore, in light of the potential that adhering to the plain meaning of the language would result in absurdity, we consider whether the legislature intended to exclude judges from prosecution under Section 10-16-3(D).

{17} In determining whether the legislature intended to exclude judges from Sections 10-16-3(D), the legislative history of the Act, including historical amendments, is instructive. See Davis, 2003-NMSC-022, ¶ 6. The Governmental Conduct Act was originally titled the Conflict of Interest Act, see NMSA 1953, § 5-12-1(1967) (recodified at NMSA 1978, § 10-16-1(1967)), and was renamed the Governmental Conduct Act in 1993, 1993 N.M. Laws, ch. 46, § 26, at 296. As originally enacted in 1967, the Conflict of Interest Act’s definition of “employee,” expressly excluded judges. NMSA 1953, § 5-12-2(D) (1967). The definitions section has been amended twice, but even when the legislature specifically amended the definition of “employee” in 1993 to that of “public officer or employee,” it chose to keep the judge exclusion. See 1993 N.M. Laws, ch. 46, § 27, at 297 (codified at Section 10-16-2(G)); 1979 N.M. Laws, ch. 350, § 1, at 1446.

{18} Additionally, when the previous version of official acts prohibited (originally titled “Gifts or loans-Request and acceptance”) was first enacted, it specifically applied to legislators, but not judges. NMSA 1953, § 5-12-3(A) (1967) (repealed 1993). Furthermore, when the legislature repealed the prior version of official acts prohibited in 1993 and enacted the current version, which included criminal penalties, the legislature again included legislators, but did not add judges to the statute’s reach. 1993 N.M. Laws, ch. 46, § 28, at 297-98 (codified at § 10-16-3(D)). This history indicates that when presented with opportunities to eliminate the judge exclusion from the Act, or to add judges to Section 10-16-3(D), official acts prohibited, the legislature has chosen not to do so.

{19} In addition to statutory history, we also consider the context in which the Governmental Conduct Act was enacted to help us determine legislative intent and whether it would be absurd to adhere to the plain language of the Act. See State v. Cleve, 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980 P.2d 23. We find it significant that the Governmental Conduct Act was enacted the same year that the Judicial Standards Commission was created. The legislation proposing a constitutional amendment for the creation of the Judicial Standards Commission was introduced during the 1967 legislative session, the same legislative session in which the legislature passed the Governmental Conduct Act. See 1967 N.M. Laws 1622-24. On November 7, 1967, New Mexico voters approved the constitutional amendment creating the Judicial Standards Commission. See N.M. Const. art. VI, § 32.

The purpose of creating the Commission was to provide an independent authority to investigate allegations of judicial misconduct. State ex rel. N.M. Judicial Standards Comm’n v. Espinosa, 2003-NMSC-017, ¶¶ 10-11, 134 N.M. 59, 73 P.3d 197. The Judicial Standards Commission is made up of two judicial officers, one magistrate, two lawyers, and six lay citizens. N.M. Const. art. VI, § 32 (as amended through 1998), and serves as the watchdog over the judiciary to ensure “an efficient and well disciplined judicial system possessing the highest degree of integrity.” Espinosa, 2003-NMSC-017, ¶ 11 (quoted authority omitted). The Commission may investigate judicial misconduct, including unethical conduct rising to the level of a criminal infraction, and make recommendations to this Court regarding discipline. See N.M. Const. art. VI, § 32.

{20} In addition, when the legislature was contemplating the Governmental Conduct

1In relevant part, Section 5-12-3 prevented employees and legislators from requesting or receiving gifts or loans if it “tend[ed] to influence him in the discharge of his official acts.” NMSA 1953, § 5-12-3(A)(1)(1967) (repealed 1993).

2Under the New Mexico Constitution, this Court possesses the authority to regulate the conduct of the judiciary and to discipline, remove or retire judges. See N.M. Const. art. VI, § 32.
Act, another statute existed for prosecuting judges who accepted or solicited valuable items in exchange for the performance of an official act. See NMSA 1978, § 30-24-2 (1963). “Demanding or receiving bribe from public officer or employee,” Section 30-24-2, applies to all public officers or employees who solicit or accept anything of value with the intent of having his or her decision or action influenced, and contains no exceptions for judges. See also NMSA 1978, § 30-1-12(I) to (J) (defining public officers and employees without including an exclusion for judges); In re Esquivel, 113 N.M. 24, 822 P.2d 121 (1992) (per curiam) (finding that disbarment was appropriate after attorney was convicted of violating Section 30-24-2); State v. Johnson, 102 N.M. 110, 692 P.2d 35 (Ct. App. 1984) (affirming police officer’s conviction under Section 30-24-2), overruled in part on other grounds by Manlove v. Sullivan, 108 N.M. 471, 775 P.2d 237 (1989). Demanding or receiving a bribe under Section 30-24-2 is a third degree felony and a conviction requires the public employee to forfeit his or her office. Defendant was not charged under Section 30-24-2, although that criminal statute remains in effect today. {21} We presume that the legislature was aware of Section 30-24-2 when it enacted the Conflict of Interest Act, now the Governmental Conduct Act. See Inc. County of Los Alamos v. Johnson, 108 N.M. 633, 634, 776 P.2d 1252, 1253 (1989) (“We presume that the legislature is well informed as to existing statutory and common law . . .”). The fact that the legislature passed the Conflict of Interest Act and the legislation approving the creation of the Judicial Standards Commission within the same legislative session, as well as the fact that Section 30-24-2 was in force, provides important context that indicates the legislature’s belief that judicial misconduct was sufficiently handled through means other than the Governmental Conduct Act. If warranted, a judge may be prosecuted for judicial misconduct under Section 30-24-2. If judicial misconduct is more in the nature of an ethical violation, then it is clear that the legislature did not intend such a result. See, e.g., Compton v. Lytle, 2003-NMSC-031, 134 N.M. 586, 81 P.3d 39; County of Los Alamos, 108 N.M. 633, 776 P.2d 1252. Although we give effect to legislative intent by construing statutes to avoid absurd results, Compton, 2003-NMSC-031, ¶ 20, “[w]e must assume the legislature chose [its] words to express its meaning unless the contrary [intent] clearly appears.” Varoz v. N.M. Bd. of Podiatry, 104 N.M. 454, 456, 722 P.2d 1176, 1178 (1986) (quoting Weiland v. Vigil, 90 N.M. 148, 151, 560 P.2d 939, 942 (Ct. App. 1977); see also Crooks v. Harrelson, 282 U.S. 55, 60 (1930) (“[T]here must be something to make plain the intent of Congress that the letter of the statute is not to prevail.”).

{23} In Compton, we diverged from the plain language of NMSA 1978, Section 33-2-34(A) (1981, repealed 1999), because it was clear that the legislature intended that only inmates convicted of noncapital crimes would receive the benefit of good-time credits. 2003-NMSC-031, ¶ 19. Although Section 33-2-34(A) stated that “[a]ny inmate” was eligible for good-time credits, we found that adhering to the plain language of the Fresh Pursuit Act, NMSA 1978, § 31-2-8(A) (1981), and held that the clear intent of the legislature was to authorize a municipal police officer to make an extraterritorial arrest for DWI, regardless of whether DWI was classified as a “misdemeanor” or “petty misdemeanor” under a local ordinance. 108 N.M. at 634, 776 P.2d at 1253. We found that adhering to the plain language of Section 31-2-8(A), which only provided for the arrest of a “misdemeanant,” would eviscerate the Fresh Pursuit Act as it applied to the pursuit of DWI suspects because officers have no way of determining whether a petty misdemeanor or misdemeanor conviction would result while the officer is in pursuit of a DWI suspect. Id. at 634-35, 776 P.2d at 1253-54.

{24} In this case, it is not clear that the legislature intended to include judges in Section 10-16-3(D), official acts prohibited. In fact, we are persuaded by the statutory history and context of the Governmental Conduct Act that the legislature intended to exclude judges from its application. As such, we find that adherence to the plain meaning of the Governmental Conduct Act does not result in absurdity contrary to legislative intent and does not require us to diverge from the plain meaning of the Act. In neither Compton, nor County of Los Alamos, were we faced with express statutory language excluding an entire class of defendants. Inserting judges into Section 10-16-3(D)’s application requires us to ignore express language the legislature chose to use when it excluded judges from the statute. Absent any evidence that clearly indicates legislative intent to include judges, we find that inserting judges into Section 10-16-3(D) is a far greater leap than we were asked to take in either Compton or County of Los Alamos. As such, we are bound by the words the legislature chose to use and we must not stray from that language. Therefore, in conformity with the legislature’s intent, we hold that judges are excluded from the application of the Governmental Conduct Act. To hold otherwise would defeat our goal of giving effect to the legislature’s intent. Davis, 2003-NMSC-022, ¶ 6.

{25} We are not aware of the legislature’s reasoning in choosing to exclude judges from the Governmental Conduct Act. Some may find it difficult to see why the legislature chose to do so. However, unless unconstitutional, it is not the role of this Court to question the wisdom, policy or justness of legislation enacted by our legislature. U.S. Xpress, Inc., 2006-NMSC-017, ¶ 11. In Cleve, we emphasized that [a] policy decision of this nature should not be second-guessed by the judiciary. The decision to extend the scope of an existing statute to reflect changing values is a matter for the Legislature, and . . . we presume that the Legislature continues to intend that the statute apply according to its original meaning.

1999-NMSC-017, ¶ 15. If the failure to include judges in Section 10-16-3(D) indeed resulted from a legislative oversight, then it is the legislature, not this Court, that should correct this mistake. See Espinosa, 2003-NMSC-017, ¶ 31.

{26} In light of the legislature’s decision to exclude judges from prosecution under the Governmental Conduct Act, we are compelled to overturn Defendant’s convictions. Although the crime of official acts prohibited exists with respect to some classes of defendants, it is nonexistent.
with respect to judges. We hold that just as a conviction for a nonexistent crime constitutes fundamental error, a conviction for a crime that does not exist as to a particular defendant is also fundamental error. See Johnson, 103 N.M. at 371, 707 P.2d at 1181 (holding that a conviction for a nonexistent crime constitutes fundamental error). Therefore, we conclude that it was fundamental error to convict Defendant of official acts prohibited under the Governmental Conduct Act due to the legislature’s express exclusion of judges.

IV. CONCLUSION

We hold that Defendant’s five convictions for official acts prohibited must be reversed due to fundamental error. As a result, Defendant’s five convictions for criminal sexual penetration committed during the commission of official acts prohibited must also be reversed.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:
RICHARD C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. SERNÁ, Justice
PETRA JIMENEZ MAES, Justice

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Certiorari Denied, No. 30,077, January 5, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-001


No. 25,456 (filed: October 4, 2006)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

ERNESTO J. ROMERO, District Judge

ANTONIO MAESTAS
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LAW OFFICES OF HEIDI S. WEBB
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OPINION

CEILIA FOY CASTILLO, Judge

{1} In this divorce case, Husband appeals an order awarding Wife a money judgment in the amount of her share of Husband’s military retirement benefits. Husband effected a significant reduction to Wife’s share of the benefits when he converted his benefits to 100% disability payments and waived further retirement benefits. We addressed this issue in Scheidel v. Scheidel, 2000-NMCA-059, 129 N.M. 223, 4 P.3d 670. There, we relied in part on language in a marital settlement agreement (MSA) and held that an ex-spouse may not reduce the other party’s share of military retirement benefits in this way. Id. ¶¶ 1, 22-23. By contrast, in our case, there was no MSA, only a final decree. We assigned this case to the general calendar to consider whether our holding in Scheidel should be expanded to include a situation in which there is no MSA and there is no language prohibiting Husband from reducing Wife’s benefits in the final decree. We conclude that Scheidel still applies because it would be inequitable to allow one party, after judgment, to unilaterally reduce the other party’s award of retirement benefits. Consequently, we affirm the trial court.

I. BACKGROUND

{2} The facts are undisputed. The parties were divorced in 1996. In the original divorce decree, Wife was awarded 50% of Husband’s retirement pay attributable to the time they were married. On December 11, 1998, the trial court entered an order clarifying the property settlement in the divorce decree and applying a mathematical formula to ascertain the exact amount of Husband’s retirement pay that would be awarded to Wife. Husband retired from the military in 2000, and Wife began receiving her portion of the retirement pay. In January 2000, Husband was injured in a helicopter accident, was adjudged to be disabled, and was entitled to disability pay. At some point in 2003, he waived his retirement pay in order to receive the disability pay instead.

{3} Section 1408 of the Uniformed Services Former Spouses’ Protection Act provides that military disability pay is not divisible as community property upon divorce. See 10 U.S.C. § 1408(a)(4)(B). Consequently, once Husband waived his retirement benefits and elected disability pay, payments to Wife stopped in January and February 2004. After February 2004, payments resumed, but they were reduced from $663.20 per month to $248.50. Wife responded by filing an application for order to show cause on January 20, 2004.

{4} The trial court held that Wife was entitled to continue receiving an amount equal to the portion of military retirement payments that Husband had waived in order to receive the disability pay, and the court entered judgment against Husband. He does not challenge the amount awarded. He only argues that no award could be made at all. He claims that state courts are without authority to award a portion of disability payments and that the trial court’s order thus violates federal law and the United States Supreme Court decision in Mansell v. Mansell, 490 U.S. 581 (1989). Husband seeks to avoid our holding in Scheidel and argues that the lack of an MSA prohibiting conversion of his retirement benefits to disability benefits makes his case distinguishable. He also claims that the trial court had no jurisdiction to enter the order because it constitutes a modification of the divorce decree, rather than enforcement.

II. DISCUSSION

A. Standard of Review

{5} Because the facts are undisputed, the
legality of the trial court’s order presents a question of law, which we review de novo. See Largo v. Atchison, Topeka & Santa Fe Ry. Co., 2002-NMCA-021, ¶ 5, 131 N.M. 621, 41 P.3d 347 (stating that federal preemption is a legal question, which is reviewed de novo); Kropinak v. ARA Health Servs., Inc., 2001-NMCA-081, ¶ 4, 131 N.M. 128, 33 P.3d 679 (applying a de novo standard of review where the appellant’s position on appeal raises a question of law arising out of undisputed facts).

B. Federal Preemption

¶ 6 In Mansell, the Supreme Court held that state courts lack the power to treat as property divisible upon divorce military retirement pay that has been waived in order for the retiree to receive disability benefits. 490 U.S. at 594-95; see 10 U.S.C. § 1408(a)(4)(B) (defining “disposable retired pay” to exclude any amounts waived in order for the retiree to receive disability benefits).

¶ 7 In Scheidel, we considered the prohibition against awarding disability payments discussed in Mansell. An MSA divided the husband’s military retirement benefits between the parties and prohibited the husband from taking any voluntary action to reduce the wife’s share of the benefits; the MSA also contained an indemnity provision requiring the husband to compensate the wife for any reductions in her benefits that might result from the husband’s voluntary actions. Scheidel, 2000-NMCA-059, ¶¶ 1-2. At the time of the divorce, the husband was 30% disabled, but in subsequent years, the husband’s disability rating increased to 100%. Id. ¶ 3. Since the wife’s share of the military pension was based upon the husband’s retirement pay, her share went down dramatically when the husband began receiving additional disability benefits and waived a corresponding amount of retirement pay, as required by federal law. Id. ¶ 4. The wife sought an order forcing the husband to compensate her for a reduction in her benefits, and the trial court ruled in favor of the wife. Id. On appeal, we affirmed the trial court’s order and rejected the husband’s challenge, which was based on Mansell. Scheidel, 2000-NMCA-059, ¶¶ 7-12. We were persuaded by cases from other jurisdictions holding that neither Mansell nor federal law prohibit a state court from enforcing indemnity provisions designed to guarantee a minimum monthly income to a non-military spouse. Scheidel, 2000-NMCA-059, ¶ 8.

¶ 8 We relied on the indemnity provision in the MSA and distinguished cases in which nothing in the settlement agreement precluded the husband from “doing anything to alter the amount the wife was to receive.” Id. ¶ 11. We did not have to consider whether the same result would apply in a case such as the current one, where there is no indemnity provision or any MSA whatsoever. See id. ¶ 12 (holding that “federal law does not prohibit state courts from enforcing indemnity provisions which ensure the payment of a minimum sum to a non-military spouse as his or her share of a community pension”).

¶ 9 In our case, there is no indemnity provision and no non-alteration provision like those contained in Scheidel. Husband contends that the lack of an indemnity provision and MSA warrant a departure from Scheidel, and Husband argues that his case is controlled by Mansell, instead. Husband relies on language in Scheidel to support his position. See id. ¶ 11 (citing In re Marriage of Pierce, 982 P.2d 995, 998 (Kan. Ct. App. 1999), and stating that the Pierce court “rightly held” that the husband was free to waive his retirement benefits because there was no language in an MSA prohibiting him from waiving his retirement benefits).

¶ 10 We disagree with Husband’s argument. The final decree appropriately awarded Petitioner “[t]he one-half of Respondent’s retirement pay attributable to the period of time the parties were married.” The actual formula, based on the number of months the parties were married, was included in a later filed stipulated order, which clarified the “award from Respondent’s military retirement pay.” Husband makes much of the fact that Wife is relying solely on a divorce decree and cannot point to language in an MSA that prohibits him from waiving his right to retirement benefits. We do not find this distinction compelling. Divorce decrees are construed in the same manner as other written instruments are. See Schlueter v. Schlueter, 117 N.M. 197, 199, 870 P.2d 159, 161 (N.M. Ct. App. 1994). Wife’s half interest in the military benefits was clearly established by the decree, and her interest was unconditional. There was no language expressly prohibiting what Husband did, but there was no language permitting it, either. The only fair and reasonable interpretation of the decree is that Wife was entitled to and reasonably expected that she would continue to receive half of the retirement benefits as they then existed. By contrast, Husband’s argument that he could avoid the final decree’s award and reduce Wife’s benefits, at his sole election, is not a reasonable interpretation of the final decree.

¶ 11 Given the clear division of benefits set by the final decree, we hold that the trial court could act to enforce and preserve Wife’s right to benefits established by the final decree. We reach this conclusion because we cannot accept the inequity and unfairness that results when one party is allowed to unilaterally reduce the other’s benefits established either under an agreement or a final decree. See Scheidel, 2000-NMCA-059, ¶¶ 7-9 (stating that it is equitable to require the husband to make up for the reduction caused by his conversion of his retirement benefits to disability benefits, since one spouse may not unilaterally reduce the other’s benefits); cf. Montero v. Montero, 96 N.M. 475, 477, 632 P.2d 352, 354 (1981) (rejecting the idea that one parent, unilaterally and at his or her whim, could undermine child visitation rights simply by moving); Bernal v. Nieto, 1997-NMCA-067, ¶¶ 15-17, 123 N.M. 621, 943 P.2d 1338 (refusing to accept a construction of an MSA that would have allowed one party to unilaterally dilute a life insurance benefit); Irwin v. Irwin, 121 N.M. 266, 271, 910 P.2d 342, 347 (Ct. App. 1995) (stating that one party is not permitted to choose a retirement option to defeat or reduce the interest of the other party). Husband cannot be permitted to unilaterally reduce the benefits awarded by the final decree, and the lack of language in an MSA does not give Respondent carte blanche to do so. See Danielson v. Evans, 36 P.3d 749, 751, 755 (Ariz. Ct. App. 2001) (holding that a court may enforce a decree and order by requiring the husband to “make up” payments lost to the wife when he converted his retirement benefits to disability benefits); Johnson v. Johnson, 37 S.W.3d 892, 895-97 (Tenn. 2001) (holding that the husband could not unilaterally alter the wife’s share of his military retirement determined in the final decree). This fundamental principle appears to us to be far more important here than whether Wife’s right to her half interest is contained in an MSA or a final decree or whether specific language in either prohibits Husband from unilaterally reducing her benefits. Since Wife’s right to 50% of his retirement benefits was set by the decree, Husband could not change it.

¶ 12 We also reject Husband’s argument that language in Scheidel requires a holding in his favor. He is correct that there is some language in Scheidel suggesting that the lack of indemnification language in an
MSA might require a different result, but the language in Scheidel on which Husband relies is not persuasive. In Scheidel, there was indemnification language, and we were not deciding the issue presented in this case: whether a spouse may reduce the other’s benefits if there is no MSA or indemnification language. Consequently, the issue in this case was not addressed by Scheidel. Cases are not authority for propositions not considered, Fernandez v. Farmers Ins. Co. of Ariz., 115 N.M. 622, 627, 857 P.2d 22, 27 (1993), so we decline to find the language on which Husband relies persuasive. Of greater importance is Scheidel’s policy of precluding one spouse from unilaterally reducing the other’s military retirement benefits.

{13} Husband contends that the trial court’s order violates Mansell because the order requires that his disability benefits be provided to Wife. Our holding is not at odds with Mansell. We join other jurisdictions that have held that Mansell only applies to the division of payments at the time of divorce and does not preclude a court from ordering the spouse who has adversely impacted the other spouse, by converting retirement benefits to disability benefits, to pay the other spouse directly. See, e.g., Danielson, 36 P.3d at 755-56; Black v. Black, 2004 ME 21, ¶ 10, 842 A.2d 1280 (agreeing with a number of other jurisdictions that federal law “does not limit the authority of a state court to grant postjudgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property”). But see In re Marriage of Pierce, 982 P.2d at 998 (expressing a contrary view). The position we adopt has been described as reflecting the majority view. See Danielson, 36 P.3d at 757; In re Marriage of Lodeski, 107 P.3d 1097, 1101 (Colo. Ct. App. 2004) (attributing the majority view to those cases that enlist equitable theories to prevent a military spouse from unilaterally defeating the other spouse’s interest in military pay by switching the pay to disability pay after the divorce decree is entered).

{14} In our case, the retirement benefits were divided at the time of the divorce, and the retirement benefits were converted to disability pay later. The trial court’s order does not identify disability payments as the source of the payments. Instead, the order leaves it to Husband to determine how he will pay the judgment. Therefore, the order does not violate Mansell because the “cultural factor, for the purposes of complying with federal law, is that the court order does not specifically require that disability benefits provide the source of the funds paid to the non-military spouse.” Scheidel, 2000-NMCA-059, ¶ 14. In Scheidel, we specifically noted that the husband was free to utilize other assets to satisfy his obligation and that he “may be required to shuffle assets or rearrange his finances” in order to do so. Id. We deemed this result fair because the “[h]usband’s increased disability rating . . . inured to his financial benefit, effectively creating additional income to him at [his w]ife’s sole expense.” Id. ¶ 15. By the same token, we believe it is equitable here to require Husband to be responsible for the reduction in Wife’s benefits. This is especially true because although Husband is deemed disabled by the military, he is employed by Lockheed and earns $32,200.00 net per month. Therefore, it is not at all unfair to require him to make up the difference caused when he waived his retirement benefits and converted them to disability benefits.

C. Jurisdiction

{16} Relying on Mendoza v. Mendoza, 103 N.M. 327, 330-33, 706 P.2d 869, 872-75 (Ct. App. 1985), Husband characterizes the trial court’s action as a modification, rather than enforcement, and argues that the court was without jurisdiction to modify the final decree. See also Hall v. Hall, 114 N.M. 378, 388, 838 P.2d 995, 1005 (Ct. App. 1992) (noting that a court’s jurisdiction to enforce a divorce decree is expansive but that the court may modify a decree only in exceptional circumstances). He claims that the trial court modified the divorce decree because there was no language in the decree that addressed the eventuality of a change in retirement benefits and that the court’s action therefore essentially added language to the decree. He argues that because there was no language prohibiting him from converting his benefits, the order “did not enforce anything in the [d]ivorce [d]ecree.”

{17} A similar argument was made in the recent case of Palmer v. Palmer, 2006-NMCA-___, N.M., __ P.3d __ [No. 24,869 (N.M. Ct. App. July 31, 2006)]. In Palmer, when the husband retired, he selected the survivor benefit annuity with his present wife as the beneficiary and thereby effected a reduction in the award of retirement benefits to him and his former wife as established by the divorce decree. Id. ¶ 4. Husband argued that his former wife’s motion to receive part of the survivor benefit was really a motion to modify the final decree. Id. ¶¶ 16-18. This Court discussed the two ways New Mexico law divides retirement benefits that have vested but have not matured: the lump sum method and the reserved jurisdiction method. Id. ¶¶ 14-15. Here, the trial court awarded the retirement benefits by setting out the formula for dividing the retirement benefits; the parties stipulated to the formula in order to clarify the distribution of this community property asset. The court thereby reserved jurisdiction to enforce distribution of the benefits once they are received by the employee spouse. See Ruggles v. Ruggles, 116 N.M. 52, 54-55, 68, 860 P.2d 182, 184-85, 198 (1993). As we stated in Palmer, “remedial enforcement against diminishment of a non-employee spouse’s community retirement entitlement . . . is not a modification seeking an additional or different value.” 2006-NMCA-___, ¶ 18.

{18} Husband’s unilateral action significantly reduced benefits to which Wife was entitled under the final decree. While we agree that there was no language expressly addressing the change in retirement benefits that would occur if Husband were to become disabled, it is also true that the decree awarded to Wife 50% of the retirement benefits that had accrued to date of divorce. Husband’s argument that no language prohibited him from electing to waive retirement benefits and convert them to disability benefits is not persuasive. There is no language in the decree permitting him to do so, either. We think it is quite a stretch for him to argue that the trial court could not intervene to address his attempt to significantly reduce the 50-50 distribution set by the decree. Consequently, we hold that the court’s order constituted enforcement because the order maintained Wife’s benefits at the same level as was established by the decree. See Black, 2004 ME 21, ¶¶ 11-13 (concluding that the trial court’s order constituted enforcement, not modification, and that the court could make adjustments necessary for the distribution, as set by the final decree, to occur); Johnson, 37 S.W.3d at 895-96 (holding that the trial court’s order constituted enforcement, not modification, because the order awarded the wife what she was originally entitled to receive under the final decree). The order simply enforces the division set by the final decree, guarantees that the reasonable expectations of the parties concerning the allocation of the retirement benefits would be protected, and ensures that Husband’s unilateral attempt to reduce Wife’s benefits would
go unrewarded. See Danielson, 36 P.3d at 758-59 (noting that the order protected the reasonable expectations of the parties). Under the facts in our case, we conclude that the trial court had jurisdiction to enter the order. Husband’s technical argument rings hollow, and we reject it.

D. Finality

{19} Finally, Husband argues that the trial court’s order is invalid because it violates the principle of finality. Our cases recognize the important policy of finality—that divorce decrees cannot be revisited, unless there are exceptional circumstances. See Mendoza, 103 N.M. at 331-32, 706 P.2d at 873-74. But we disagree with Husband’s argument. Husband’s choice to convert his benefits is what undermined the finality of the divorce decree because his choice altered the rights of Wife that were set by the decree. The court’s order preserved the division of benefits set by the judgment. Therefore, the order advanced the principle of finality; it did not violate it. See Black, 2004 ME 21, ¶ 13 (noting that the husband’s election to waive retirement benefits in favor of disability benefits promoted the exact instability the policy favoring finality of judgments was designed to avoid). Were we to hold otherwise, we would allow Husband to alter Wife’s benefits without his having to obtain court approval. We cannot accept such an inequitable result.

III. CONCLUSION

{20} We hold that the trial court had jurisdiction to enforce the final decree and to require Husband to pay Wife the share of his military retirement benefits awarded to her in the final decree. Accordingly, we affirm the order of the trial court.

{21} IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge
IRA ROBINSON, Judge (specially concurring)

ROBINSON, Judge (specially concurring).

{22} I have chosen to specially concur because this case presents an opportunity to look at what might be described as the larger picture. In trying to analyze this case, I was impressed with the case of In re Marriage of Pierce, 982 P.2d 995 (Kan. Ct. App. 1999). That divorce case went against our holding here. In Pierce, the Kansas Court of Appeals held that, under much the same fact pattern as our case, a state trial court had no jurisdiction over disability benefits received by a veteran and could not order the husband (the veteran) to change the payment back to retirement benefits and also could not order him to pay his disability benefits to his wife. Id. at 998. Then, the Kansas court said something really interesting: “We conclude the court may not do indirectly what it cannot do directly.” Id.

{23} The Kansas court held that the trial court had no method of granting relief to the wife. Id. That is exactly the opposite of what we are holding here. While Pierce is a minority decision, its reasoning seemed to make sense to me—a somewhat technical analysis, but a correct one. We do this every day.

{24} Then, I reread the Opinion in our case again. I had been concerned that it repeatedly reasoned that not allowing the husband to waive his retirement payments and switch to disability benefits was simply not “fair” to the wife and not “reasonable.” The Opinion repeats this language several times.

{25} After further rumination, I have reached a different conclusion. What the Opinion does is precisely what we should be doing. We should be doing what is fair and reasonable. That is what justice is all about—fair and reasonable, not just technically workable or correct.

{26} I, therefore, concur.

IRA ROBINSON, Judge
Opinion

LYNN PICKARD, JUDGE

{1} Jerome Sedillo (Plaintiff) appeals from the district court’s orders granting summary judgment to the State of New Mexico Department of Public Safety, New Mexico State Police, Cabinet Secretary John Denko, Jr., Cabinet Secretary Carlos R. Maldonado, and New Mexico State Police Board (Defendants). Plaintiff contends that (1) the district court erred in granting Defendants’ motion for summary judgment denying Plaintiff’s private right of action under the Peace Officer’s Employer-Employee Relations Act (the POEERA) and (2) the district court erred in granting Defendants’ motion for summary judgment upholding Defendants’ decision to deny Plaintiff’s reinstatement. We affirm the district court’s orders.

FACTUAL AND PROCEDURAL BACKGROUND

{2} Plaintiff filed a verified petition for writ of mandamus and complaint for declaratory judgment, injunctive relief, and damages for Defendants’ violation of New Mexico statutes and Department of Public Safety rules and regulations. Specifically, Plaintiff complained that his statutory rights to a fair and full investigation of his application to be reinstated as a member of the Department of Public Safety of the New Mexico State Police (DPS) were violated under DPS rules and regulations and the POEERA. See NMSA 1978, § 29-14-1 to -11 (1991).

{3} Plaintiff was employed as a New Mexico State Police Officer from December 1992 until August 9, 2001, when he voluntarily resigned. In May 2000, several State Police Officers, including Plaintiff, were assigned to the Los Alamos area during the Cerro Grande fire. On May 22, 2000, several DPS officers engaged in an incident which allegedly involved racially discriminatory actions toward a fellow officer, Officer Dexter Brock (the Brock incident). Officer Brock filed a complaint against the State of New Mexico for racial discrimination, which was later settled. DPS opened an internal affairs investigation into the allegations of Officer Brock. Plaintiff was informed that an investigation into the Brock incident was being conducted. On December 28, 2000, Plaintiff was advised by then Chief of Police, Frank Taylor, that Plaintiff was implicated in the Brock incident. Plaintiff was alleged to have failed to follow rules, regulations, policies, or procedures and to have engaged in conduct unbecoming an officer with regard to Brock. Plaintiff denied the allegations; however, he was ordered to submit to a polygraph interrogation session on January 29, 2001. During the course of the polygraph interrogation, Plaintiff also denied involvement in the racially discriminatory actions against Officer Brock. At the conclusion of the examination, Plaintiff was informed that his denials were found to be deceptive under the test standards. Subsequently, Plaintiff was advised by a fellow officer that his employment with the State Police was going to be terminated. During the investigation, but before any disciplinary action could be imposed against him, Plaintiff accepted another position with the Department of Energy and resigned from the State Police effective August 9, 2001.

{4} In 2002, Plaintiff applied for reinstatement as an officer with the State Police. Plaintiff was advised by the former Chief of Police, Chief Taylor, that his application would not be considered pursuant to DPS Policy PRS:01:00 (the Policy). The Policy states that “[n]o applicant shall be considered for reinstatement who previously was terminated, resigned in lieu of termination proceedings, or resigned either while disciplinary proceedings were pending, in process, or prior to serving any discipline imposed.” On January 15, 2003, Plaintiff again requested reinstatement by letters to Defendants Cabinet Secretary John Denko and Chief/Deputy Secretary Carlos Maldonado, who were part of a new police administration. By letter dated February 5, 2003, Chief Maldonado advised Plaintiff that his request for reinstatement was denied pursuant to the Policy.

{5} In response to Plaintiff’s petition and complaint, Defendants filed two motions for summary judgment. Defendants’ first motion was granted in part and denied in part. The district court’s order granted the motion on the basis that (1) the Policy is valid and enforceable, having been enacted pursuant to the authority granted by NMSA 1978, § 29-2-4.1 (1979); (2) the Policy was not required to be filed under the State Rules Act, NMSA 1978, §§ 14-4-1 to -11 (1967, as amended through 1995), which...
requires State agencies to file and publish rules, regulations, and proclamations; and (3) the POEERA does not create a private right of action for money damages for Plaintiff against Defendants. The district court denied Defendants’ motion for summary judgment on the basis that the Policy bars Defendants from considering Plaintiff’s application for reinstatement as a State Police Officer, concluding that Plaintiff did not resign while disciplinary proceedings against him were pending or in process.

Defendants’ second motion for summary judgment argued that even if Plaintiff did not resign while disciplinary proceedings were pending or in process, the Policy contains another provision that supports DPS’s decision to deny Plaintiff’s request for reinstatement. Defendants argued that the Policy specifically requires that a prior State Police Officer seeking reinstatement “must have satisfactorily performed the duties of a New Mexico State Police officer prior to his initial separation from the force.” Defendants presented DPS documents along with Chief Maldonado’s affidavit indicating that Plaintiff did not satisfactorily perform his duties as a State Police Officer prior to his resignation from the force for several reasons including the Brock incident. The district court granted the Defendants’ second motion for summary judgment, observing “that the determination of defendant State Police Chief Maldonado that Plaintiff did not satisfactorily perform his duties was not arbitrary or capricious.” Plaintiff appeals the summary judgment orders.

**DISCUSSION**

1. **Standard of Review**

   Plaintiff contends that the district court erred in granting Defendants’ motion for summary judgment on his claims under the POEERA because the POEERA provides a private right of action. Plaintiff asserts that his POEERA rights were violated because the polygraph results and the attendant investigation regarding the Brock incident should not be used to deny him reinstatement. He asserts that an unauthorized individual intruded during the polygraph interrogation, he did not receive a copy of the interrogation record or the allegations, and the duration of the interrogation exceeded the statutory limit. Plaintiff requests damages for these violations.

2. **Private Right of Action Under the POEERA**

   Plaintiff relies on a series of Tort Claims Act cases for the proposition that the POEERA creates a private right of action in a similar way. We discuss the critical distinction between these cases and our case later in this opinion. At this point, we set forth the test established in these cases and relied upon by Plaintiff for determining whether a statute creates a right that can be redressed under 42 U.S.C. § 1983, and we show that Plaintiff’s claim fails under the explicit language of that test.

3. **Private Right of Action Under the POEERA**

   Even assuming that this test applies to this case, the language we have quoted from Section 29-14-2(C), stating that the POEERA applies only to administrative actions, is exactly the sort of express limiter that would preclude the POEERA’s usefulness in an ordinary civil action such as the one Plaintiff brought below.

4. **Moreover, we agree with Defendants that there is no express allowance of a private right of action anywhere in the POEERA. See Patterson v. Globe Am. Cas. Co., 101 N.M. 541, 543, 685 P.2d 396, 398 (Ct. App. 1984) (indicating that the legislature knows how to create a private remedy if it intends to do so), superseded by statute on other grounds as stated in Journal Publ’g Co. v. Am. Home Assurance Co., 771 F. Supp. 632, 635 (S.D.N.Y. 1991). Finally, we note that not only does the POEERA state that it applies only to administrative actions, but it also states that its provisions do not apply to criminal investigations. Thus, had Defendants contemplated charging Plaintiff with false imprisonment or assault, crimes that were arguably committed during the Brock incident, there would be no private right of action under the express language of this provision. It would be odd indeed to imply...
a private right of action for violations of provisions of an act that the legislature has expressly said could be violated in the context of criminal investigations. For these reasons, we find no support in the statutory language for Plaintiff’s argument concerning a private right of action, and in fact we find express language contrary to it.

{13} Plaintiff places major reliance on several Tort Claims Act cases. We are uncertain how Plaintiff intends these cases to apply. We note that Plaintiff did not file his petition under the Tort Claims Act, and he emphasizes that a “claim pursuant to the POEERA is not a tort claim, it is a claim based upon a statute which is a statutory claim. Violation of the POEERA is not a tort. No common law tort provided the rights that the POEERA provides.” Nonetheless, we discuss these cases to show how vastly different they are from this case.

{14} Plaintiff cites California First Bank, 111 N.M. at 66, 801 P.2d at 648, in which an estate sued governmental entities for wrongful death and personal injury, which are well-established statutory or common law remedies, as well as for damages under the Tort Claims Act. California First Bank concerns sovereign immunity for injury caused by law enforcement officers to third parties under the Tort Claims Act. Id. California First Bank specifically held that NMSA 1978, § 29-1-1 (1979), which sets out specific duties of police officers to investigate criminal violations and file reports, may be redressed because the Tort Claims Act waives immunity for violations of rights secured under New Mexico law and such a waiver is consistent with the general public policy regarding compensation for victims of government torts expressed in the Tort Claims Act. See Cal. First Bank, 111 N.M. at 74-75, 801 P.2d at 656-57. California First Bank, however, does not create a private right of action for non-tortious behavior for police officers against DPS when an officer is under internal investigation for alleged actions that could result in administrative sanctions being levied against the officer.

{15} Similarly, in Weinstein v. City of Santa Fe ex rel. Santa Fe Police Department, 121 N.M. 646, 654, 916 P.2d 1313, 1321 (1996), our Supreme Court followed California First Bank, holding that the plaintiffs, members of the public, may raise a claim for personal injuries resulting from a law enforcement officer’s negligent failure to perform a statutory duty which resulted in a battery. The Court noted that the plaintiffs’ tort claims may be enforced under the Tort Claims Act. Weinstein, 121 N.M. at 655, 916 P.2d at 1322. As in California First Bank, the Court concluded that Section 29-1-1 confers an individual right on the public for violations of police duties to them and that the legislature did not intend to preclude tort liability under the Tort Claims Act for a violation of the right. Weinstein, 121 N.M. at 655, 916 P.2d at 1322. The Court reiterated that the police duty to investigate violations of criminal laws, imposed by Section 29-1-1, is designed to protect individual citizens from harm. Id.; see Scheer v. Bd. of County Comm’rs, 101 N.M. 671, 677, 687 P.2d 728, 734 (1984) (holding that Section 29-1-1 created a duty that supported a cause of action in negligence against law enforcement officers who failed to investigate a reported assault in progress). Again, Weinstein, like California First Bank, was decided in the context of well-established torts or claims under the Tort Claims Act and does not create a private right of action for officers against their DPS employer.

{16} Plaintiff also cites Weidler v. Big J Enterprises, Inc., 1998-NMCA-021, 124 N.M. 591, 953 P.2d 1089 and Michaels v. Anglo American Auto Auctions, Inc., 117 N.M. 91, 869 P.2d 279 (1994). We are not persuaded that these cases support Plaintiff’s argument. In these cases, as in California First Bank and Weinstein, the plaintiffs filed tort claims. See Weidler, 1998-NMCA-021, ¶ 1; Michaels, 117 N.M. at 91, 869 P.2d at 279. Weidler and Michaels concern claims that stated a common-law cause of action for unlawful discharge. Weidler stated that “New Mexico thus recognizes an employee’s right to institute a private cause of action, not seeking enforcement of the statute as such, but to enforce his common-law right not to be discharged for reporting unsafe practices in the workplace.” 1998-NMCA-021, ¶ 17. In this case, Plaintiff cannot claim and has not claimed any cause of action for wrongful discharge or any common law tort or breach of duty. It is important, too, that Plaintiff has not cited any authority, and we are certainly aware of none, standing for the proposition that a person has any right to reinstatement to a job from which the person has voluntarily resigned.

{17} Therefore, as the structure and wording of the POEERA and Plaintiff’s cited cases in support of his argument are unavailing, we hold that the POEERA does not provide a private right of action for this Plaintiff against these Defendants.

3. The District Court’s Finding That the Decision Not to Reinstatement Plaintiff Was Not Arbitrary or Capricious

{18} Plaintiff contends that the district court erred in determining that DPS’s decision not to reinstate him was arbitrary and capricious. Plaintiff argues that the decision by Chief Taylor and Chief Maldonado was arbitrary and capricious because other individuals similarly situated to Plaintiff were reinstated. We do not address this question because Plaintiff’s brief and presentation on appeal are insufficient to establish a factual basis for this claim.

{19} Although we denied Defendants’ motion to strike Plaintiff’s brief in chief during the pendency of this appeal, our denial was without comment or explanation. We therefore could have denied the motion on the merits, denied it because Defendants could as easily raise their objections to Plaintiff’s brief in their answer brief, or denied it for a combination of these reasons because Defendants’ motion contained numerous complaints about deficiencies in the brief in chief. We now hold that, as to the contention that other individuals similarly situated to Plaintiff were reinstated, Plaintiff did not make an adequate showing of this in his brief in chief or on appeal.

{20} The brief in chief contains a paragraph without a single record reference, saying that Defendants provided information in discovery that various officers who were disciplined were reinstated. It is enough to answer this portion of Plaintiff’s argument by the familiar rule that contentions in an appellant’s brief not supported by record references need not be considered on appeal. See Murken v. Solv-Ex Corp., 2005-NMCA-137, ¶ 14, 138 N.M. 653, 124 P.3d 1192. However, we also point out that Plaintiff’s argument contains no discussion whatsoever concerning the circumstances of those officers’ performance or reinstatements as compared to Plaintiff’s. As the Supreme Court stated in Archuleta, the differing circumstances of different employees’ situations makes comparison on marginally relevant. Archuleta, 2005-NMSC-006, ¶ 24. Such comparisons are completely irrelevant where we know absolutely nothing about the underlying facts of those officers’ disciplinary actions and reinstatements.

{21} As to the one officer about whom Plaintiff’s brief contains detailed argument and record reference, the record reference is to an order sealing a portion of the court file. Plaintiff has not placed before us the sealed portions of the record on which he
relies. “It is the burden of the appellant to bring up a record sufficient for review of the issues [he or] she raises on appeal.” Reeves v. Wimberly, 107 N.M. 231, 236, 755 P.2d 75, 80 (Ct. App. 1988). To the extent that the record before us is deficient, we will “indulge in every presumption in support of the correctness of the trial court’s decision.” Luxton v. Luxton, 98 N.M. 276, 278, 648 P.2d 315, 317 (1982).

{22} Plaintiff also maintains that the district court should not have used the administrative standard to review Chief Maldonado’s decision because Plaintiff “was not allowed any input whether through a written statement or testimony and he was not allowed to cross examine any witnesses.” This contention concerning the appropriate standard used by the district court, interesting though it may be inasmuch as Plaintiff resigned before any administrative proceedings were formally initiated, will not be addressed because it was not raised in the proceedings below. In order to preserve an issue for appeal, the issue must have been raised before the trial court such that it “appear[s] that [the] appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.” Woolwine v. Furr’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987).

{23} When Defendants moved for summary judgment and contended that Chief Maldonado’s decision was not arbitrary or capricious, Plaintiff alleged a factual dispute in which he contended that Chief Maldonado’s decision was arbitrary and capricious because Plaintiff had received satisfactory performance evaluations in the past. Plaintiff never argued below that the arbitrary and capricious standard could not be used, and therefore cannot argue on appeal that the district court erred in using an erroneous standard when it ruled that “the determination of defendant State Police Chief Maldonado that Plaintiff did not [satisfactorily perform his duties] was not arbitrary or capricious.”

{24} In addition, on appeal, Plaintiff abandons any allegations asserting that the decision was arbitrary and capricious due to a factual conflict based on his prior alleged good performance by not arguing it in his brief. See State v. Sandoval, 88 N.M. 267, 270, 539 P.2d 1029, 1032 (Ct. App. 1975) (indicating that points of error identified in the statement of proceedings but neither briefed nor supported by authority are considered abandoned). The arguments in Plaintiff’s briefs rely solely on the other officers who are claimed to be similarly situated. However, as stated above, the record is insufficient to establish this ground. Under these circumstances, we cannot say that the district court erred in ruling that Chief Maldonado’s decision was not arbitrary or capricious.

CONCLUSION

{25} We affirm the district court’s orders granting summary judgment to Defendants.

{26} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Chief Judge

CYNTHIA A. FRY, Judge
On the evening of July 28, 2001, Plaintiff was standing with her son on the balcony in front of her apartment at La Mariana Apartments, visiting with two neighbors, who were present in the parking lot below. Plaintiff’s phone rang. After Plaintiff went inside to answer the phone, her son, who had been playing and swinging on the balcony guardrail, fell head-first through an eight and three-quarters inch space between a wooden roof support column and the first vertical post of the balcony guardrail, striking the pavement below. Her son suffered a skull fracture, and Plaintiff also alleged that he developed post-traumatic epilepsy as a result of the impact.

II. NEGLIGENCE PER SE

5. Plaintiff argues that the trial court erred in dismissing her claim for negligence per se, and submits that provisions of the UBC, relating to the continued use and occupancy of buildings in existence at the time new versions of the UBC are promulgated, created an absolute duty on the part of Defendant to abate any hazard posed by the guardrail space through which her son fell. We disagree, and hold that the trial court correctly ruled that the 1997 UBC provisions, relied on by Plaintiff, did not set out a sufficiently specific duty to warrant submission of a negligence per se instruction to the jury.

6. “A directed verdict is appropriate only when there are no true issues of fact to be presented to a jury.” Sunwest Bank of Clovis v. Garrett, 113 N.M. 112, 115, 823 P.2d 912, 915 (1992). Whether the UBC provisions relied upon by Plaintiff may serve as the basis of a claim for negligence per se is a question of law which we review de novo. See Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶ 43, 134 N.M. 77, 73 P.3d 215; see also Acosta v. City of Santa Fe, 2000-NMCA-092, ¶ 16, 129 N.M. 632, 11 P.3d 596 (noting that interpreting an ordinance to determine existence of legal duty is a question of law).

7. In determining whether a negligence per se instruction is appropriate, we apply the following four-part test adopted by our Supreme Court in Archibeque v. Homrich, 88 N.M. 527, 532, 543 P.2d 820, 825 (1975):

1. There must be a statute which prescribes certain actions or defines a standard of conduct, either explicitly or implicitly;
2. the defendant must violate the statute;
3. the plaintiff must be in the class of persons sought to be protected by the statute; and
4. the plaintiff asserts the following three errors:

I. BACKGROUND

2. The underlying facts of this case are not in dispute. The Apartments were constructed in 1982, and purchased by Gerald Deabel (Defendant) in 1994. The 1979 UBC, as adopted by ordinance of the City of Las Cruces, governed the design and construction of the Apartments. At that time, UBC provisions, governing guardrail construction, required that vertical posts within a guardrail, or any ornamental pattern serving the same barrier-creating function, be designed so that a nine-inch sphere could not be passed through any space within the overall guardrail design. 1979 U.B.C. § 1716.

3. Since 1979, Section 1716 of the UBC has been amended twice. In 1983, the maximum allowable space within a guardrail design was reduced to six inches; in 1986, it was further reduced to four inches. These amendments were made in order to reduce the danger posed to children, who were small enough to fit through the prior allowable spaces, or whose heads could become caught in such spaces.

4. Since 1979, Section 1716 of the UBC has been amended twice. In 1983, the maximum allowable space within a guardrail design was reduced to six inches; in 1986, it was further reduced to four inches. These amendments were made in order to reduce the danger posed to children, who were small enough to fit through the prior allowable spaces, or whose heads could become caught in such spaces.

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the harm or injury to the plaintiff must generally be of the type the legislature through the statute sought to prevent. 

Id. 

{[8]} Regarding the first factor, this Court has acknowledged that “[t]here is substantial authority for the proposition that a negligence-per-se instruction is appropriate only if the statute or regulation defines the duty with specificity.” Abeita v. N. Rio Arriba Elec. Coop., 1997-NMCA-097, ¶ 21, 124 N.M. 97, 946 P.2d 1108. To further explain this principle, we adopted the following language from Swoboda v. Brown, 196 N.E. 274, 278-79 (Ohio 1935): 

Where a specific requirement is made by statute and an absolute duty thereby imposed, no inquiry is to be made whether the defendant acted as a reasonably prudent man, or was in the exercise of ordinary care. . . . But, where duties are undefined, or defined only in abstract or general terms, leaving to the jury the ascertainment and determination of reasonableness and correctness of acts and conduct under the proven conditions and circumstances, the phrase “negligence per se” has no application. 

{[9]} With these principles in mind, we turn to the successive UBC provisions relied upon by Plaintiff in support of her argument that a charge of negligence per se should have been submitted to the jury. Plaintiff argues that provisions of the 1997 UBC, permitting the continued use and occupancy of existing buildings except where such use and occupancy is “dangerous to human life,” created an absolute duty on the part of Defendant to abate the hazard posed by the eight and three-quarters inch space between a roof support post and the first vertical post of the guardrail, protecting the second-floor balcony in front of Plaintiff’s apartment entrance. 1997 U.B.C. § 102 We disagree, and hold that the trial court correctly concluded that the UBC provisions cited by Plaintiff neither establish an absolute duty of repair with regard to any hazard posed by the guardrail space, nor justify departure from the established standard of ordinary care that requires all landlords to maintain the common areas of their properties in a reasonably safe condition. 

{[10]} As the basis for her claim of negligence per se, Plaintiff cites several provisions of the 1997 UBC. First, Plaintiff points to Section 102, which provides: 

All buildings or structures regulated by this code that are structurally unsafe or not provided with adequate egress, or that constitute a fire hazard, or are otherwise dangerous to human life are, for the purpose of this section, unsafe. . . . All such unsafe buildings, structures or appendages are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition or removal in accordance with the procedures set forth in the Dangerous Buildings Code or such alternate procedures as may have been or as may be adopted by this jurisdiction. 

{[11]} Plaintiff next cites to the 1997 UBC Section 3402: “[t]he owner or . . . designated agent shall be responsible for the maintenance of buildings and structures.” Lastly, Plaintiff submits that the reduced, four-inch guardrail space limitation found in Section 509.3 of the 1997 UBC provides a “precise, measurable standard” to which Defendant was required to conform. At trial, Plaintiff elicited testimony from experts on both sides, establishing that the eight and three-quarters inch guardrail space, through which her son fell, was a condition dangerous to life. Construing these provisions together, and relying on that expert testimony, Plaintiff argued below that because the space in the guardrail was “dangerous to human life,” for example, small children, Sections 102 and 3402 triggered an “absolute duty of repair” on the part of Defendant which “had to conform to the specific, verifiable 4-inch standard under the UBC.” 

{[12]} According to Plaintiff’s argument, any safety-related amendments to the UBC would create an absolute duty on the part of landlords to ensure continuing compliance with those amendments. We see nothing in the UBC, however, indicating an intent to impose such a broad and absolute duty on landlords. Instead, we find several provisions that counsel against accepting Plaintiff’s argument that the UBC imposes an absolute duty of compliance with amendments made subsequent to a building’s construction. 

{[13]} Chapter 34 of the 1997 UBC governs existing structures at the time of Plaintiff’s son’s fall. Section 3402 of that chapter provides that “[a]ll devices or safeguards required by this code shall be maintained in conformance with the code edition under which installed.” U.B.C. § 3402 (emphasis added). Section 3403.2 similarly indicates the lack of a duty to retrofit existing structures. “Additions, alterations or repairs may be made to any building or structure without requiring the existing building or structure to comply with all the requirements of this code, provided the addition, alteration or repair conforms to that required for a new building or structure.” U.B.C. § 3403.2 Section 3401, relied on in part by Plaintiff, provides that “[b]uildings in existence at the time of the adoption of this code may have their existing use or occupancy continued, if such use or occupancy was legal at the time of the adoption of this code, provided such continued use is not dangerous to life.” We see nothing in these provisions requiring, or even suggesting, that Defendant was responsible for ensuring compliance of the Apartments with UBC amendments made (1) subsequent to the apartment’s construction, but prior to Defendant’s purchase of the property, or (2) after Defendant purchased the apartments in 1994. 

{[14]} As further support for our analysis, we note that the UBC does not specifically identify what conditions may, or may not, render a building unsafe or dangerous to life. While it alludes to general examples, such as a lack of sufficient egress, structural instability, or the presence of a fire hazard, it appears that the determination of whether a building is unsafe, or otherwise dangerous to life, is left to the authority of building inspectors charged with enforcement of the UBC’s specific technical and structural requirements. See 1997 U.B.C. § 3402 (“To determine compliance with this subsection, the building official may cause a structure to be reinspected.”). We specifically note the absence of any language, identifying guardrails that do not comply with the current, four-inch standard found in Section 509.3 of the 1997 UBC as rendering a structure unsafe, or dangerous to life. We, therefore, conclude that the UBC lacks the requisite level of specificity to justify the submission of a negligence per se instruction to the jury. 

{[15]} Lastly, we note that Plaintiff’s argument would bring the UBC in direct conflict with New Mexico’s established standard of ordinary care, requiring Defendant, as a landlord, to “maintain the common areas of his property in a reasonably safe condition.” Calkins v. Cox Estates, 110 N.M. 59, 64, 792 P.2d 36, 41 (1990); see NMSSA 1978, § 47-8-20(A)(3) (1999) (requiring landlords to maintain common areas in
a “reasonably safe condition”); Rule 13-1315 NMRA (instructing that a landlord is bound by the standard of ordinary care). Our Supreme Court has explicitly rejected attempts to impose an absolute duty upon landlords to provide common areas that are absolutely free of any hazards, whether latent or apparent. “A landlord is not obligated to provide a tenant with a premises completely free of defects. As a matter of fairness, the law does not make landlords guarantors of the safety of their tenants or visitors. Rather, a landlord is bound by the standard of ordinary care[].” Gourdi v. Berkelo, 1996-NMSC-076, ¶ 8, 122 N.M. 675, 930 P.2d 812 (citations omitted).

{16} In this case, we see no reason to supplant this established standard of ordinary care with a standard that renders landlords strictly liable (notwithstanding issues of causation) for any injury suffered by a tenant that might have been prevented by bringing an existing structure into compliance with amendments to the UBC. Cf. Sims v. Sims, 1996-NMSC-078, ¶ 22, 122 N.M. 618, 930 P.2d 153 (stating that statutes “will be interpreted as supplanting the common law only if there is an explicit indication that the legislature so intended”). In the absence of clear legislative or municipal imposition of a duty to repair existing conditions rendered obsolete by later amendments to the UBC, we think ordinary negligence principles remain the best measure of a landlord’s civil liability for tenant injury. Accordingly, we conclude that the trial court was correct in granting Defendant’s motion for judgment as a matter of law and dismissing Plaintiff’s claim for negligence per se.

III. EXCLUSION OF OTHER CODE VIOLATIONS

{17} Plaintiff contends that the trial court erroneously excluded evidence of other 1979 UBC violations observed by Plaintiff’s architectural expert at the Apartments. The other violations related to the fire-rating of certain windows, the number of balcony exits, the measurements of posts in stairway guardrails, corridor lengths, and the height of doorway thresholds. Plaintiff argues that the additional violations, though unrelated to the guardrail space through which her son fell, were relevant to the issue of constructive notice to Defendant that the Apartments were in need of repair or rehabilitation.

{18} We review the admission, or exclusion, of evidence for abuse of discretion. Coates v. Wal-Mart Stores, Inc., 1999-NMSC-013, ¶ 36, 127 N.M. 47, 976 P.2d 999. “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case” is “clearly untenable or is not justified by reason.” State v. Stanley, 2001-NMSC-037, ¶ 5, 131 N.M. 368, 37 P.3d 85 (internal quotation marks and citation omitted).

{19} There was no error in the exclusion of this evidence. Plaintiff’s reliance on Ruiz v. Southern Pacific Transportation Company, 97 N.M. 194, 638 P.2d 406 (Ct. App. 1981) is misplaced. In that case, the defendant was ordered to respond to discovery requests regarding other accidents similar in nature to the one suffered by the plaintiff in that case, in order to demonstrate the defendant’s notice and knowledge of conditions likely to result in further accidents. Id. at 202, 638 P.2d at 414. In so holding, this Court stated:

Evidence of the happening of accidents at other places is ordinarily not admissible to show whether the danger of such an accident exists at the place in question. If, however, such evidence would have the tendency to make the existence of defendants’ allegedly negligent omissions in this case, after notice and knowledge of danger, more or less probable, the evidence is relevant and admissible.

Id.

{20} Here, Plaintiff did not seek to introduce evidence of other accidents which might have put Defendant on notice of the danger posed by the guardrail through which her son fell. Had other children fallen through guardrail spaces during the period of Defendant’s ownership, then the principles underlying our holding in Ruiz might have some applicability here. In contrast, Plaintiff argues that the mere existence of other code violations at the apartments is “probative of Defendant’s knowledge, or lack thereof, of the state of the property and his legal obligations with respect to repair.” The other violations, however, have no tendency to make more, or less, probable Defendant’s awareness of any danger posed by, or any duties relating to, the specific hazard at issue in this case. See Rule 11-401 NMRA (defining relevance). Being irrelevant, the other violations were properly excluded by the trial court. Rule 11-402 NMRA (irrelevant evidence inadmissible).

IV. JURY INSTRUCTIONS

{21} The final point of error raised by Plaintiff challenges UJI 13-302 submitted to the jury. Plaintiff asserts three errors regarding this instruction: (1) that by including Defendant’s affirmative defense based on Plaintiff’s negligence, the instruction improperly permitted her negligence to be imputed to her son; (2) that the instruction improperly invoked contributory negligence; and (3) that the instruction was vague because it failed to adequately instruct the jury on principles of comparative fault. We hold that the trial court correctly permitted Defendant to assert an affirmative defense based on the negligence of Plaintiff, and that she failed to preserve the other arguments she now raises on appeal.

{22} The question of whether the jury was properly instructed with regard to Defendant’s affirmative defense based upon Plaintiff’s negligence is a mixed question of law and fact subject to de novo review. State v. Gaitan, 2002-NMSC-007, ¶ 10, 131 N.M. 758, 42 P.3d 1207. “A jury instruction is proper, and nothing more is required, if it fairly and accurately presents the law.” State v. Laney, 2003-NMCA-144, ¶ 38, 134 N.M. 648, 81 P.3d 591.

{23} Plaintiff and Defendant each tendered UJI 13-302 and special verdict forms. In addition to stating a denial of Plaintiff’s claim that he was negligent, Defendant’s UJI 13-302 included a statement of an affirmative defense based upon Plaintiff’s negligent supervision of her son, and Defendant’s special verdict form permitted the jury to apportion fault between Plaintiff and Defendant. In contrast, Plaintiff’s tendered UJI 13-302 did not include any statement of Defendant’s affirmative defense, and the special verdict form tendered by Plaintiff also only permitted the jury to assign causation and, therefore, liability for damages to Defendant alone.

{24} We first address issues relating to preservation of Plaintiff’s challenges to the submitted instructions. At trial, Plaintiff’s counsel objected to the inclusion of any affirmative defense based on her negligence, arguing that “by allowing the jury to compare the negligence of [Plaintiff] . . . the Court is attributing her negligence to the child . . . improperly, so for that reason[,] we object to Instruction Number 3 and to the form of verdict.” Plaintiff then requested that the trial court accept Plaintiff’s tendered instruction and special verdict form, which limited the jury’s consideration only to the question of Defendant’s negligence and made no provision for comparing fault between Defendant and Plaintiff.

{25} The trial court concluded that Defen-
of the plaintiff in determining the amount that Defendant would pay as damages on Plaintiff’s son’s claims.

{27} Plaintiff contends that the submission of UJI 13-302, including Defendant’s affirmative defense based upon Plaintiff’s negligence, “violated the principle that the negligence of the parent cannot be imputed to the child to bar recovery.” In support of her argument, Plaintiff cites to the case of Montoya v. Winchell, 69 N.M. 177, 364 P.2d 1041 (1961), which, despite having been decided under contributory negligence, remains in the annotations to UJI 13-1610, which currently states: “If you find that the parent was negligent, any such negligence shall not be attributed to the child.” Prior to New Mexico’s abolishment of contributory negligence and joint and several liability, the rule read as follows: “If you find that the parents of the child were negligent such negligence does not prevent a recovery by the child, if the child is otherwise entitled to recover.” UJI Civ. 12.8 NMRA (1979).

{28} In our view, at least in the context of a pure comparative fault system, the rule, prohibiting the imputation of parental negligence, is simply an atavistic holdover from the era of contributory negligence. The rule’s future obsolescence was anticipated by our Supreme Court when it stated in Scott v. Rizzo that “[u]nder comparative negligence, rules designed to ameliorate the harshness of the contributory negligence rule are no longer needed.” 96 N.M. 682, 687, 634 P.2d 1234, 1239 (1981) (abolishing “last clear chance” rule and the distinction between ordinary and gross negligence); cf. Dunleavy v. Miller, 116 N.M. 353, 354, 862 P.2d 1212, 1212 (1993) (abolishing doctrine of sudden emergency because of its incompatibility with principles of comparative negligence); Klopp v. Wackenhut Corp., 113 N.M. 153, 159, 824 P.2d 293, 299 (1992) (holding “open and obvious danger” rule to be inconsistent with pure comparative negligence system). Because “[c]omparative negligence has freed us from artificial doctrines of the past, such as contributory negligence as a total defense,” rules designed to counteract the unjust consequences of those doctrines are unnecessary and inapplicable in a comparative fault system. Yount v. Johnson, 1996-NMCA-046, ¶¶ 4-5, 121 N.M. 585, 915 P.2d 34 (discussing departure from “judicially declared immunity or protectionism, whether of a special class, group or activity,” toward a pure comparative fault system under which “everyone has a duty to exercise ordinary care for the safety of others”) (internal quotation marks and citations omitted).

{29} The rule at issue here—that a parent’s negligence may not be imputed to a child to bar recovery—was developed solely “as [a] judicial escape mechanism[] to avoid the sometimes harsh results of contributory negligence, which operated to deny plaintiffs any recovery even if they were only minimally at fault for their injuries.” Berlangieri v. Running Elk Corp., 2003-NMCA-024, ¶ 23, 134 N.M. 341, 76 P.3d 1098. For example, it permitted a child to fully recover from a negligent defendant despite any contributory negligence on the part of the child’s parent(s), making defendant jointly and severally liable for the child’s injuries. Put simply, the rule elevated concerns about fairness to child victims of negligence above concerns about fairness to defendants. In contrast, “[o]ur system of pure comparative negligence is based on fairness to both plaintiffs and defendants.” Andrews v. Saylor, 2003-NMCA-132, ¶ 26, 134 N.M. 545, 80 P.3d 482 (declining to create a legal malpractice exception to comparative fault); see also Y.H. Ins., Inc. v. Godales, 690 So. 2d 1273, 1278 (Fla. 1997) (holding that comparison of fault between parent and the defendant, based on parent’s negligent supervision of child who fell through a stairway guardrail, was appropriate under Florida’s comparative negligence statute, and drawing distinction between “imputed” contributory negligence and modern policy mandating comparison of injury-causing fault).

{30} Because New Mexico’s adoption of pure comparative negligence is centered on the policy that “each individual tortfeasor should be held responsible only for his or her percentage of the harm,” we hold that Defendant was entitled to assert an affirmative defense based upon the negligence of Plaintiff and to have her negligence compared in determining any amount that Defendant would pay as damages. Reichert v. Atler, 117 N.M. 623, 625, 875 P.2d 379, 381 (1994); see also NMSA 1978, § 41-3A-1(B) (1987) (stating that “any defendant who establishes that the fault of another is a proximate cause of a plaintiff’s injury shall be liable only for that portion of the total dollar amount awarded as damages to the plaintiff that is equal to the ratio of such defendant’s fault to the total fault attributed to all persons, including plaintiffs, defendants and persons not party to the action”); see generally Bartlett v. N.M. Welding Supply, Inc., 98 N.M. 152, 159, 646 P.2d 579, 586 (Ct. App. 1982) (abolishing joint and several liability). We, therefore, conclude
that the submission of UJI 13-302 properly reflected general principles of comparative negligence and accurately stated the law applicable to this case.

{31} As a final note, we recognize that the rule forbidding the imputation of parental negligence retains vitality in other contexts. See, e.g., Rider v. Albuquerque Pub. Schs., 1996-NMCA-090, ¶¶ 14-15, 122 N.M. 237, 923 P.2d 604 (holding that negligent failure of custodian to file notice of the child’s claim under Tort Claims Act did not foreclose the child from filing suit); Jaramillo v. Bd. of Regents of Univ. of N.M., 2001-NMCA-024, ¶ 1, 130 N.M. 256, 23 P.3d 931 (applying same rule to excuse the child’s failure to meet statute of limitations period). In these cases, parental negligence was not a proximate cause of the injury itself. Accordingly, we limit the applicability of this holding to cases in which a defendant asserts an affirmative defense, supported by the evidence, based on the negligent failure of a parent to prevent harm to his or her child.

V. CONCLUSION

{32} For the foregoing reasons, we affirm the order of the trial court dismissing Plaintiff’s claim for negligence per se and the jury verdict finding for Defendant on Plaintiff’s claims for negligence, intentional infliction of emotional distress, and loss of consortium.

{33} IT IS SO ORDERED.

IRA ROBINSON, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

RODERICK T. KENNEDY, Judge

Certiorari Granted, No. 30,057, November 29, 2006

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-004

JEROME C. ROMERO,
Appellant-Petitioner/Cross-Respondent,
versus
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RIO ARriba,
Appellee-Respondent/Cross-Petitioner.
No. 24,147 consolidated with No. 24,180
(fileD: August 29, 2006)

APPEAL FROM THE DISTRICT COURT OF RIO ARriba COUNTY
TIMOTHY L. GARCIA, District Judge

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OPINION

IRA ROBINSON, Judge

{1} The parties appeal from a district court order partially affirming and partially reversing the decision of the Rio Arriba County (County) Board of County Commissioners (Board) entered on May 30, 2003. Jerome Romero (Romero) claims that he is entitled to mine 14.5 acres of the land owned by Romero. On March 18, 1998, the Department’s Director held a hearing and approved gravel mining on 5 of the 14.5 acres as a grandfathered, non-conforming use. During a meeting held on April 29, 1998, after complaints from local residents, the Planning & Zoning Committee overturned the Director’s decision. However, on May 28, 1998, the Board voted in favor of denying the appeal of the Director’s decision. [RP 240-242] At a special meeting of the Board on July 15, 1998, after hearing the appeal of concerned citizens, the Board approved the grandfathered, non-conforming use of the 5 acres and reaffirmed that the Department would monitor the community’s concerns. Local residents appealed the Board’s decision to the district court, naming the County and Romero as defendants in Calabaza v. Rio Arriba Board of County Commissioners, No. D-0117-CV-0009801573. The Calabaza appeal was dismissed in October 1999.

{2} Romero did not appeal the findings of the Director and the Board that he was only entitled to mine 5 acres as a grandfathered use. However, with some encouragement from the Department and the County, Romero and ETM continued to seek the Board’s approval to mine the additional 9.5 acres. On October 9, 1998, Romero filed a “Development Permit Application” with the Department, seeking approval to mine the additional 9.5 acres. He also submitted a “Storm Water Pollution Prevention Plan” and other information requested by the County.

{3} On February 27, 1998, Española Transit Mix (ETM), with authorization from Romero, notified the County Planning and Zoning Department (Department) of its proposal to “develop a sand and gravel material source” on 14.5 acres of the land owned by Romero. On August 26, 1999, the County amended the “Rio Arriba County Design and Development Regulation System” (Ordinance 1996-1) to prohibit material source on 14.5 acres of the land owned by Romero. On March 18, 1998, the Director held a hearing and approved gravel mining on 5 of the 14.5 acres as a grandfathered, non-conforming use. During a meeting held on April 29, 1998, after complaints from local residents, the Planning & Zoning Committee overturned the Director’s decision. However, on May 28, 1998, the Board voted in favor of denying the appeal of the Director’s decision. [RP 240-242] At a special meeting of the Board on July 15, 1998, after hearing the appeal of concerned citizens, the Board approved the grandfathered, non-conforming use of the 5 acres and reaffirmed that the Department would monitor the community’s concerns. Local residents appealed the Board’s decision to the district court, naming the County and Romero as defendants in Calabaza v. Rio Arriba Board of County Commissioners, No. D-0117-CV-0009801573. The Calabaza appeal was dismissed in October 1999.

{5} On October 9, 1998, Romero and ETM filed a “Development Permit Application” with the Department, seeking approval to mine the additional 9.5 acres. He also submitted a “Storm Water Pollution Prevention Plan” and other information requested by the County.

{6} Romero did not appeal the findings of the Director and the Board that he was only entitled to mine 5 acres as a grandfathered use. However, with some encouragement from the Department and the County, Romero and ETM continued to seek the Board’s approval to mine the additional 9.5 acres. On October 9, 1998, Romero filed a “Development Permit Application” with the Department, seeking approval to mine the additional 9.5 acres. He also submitted a “Storm Water Pollution Prevention Plan” and other information requested by the County.
The Department informed Romero that he needed to complete an application pursuant to the requirements of the Sand and Gravel Ordinance.

{8} Romero appealed the Department’s denial to the Planning and Zoning Committee, which recommended that the Board uphold the Department’s denial. Romero then appealed to the Board, which affirmed the denial on December 3, 2001. The Board concluded that (1) Romero was not engaged in mining on his property as of the effective date of the Zoning and Sand and Gravel Ordinances; (2) Romero’s proposal to mine and extract gravel would constitute an enlargement, expansion, and extension of any prior mining activity that may have occurred within the previously permitted 5-acre area; (3) the proposal would entail activities “substantially and materially different from intermittent hauling of materials from existing stockpiles”; (4) Romero’s failure to comply with Article 7 of the Sand and Gravel Ordinance nullified any obligation of the County to pursue an investigation of a claim for non-conforming use; (5) the diminishing assets doctrine, assuming it is recognized in New Mexico, does not apply in this case because sand and gravel mining is not a non-conforming use on the property and because Romero lacked the intent to mine beyond the 5-acre area that was the subject of the 1998 permit; (6) the validity of the Ordinance 1996-1 is not relevant to Romero’s appeal and, to the extent Romero is challenging the 1998 permit, the challenge is untimely; and (7) requiring Romero to comply with the 2000 Ordinances does not constitute an unconstitutional taking.

{9} Romero appealed to the district court pursuant to Rule 1-074 NMRA. The district court partially reversed and partially affirmed the Board’s decision. It affirmed the Board’s denial of mining on the additional 9.5 acres, finding that there was insufficient, contradictory evidence regarding any existing, non-conforming use on the 9.5 acres, and that any mining on these acres would constitute a new or expanded operation separate and apart from the non-conforming use established on the 5 acres. It reversed the Board’s denial regarding the legal, non-conforming use on the grandfathered 5-acre sand and gravel operation, determining that Romero had not discontinued non-conforming use for the requisite six-month period. It also determined that the Board had received sufficient notice to comply with the description of operations required by Article 7 of the Sand and Gravel Ordinance.

{10} Romero filed a motion to amend, or for rehearing on the judgment, which was denied. Romero and the Board petitioned this Court for a writ of certiorari to review the decision of the district court. We granted the petitions and consolidated the cases for appeal.

II. DISCUSSION

{11} Romero raises five issues on appeal arguing that (1) the Ordinance 1996-1 is void for lack of substantial compliance with statutory publication and filing requirements; (2) because the Ordinance 1996-1 is void, the Board’s 5-acre mining limit, imposed in March 1998, is also void; (3) the diminishing assets doctrine should be adopted by this Court to protect Romero’s vested right to expand mining; (4) the district court erred in upholding the Board’s decision on the ground that expansion of mining from 5 acres to 14.5 acres would have an adverse impact on the neighborhood when the Board’s decision contained no such findings and conclusions; and (5) Romero has vested property rights, compensable under the New Mexico Constitution, that were damaged by the Board’s illegal or improper land use decisions. The Board also appeals, claiming that the district court erred in reversing the Board’s finding that Romero did not have a valid non-conforming use to mine 5 acres of his property at the time the 2000 Ordinances were adopted.

A. STANDARD OF REVIEW

{12} In reviewing a decision of an administrative agency, we apply the same statutorily-defined standard of review applied by the district court. Rio Grande Chapter of Sierra Club v. N.M. Mining Comm’n, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. We will not reverse an agency’s final decision unless “it is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or, otherwise not in accordance with law.” Id.; NMSA 1978, § 39-3-1.1(D) (1999); NMSA 1978, § 3-21-9 (1999). “A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.” Atlixco Coal. v. County of Bernalillo, 1999-NMCA-088, ¶ 11, 127 N.M. 549, 984 P.2d 33

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that which supports as well as that which examine all the evidence presented, both whether a different result could have been reached.” *Gallup Westside Dev., LLC v. City of Gallup*, 2004-NMCA-010, ¶ 11, 135 N.M. 30, 84 P.3d 78.

**B. VESTED RIGHTS TO 5 ACRES AS A CONTINUING GRANDFATHERED, NON-CONFORMING USE**

{13} The district court determined that the Board’s decision that the existing 5-acre mine site was not a legal, non-conforming use pursuant to Article 7 of the Sand and Gravel Ordinance, was not supported by substantial evidence, and was arbitrary and capricious. Therefore, the court reversed the Board’s decision and concluded that Romero could continue the sand and gravel operation on the 5 acres. The Board contends that substantial evidence supports the Board’s determination that there was no ongoing activity on the 5 acres on the effective date of the 2000 Ordinances. We disagree with the Board’s findings.

{14} The general rule is that the non-conforming use must be present at the time of the enactment of the restrictive ordinance. *City of Las Cruces v. Huerta*, 102 N.M. 182, 185, 692 P.2d 1331, 1334 (Ct. App. 1984). In the 1998 hearings, it was established that Romero was lawfully using 5 acres of his property for mining at the time the County enacted the Ordinance 1996-1 limiting such use. Therefore, in 1998, Romero had a legal, non-conforming use on 5 acres of his property. *See id.* at 184-85, 692 P.2d at 1333-34. As a non-conforming use, the 5 acres of mining was not subject to immediate termination, unless the use had been abandoned by the time the 2000 Ordinances became effective. *See Tex. Nat’l Theatres, Inc. v. City of Albuquerque*, 97 N.M. 282, 287, 639 P.2d 569, 574 (1982). In general, abandonment of a non-conforming use requires an intent to permanently abandon the non-conforming use and an overt act, or a failure to act, which implies that the owner no longer claims or retains an interest in the non-conforming use. *See id.* However, intent is not required if an ordinance contains a specific provision, stating that a discontinuance, which persists for a specified time period, will automatically terminate the right to resume the non-conforming use. *See id.* (citing 82 Am. Jur. 2d Zoning & Planning § 220, at 742 (1976)).

{15} Here, Article 1, Section IX(B) of the Zoning Ordinance defines abandonment of a non-conforming use as a discontinuance for a period of six consecutive months or more. The 2000 Ordinances were adopted on August 26, 1999, and published on September 2 and 9, 1999. We thus turn to whether Romero discontinued his previously established, non-conforming use on the 5 acres of property for a period of six consecutive months by September 1999, the effective date of the 2000 Ordinances or, at some point, before the Department’s letter denying Romero’s claim on February 25, 2000.

{16} Romero claims there was steady activity, although not major activity, at the time the 2000 Ordinances were enacted. We agree. Evidence introduced at the Committee hearings, on October 3 and 24, 2001, suggests continuing use. At the hearing on October 3, 2001, Romero provided a history of extraction and hauling with accompanying receipts, invoices, and checks. The invoices and receipts reflect activity from March 1998, through September 1999, after the effective date of the 2000 Ordinances. Additional invoices reflect activity from October 1999, until March 2000, after the Director had incorrectly determined that mining had discontinued for a period of six months or more. At the hearing on October 24, 2001, Romero introduced evidence, showing that the County had continued to inspect Romero’s 5-acre mine, to determine compliance with the 5-acre limit up to the time of the 2000 Ordinances. Witnesses stated there was activity, even if it only amounted to the removal of stockpiled materials.

{17} The foregoing constitutes substantial evidence, supporting the district court’s determination that the 5-acre mine was in operation at the time the County enacted the 2000 Ordinances. Moreover, we are unpersuaded that the evidence relied upon by the Board is sufficient to support its contention that Romero had abandoned his valid, non-conforming use by the time the 2000 Ordinances were adopted. We observe that some of the evidence relied upon by the Board is disputed by the record. For example, the Board relies on Romero’s alleged statement that extraction of new material within the permitted 5-acre area had been exhausted. Review of the testimony cited by the County indicates that it was the County’s Assistant Planning Director, Gilbert Chavez, not Romero, who characterized the 5 acres as “exhausted.” Romero merely stated that materials on the 5 acres were being “hauled off” and, as far as removing materials from the 5 acres, he was no longer allowed to do so by the County. The Board also relies on the statement of Romero’s counsel, in a letter dated December 9, 1998, that Romero had “already mined” 5 acres. However, this statement appears to address the acreage where Romero had already been mining, not that the mining had been completed or terminated.

{18} The Board also relies on the testimony of Patricio Garcia, the County’s Planning Director, and Gilbert Chavez, the County’s Assistant Planning Director, that as of the effective date of the 2000 Ordinances, there was no ongoing mining activity. However, review of their testimony indicates that they may have only considered whether actual extraction was ongoing. Chavez asked whether pulling out the stockpiles would constitute sufficient activity. He also testified that he never asked Romero for receipts that would support Romero’s claim of ongoing activity because Romero had failed to meet the ninety-day notice requirement. Furthermore, although Garcia testified that there was no ongoing mining activity on August 27, 1999, his testimony was based on a visual inspection showing two pits, two mountains of gravel and, at most, minimal removal of earth or dirt. He did not address whether anyone was hauling away previously extracted materials from the 5 acres. Finally, the Board claims that the only evidence presented concerning Romero’s use of the 5-acre parcel near the effective date of the 2000 Ordinances was his contradicted statement that he allowed third parties to remove sand and gravel from existing stockpiles. We disagree that this testimony was contradicted in light of the evidence reviewed above.

{19} The Board’s argument is based upon its contention that, in order to conduct ongoing activity, Romero must be extracting new materials from the ground. We disagree. There is no definition of mining in the Sand and Gravel Ordinance, and nothing in the Zoning Ordinance, requiring Romero to extract new material from the ground, or to conduct major activity to continue his non-conforming use. Therefore, the intermittent removal and hauling from existing stockpiles is enough to constitute ongoing, non-conforming activity, and we agree with the district court that “whatever existing activity or remaining mining activity on the five acres can be
completed, [Romero is] entitled to do so on the existing five acre parcel.” See Hansen Bros. Enters., Inc. v. Bd. of Supervisors, 907 P.2d 1324, 1345 (Cal. 1996) (stating that, when “determining the use to which the land was being put at the time the use became non[-]conforming, the overall business operation must be considered”); Town of W. Greenwich v. A. Cardi Realty Assocs., 786 A.2d 354, 360-61 (R.I. 2001) (holding that diminishing excavation activity does not establish abandonment of a non-conforming use and the landowner’s activities in removing truckloads of earth from the site each year was sufficient to establish a continuing, non-conforming use); Ernst v. Johnson County, 522 N.W.2d 599, 604 (Iowa 1994) (holding that minimal continued use of the quarry, along with maintenance of requisite licenses and permits, was enough to establish uninterrupted operation).

C. DIMINISHING ASSETS DOCTRINE

{20} When Romero appealed the Department’s denial to the Planning and Zoning Committee, the Board concluded that the diminishing assets doctrine was inapplicable because sand and gravel is not a non-conforming use on Romero’s property and Romero lacked the intent to mine beyond the 5-acre area. Even though there is no evidence of an actual non-conforming mining use on the 9.5 acres at the time the Zoning Ordinance became effective, Romero urges us to adopt the diminishing assets doctrine and to hold that he has a vested property right to expand his sand and gravel business to an additional adjoining 9.5 acres.

{21} The diminishing assets doctrine is an exception to the enforceability of zoning laws designed to terminate non-conforming uses. The decision of whether to adopt the diminishing assets doctrine is a question of law, which we review de novo. See Rio Grande Chapter, 2003-NMSC-005, ¶ 17. Application of the diminishing assets doctrine to the facts of this case is a mixed question of law and fact. See Huerta, 102 N.M. at 185, 692 P.2d at 1334. This Court will not reverse an agency’s decision unless there is “an abuse of discretion not supported by substantial evidence in the record” or, otherwise not in accordance with law.” Rio Grande Chapter, 2003-NMSC-005, ¶ 17.

{22} Article 1, Section IX(A) of the Zoning Ordinance provides that “legal non-conforming uses shall be allowed to continue but any enlargement, physical expansion or extension of the non-conforming use or structure is prohibited unless the non-conforming use or structure is brought into compliance with the requirements of this Ordinance.” Nonetheless, when it comes to the extraction of earth materials and the lateral expansion of such extraction, other jurisdictions are reluctant to prohibit the expansion of a non-conforming use. A. Cardi Realty Assocs., 786 A.2d 354; Stephan & Sons, Inc. v. Municipality of Anchorage Zoning Bd., 685 P.2d 98 (Alaska 1984); McCaslin v. City of Monterey Park, 329 P.2d 522 (Cal. Ct. App. 1958); County of Du Page v. Elmhurst-Chicago Stone Co., 165 N.E.2d 310 (Ill. 1960); Town of Billerica v. Quinn, 71 N.E.2d 235 (Mass. 1947); Town of Wolfeboro v. Smith, 556 A.2d 755 (N.H. 1989).

{23} In A. Cardi Realty Associates, the Rhode Island Supreme Court determined that, under the diminishing assets doctrine, a landowner could expand a pre-existing non-conforming earth and gravel removal business where the landowner was engaged in such a business on the property prior to passage of the zoning ordinance. That court expressed that “[t]he doctrine of diminishing assets has evolved from the recognition that extractive industries use the land itself and all resources that are found on a given parcel comprise the ongoing business.” 786 A.2d at 362. That court further recognized that “courts have acknowledged that the amount and frequency of the recovery of the material is driven by market forces, varies with the seasons and fluctuates with the needs of the industries that depend on the resource.” Id. at 363.

{24} Moreover, “[u]nlike other non[-]conforming uses of property which operate within an existing structure or boundary, mining uses anticipate extension of mining into areas of the property that were not being exploited at the time a zoning change was caused to be non[-]conforming.” Hansen Bros. Enters., Inc., 907 P.2d at 1336. “Only by allowing the continued excavation of land previously appropriated for that use would an owner truly be able to continue an excavation which he had begun” at the time the zoning ordinance was enacted. Smith, 556 A.2d at 758 (internal quotation marks omitted). Therefore, as the court expressed in Hansen Brothers Enterprises, when “there is objective evidence of the [land] owner’s intent to expand a mining operation, and that intent existed at the time of the zoning change,” the diminishing assets doctrine protects the unique character of land that has been reserved for excavation and allows expansion into those areas. 907 P.2d at 1336.

{25} In Smith, the New Hampshire Supreme Court adopted a three-pronged test that a landowner must satisfy to establish a right to expand operations as a non-conforming use.

First, [the land owner] must prove that excavation activities were actively being pursued when the [Ordinance] became effective; second, [the land owner] must prove that the area that he desires to excavate was clearly intended to be excavated, as measured by objective manifestations and not by subjective intent; and, third, [the land owner] must prove that the continued operations do not, and/or will not, have a substantively different and adverse impact on the neighborhood.

{26} Since we have determined that a non-conforming use has been established on Romero’s 5-acre area, we hold that a landowner, under the diminishing as-
sets doctrine, may expand pre-existing, non-conforming earth and gravel removal pursuant to the Smith analysis. In our case, the Board found and the district court determined that Romero had not established the requisite “objective manifestations” of an intent to mine beyond the 5-acre area. Thus, we turn to the second prong of the Smith analysis to determine whether Romero objectively manifested an intent to expand his operation beyond the 5-acre area. 

First, on February 27, 1998, prior to the adoption of the Zoning Ordinance, ETM, with authorization from Romero, notified the Department of its proposal to “develop a sand and gravel material source” on the 14.5 acres of land owned by Romero for which the Board previously only allowed the mining of the 5-acre area. Here, the Board contends that since “Romero did not have a non[-]conforming use to engage in renewed sand and gravel mining and, for that basis alone, the [Board] properly concluded that the diminishing assets doctrine is not applicable.” Further, the Board also adopted, in its findings and conclusions, that (1) in 1998, Romero requested the County’s approval to mine the 14.5 acres, which it denied, and he failed to challenge that decision; (2) Romero had not mined gravel beyond the 5-acre area; (3) after issuance of the 1998 permit, Romero did not have an application pending with the County for mining on areas beyond the 5-acre area; and (4) concluded that the “diminishing assets doctrine . . . is not otherwise applicable in this case because . . . sand and gravel mining is not a non[-]conforming use on the property and . . . Romero lacked the intent to mine beyond the [5]-acre area that was the subject of the 1998 permit.” We disagree.

Evaluation of Romero’s activities prior to the enactment of the 2000 Ordinance establishes substantial evidence to the contrary. The Board and the Department encouraged Romero to resubmit an application; thus, Romero submitted an additional application for expanded mining to the Board on October 9, 1998. However, since this application was marked “Zoning Use Change,” the Board contends that Romero did not intend to expand his current operations, but to develop a new one. We again disagree because, subsequent to the filing of this application, Romero’s counsel communicated his intentions to expand his current operations and the application of the diminishing assets doctrine to the Board. Romero also supplemented this application with his gravel mine operation plan, which refers to Romero’s gravel mine as being “approximately 14 acres in the area with approximately 5 acres currently disturbed.” Further, prior to the public hearing on this application, the Board received a drainage report referring to the 5 acres and the expansion. Thus, any misunderstanding was certainly clarified by these subsequent correspondences by Romero. Meanwhile, instead of issuing a ruling on Romero’s application to the additional 9.5 acres, the County subsequently adopted the Zoning Ordinance, prohibiting the expansion of non-conforming uses. 

It is irrational and unreasonable to hold Romero at fault for not appealing the Board’s denial of his application to expand under these circumstances. First, the Board encouraged Romero to resubmit an application. Second, Romero, relying on this, resubmitted an application and, while waiting for a ruling, the Board instead adopted the Zoning Ordinance, eliminating his chances to expand his operation outright. Lastly, the Board concluded that Romero did not meet one of the essential elements of the diminishing assets doctrine because it determined that Romero had not mined gravel beyond the 5-acre area, suggesting he abandoned his intentions to mine beyond the 5-acre area. We find the Board’s reasoning to be perplexing because, in essence, the Board is saying that because Romero obeyed the Ordinance 1996-1 not to mine beyond the 5-acre area, they are now going to find that he abandoned his intentions to do so. This deduction is irrational and unconscionable. In any event, Romero, never having actually mined the 9.5 acres, while perhaps improbable, is not a bar to application of the diminishing assets doctrine. For instance, the diminishing assets doctrine is applicable where a non-conforming use exists on the land intended for expansion. See, e.g., Stephan & Sons, Inc., 685 P.2d at 101-02 (stating that the diminishing assets doctrine holds that an owner of the non-conforming use may sometimes be found to have a vested right to use an entire tract, even though only a portion of the tract was used when the restrictive ordinance was enacted).

Moreover, there is no indication that Romero utilized his acreage for any other commercial use, other than the sand and gravel mining. Based on the foregoing, we conclude that there was substantial evidence establishing Romero’s objective manifestation of his intent to mine beyond the 5-acre area. See Hansen Bros. Enters., Inc., 907 P.2d at 1336 (holding that “[w]hen a mining or quarrying operation is a lawful non[-]conforming use, progression of the mining or quarrying activity into other areas of the property is not necessarily a prohibited expansion . . . of the non[-]conforming use”). “When there is an objective evidence of the owner’s intent to expand a mining operation, and that intent existed at the time of the zoning change, the use may expand into the contemplated area.” Id. Accordingly, the Board’s findings that Romero had not established the requisite objective intent to expand beyond the 5-acre area was irrational and improper.

Now, we must determine whether the third prong of the Smith analysis is satisfied and determine whether the mining will have “a substantially different and adverse impact on the neighborhood.” 556 A.2d at 759. In our case, the Board never reached a decision or heard any evidence on whether Romero’s mining on the 5-acre or the 9.5 acres would have an adverse impact on the neighborhood. Instead, the district court suggested that the adverse impact of Romero’s proposed expansion was a legally recognized ground for denying application of the diminishing assets doctrine, despite the complete lack of evidence regarding adverse neighborhood impact at the administrative hearings. The Board made no findings on whether the adverse impact of expansion of the non-conforming use would be worse in kind and degree than the adverse impact resulting from the mining prior to the adoption of the Zoning Ordinance. See id. (stating that landowner shall not be restricted if “continued operations do not, and/or will not, have a substantially different and adverse impact on the neighborhood” than the operation conducted before the zoning ordinance was enacted). Furthermore, it is not the function of the district court, nor this Court, to substitute its judgment for that of an administrative agency. See Atlixco Coal., 1999-NMCA-088, ¶ 11.

Since we have adopted the diminishing assets doctrine, we need not address the validity of the Ordinance 1996-1, nor Romero’s unconstitutional takings claim.

III CONCLUSION

For the reasons set forth above, the judgment of the district court (1) that the existing 5-acre mine site was a legal, non-conforming use is affirmed; and (2) that there was insufficient evidence to adopt the diminishing assets doctrine is reversed. This case is remanded to the district court with instructions to remand to the Rio Arriba Board of County Commissioners for
further proceedings in accordance with this opinion.

{34} IT IS SO ORDERED.
IRA ROBINSON, Judge

I CONCUR:
RODERICK T. KENNEDY, Judge
JONATHAN B. SUTIN, Judge,
specially concurring

SUTIN, Judge (specially concurring).

{35} I concur in the result of the majority’s opinion.

{36} This case is troublesome and has been very difficult to review. The manner in which both Romero and the County proceeded throughout the period in question leaves much to be desired. The facts in this case can be viewed differently. Under the standard of review, neither we nor the district court are to engage in fact finding. The review here is whether the Board’s decisions are supported by substantial evidence, whether they are arbitrary or capricious, and whether they are in accordance with law. The answers to these questions are not cut and dried. One can have a reasonable hesitation to withhold the usual deference given to the findings of a board of county commissioners in planning and zoning matters. Yet one can also have a reasonable hesitation to permit counties through planning and zoning ordinances to arbitrarily or otherwise improperly restrict use of private property. Here, a portion of the property was successfully used for mining sand and gravel, with a contiguous part of the acreage apparently intended and available for further sand and gravel mining.

{37} I am impressed by the fact that the earth and gravel removal business is a unique one, in that landowners must start in one place and continually expand to more land. Thus, “quarrying, as a non\-[\-]conforming use, cannot be limited to land actually excavated at the time of enactment of the restrictive ordinance because to do so would, in effect, deprive the landowner of his use of the property as a quarry.” Syracuse Aggregate Corp. v. Weise, 414 N.E.2d 651, 655 (N.Y. 1980). By its very nature, land intended for quarry development over time can, under certain circumstances, be a non-conforming use. Unless there exists a lawful basis on which to restrict the physical expansion or extension of the mining, the continuation of the mining should be considered a proper existing non-conforming use. The focus in this case is necessarily on the extent of the non-conforming use at the time of the enactment of the 2000 ordinances, and on the landowner’s manifestation of intent at that time to mine additional acreage. “[T]he nature of the incipient non\-[\-]conforming use, in light of the character and adaptability to such use of the entire parcel, manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance.” Id. at 654 (internal quotation marks and citation omitted).

{38} It appears to me that Romero did manifest some intent to expand, but after the Board first denied him any right to do so, he could not begin mining. I agree with the majority that Romero did enough from the Board’s first decision to the time of the enactment of the 2000 ordinances to come within the diminishing assets doctrine’s element of manifestation of intent. I also agree that the Board’s decision to the contrary was not based on substantial evidence and also evidenced a somewhat arbitrary result.

{39} I am convinced that the result reached by the majority is the fair and right result under the circumstances. I agree that we should adopt and apply the diminishing assets doctrine. I think the better judgment in this case is to err on the side of the landowner, as the majority has done, and leave the ultimate and perhaps only real issue of adverse neighborhood impact to be decided on remand, again as the majority has also done.

JONATHAN B. SUTIN, Judge
APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
STEPHEN BRIDGFORTH, District Judge

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for Appellant

OPINION

CELIA FOY CASTILLO, JUDGE

{1} The State appeals from the trial court’s order dismissing Defendant’s pending second-degree murder charge. The basic question in this case is whether Defendant can be retried for second-degree murder in connection with one killing when the jury signed two verdict forms: one acquitting Defendant of second-degree murder and the other finding him guilty of second-degree murder. The State argues that double jeopardy does not apply to a valid conviction of second-degree murder and that the trial court therefore erred in dismissing the case based on double jeopardy. Defendant contends that the acquittal verdict governs the verdicts nor asked that the verdicts be read into the record and then asked the attorneys if they wished to poll the jury; both parties stated that they did not want to poll the jury. The attorneys neither questioned the verdicts nor asked that the verdicts be clarified.

{5} The jury reached unanimous verdicts on all counts. The trial court read the verdicts into the record and then asked the attorneys if they wished to poll the jury; both parties stated that they did not want to poll the jury. The attorneys neither questioned the verdicts nor asked that the verdicts be clarified.

{6} The jury acquitted Defendant on first-degree murder by willful and deliberate killing, on second-degree murder “as charged as an included offense of first[-]degree murder by a deliberate killing” (second-degree deliberate intent murder), and on felony murder. The jury found Defendant guilty of second-degree murder “as an included offense of felony murder,” as charged in the alternative to Count 1 (second-degree felony murder).

{7} Defendant appealed his conviction to this Court and raised nine issues in his docketing statement, none of which related to the second-degree murder step-down instructions or verdict forms. This Court issued a memorandum opinion reversing and remanding the second-degree murder conviction on the ground that it was reversible error for the trial court to refuse to give Defendant’s proposed lesser included instruction on involuntary manslaughter.

{8} After remand, the parties began to two theories of second-degree murder. The jury was given a step-down instruction on second-degree murder as an included offense of first-degree murder by a deliberate killing. See UJI 14-250 NMRA. In addition, the jury was given a separate step-down second-degree murder instruction based on felony murder. Both second-degree murder instructions, however, required the jury to find that (1) Defendant killed the victim and (2) Defendant “knew that his acts created a strong probability of death or great bodily harm.” The verdict forms followed the sequence of the jury instructions. There were separate verdict forms for each theory of first-degree murder and its corresponding lesser offense of second-degree murder. Defense counsel later characterized the instructions as “linear,” meaning that the jury was instructed on deliberate murder and its included offenses and then on felony murder and its included offenses. According to the State, defense counsel would have preferred structuring the jury instructions based on the “Y” approach, in which the jury would first be instructed on both theories of first-degree murder and then would be given the step-down to second-degree murder if the jury could not reach a verdict on first-degree murder.

{3} The grand jury indicted Defendant on seven criminal counts stemming from this incident. Count 1 of the indictment charged Defendant with first-degree murder, willful and deliberate killing, or, in the alternative, first-degree murder, felony murder. The willful and deliberate murder charge stated that Defendant did kill Gonzales with the deliberate intention to take away her life. The felony murder charge stated that Defendant did intentionally cause the death of Gonzales during the commission or attempted commission of aggravated burglary, a felony offense, under circumstances or in a manner dangerous to human life and that Defendant intended to kill or knew that his acts created a strong probability of death or great bodily harm.

{4} At trial, the jury was instructed on the elements of two theories of first-degree murder: first-degree willful and deliberate murder and felony murder. The jury was also instructed on what can be perceived as
prepare for retrial. Defendant then filed a motion claiming that the State’s prosecuting Defendant on the second-degree murder charge would violate his right to be free from double jeopardy because he had been acquitted of second-degree murder in the first trial. The State responded by arguing that the jury had convicted Defendant of second-degree murder and that there was no issue regarding innocence on that count. The State further argued that if error had occurred, it had been invited by the defense—in that the defense had agreed to the jury instructions and verdict forms, had heard the verdicts read in open court, and had made no objection or argument. Among other contentions, the State maintained that the instructions and the verdict forms made it clear that the State was proceeding under two distinct theories of murder and that the jury’s verdicts indicated its understanding of that distinction.

{10} After the hearing, the trial court issued a written order dismissing the case with prejudice, which stated, “[T]here is unitary conduct in this matter, the essential elements to be re-tried are identical to those for which the Defendant was acquitted, and there was not a waiver of the double jeopardy claim, if it is subject to such waiver.” The State appeals from that order.

II. DISCUSSION
{11} The State contends that double jeopardy does not apply because the jury returned a conviction for second-degree murder and because acquittal cannot be implied from that conviction. The State further argues that the only way double jeopardy can be found in this case is by implying an acquittal from the conviction—that is, we must assume that the jury must have also meant to acquit on the second-degree felony murder theory. Defendant limits his focus to the verdict form that acquits him of second-degree deliberate intent murder, and he asserts that an acquittal of one second-degree murder offense is an acquittal of the other second-degree murder offense because the offenses are the same and double jeopardy therefore prevents retrial. We disagree with this conclusion.

A. Standard of Review
{12} Double jeopardy claims are not waived and can be raised at any time before or after entry of a judgment. NMSA 1978, § 30-1-10 (1963). We review double jeopardy claims de novo. See State v. Schoonmaker, 2005-NMCA-012, ¶ 19, 136 N.M. 749, 105 P.3d 302, cert. granted, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 579.

B. New Mexico Constitution
{12} Defendant recognizes that the double jeopardy clause of the Fifth Amendment protects “a defendant against a second prosecution for the same offense after acquittal.” Citing to State v. Gomez, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1, Defendant acknowledges that because his rights are protected under the federal constitution, “this Court need not examine the state constitutional claim.” Nevertheless, Defendant argues that he preserved his state constitutional claim, as required in State v. Lynch, 2003-NMSC-020, ¶ 13, 134 N.M. 139, 74 P.3d 73, and further that this Court should read Lynch to allow Article II, Section 15, to be interpreted more expansively than the double jeopardy clause of the Fifth Amendment.

{13} We decline to address Defendant’s argument because he did not properly preserve it. See State v. Vaughn, 2005-NMCA-076, ¶ 7, 137 N.M. 674, 114 P.3d 354. Under Gomez, our first inquiry must be whether the state constitution has been held to provide greater protection under similar circumstances than the federal constitution does. Lynch, 2003-NMSC-020, ¶ 13. No New Mexico case has applied an expansive interpretation to the acquittal aspect of the New Mexico double jeopardy clause. Id. Accordingly, proper preservation requires a defendant to “raise this claim in the trial court and provide a basis to interpret the state constitution differently.” Vaughn, 2005-NMCA-076, ¶ 7; see also Lynch, 2003-NMSC-020, ¶ 13. We agree that Defendant did cite to the state constitution in his pleadings, but he did not articulate why the provisions of the state constitution should be interpreted differently from those of the federal constitution. By failing to present to the trial court any argument or authority in support of a more expansive interpretation of Article II, Section 15, of the New Mexico Constitution as it relates to the acquittal aspect of double jeopardy, Defendant failed to preserve this argument on appeal.

C. Double Jeopardy and Conviction of Second-Degree Murder
{14} In general, the federal double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after a conviction, and (3) multiple punishments for the same offense. State v. Angel, 2002-NMSC-025, ¶ 7, 132 N.M. 501, 51 P.3d 1155. In Defendant’s motion, he concentrates on the first protection, which is aimed to prevent the government from “harassing citizens by subjecting them to multiple suits until a conviction is reached, or from repeatedly subjecting citizens to the expense, embarrassment and ordeal of repeated trials.” Id. ¶ 15 (internal quotation marks and citation omitted). The key question is whether the acquittal on one of the second-degree murder theories also acted as an acquittal on the entire second-degree murder charge and thereby prohibited any retrial on the remaining theory under a double jeopardy analysis.

{15} There is no question that jeopardy attached in this case; jeopardy terminates upon an acquittal, upon a conviction, or with certain types of mistrial. County of Los Alamos v. Tapia, 109 N.M. 736, 737 & n.1, 790 P.2d 1017, 1018 & n.1 (1990). Under the doctrine of double jeopardy, a verdict of acquittal is given “absolute” protection in order to guarantee the finality of that verdict because the defendant’s interest in such finality is “at its zenith.” Tapia, 109 N.M. at 742, 790 P.2d at 1023. It is fundamental that a defendant cannot be retried after a verdict of acquittal, even if the verdict is egregiously erroneous, United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), and that acquittals hold “special weight” under double jeopardy analysis. Tibbs v. Florida, 457 U.S. 31, 41 (1982). Our case law also instructs that what constitutes an acquittal is not to be controlled by the form of the judge’s action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged and the focus is on substance as well as form. Vaughn, 2005-NMCA-076, ¶ 9 (internal quotation marks and citation omitted).

{16} Although there is no New Mexico case law directly on point, we look to recent case law that addresses, in a variety of contexts, what is or is not an acquittal. These cases support our resolution that the fact that the jury signed a not guilty verdict is not controlling when the jury had not finished its deliberations on all of the charges submitted to it in this one proceeding and when none of the important policies protected by the double jeopardy clause was implicated. In State v. Rodriguez, 2006-NMSC-018, ¶ 1, 139 N.M. 450, 134 P.3d 737, our Supreme Court recently held that the trial court was entitled to correct the verdict form to reflect the true verdict of the jury and thus eliminate any double jeopardy
violation. The jury foreman in Rodriguez had mistakenly signed the not guilty verdict form when the jury had unanimously found Defendant guilty. Id. In that case, the Court noted that the jury did not leave the presence and control of the trial court after the incorrect verdict was read and the jury was discharged. Id. ¶ 8. Therefore, because the record in the case was adequate, the Court determined that although the trial court stated in open court that Defendant was not guilty of the crime charged, no outside influence tainted the corrected verdict. Id. ¶ 11. The Court could not find that entry of the jury’s chosen verdict was barred by double jeopardy. Id.

{17} In another recent case, Vaughn, 2005-NMCA-076, this Court rejected the defendant’s claim of double jeopardy. Id. ¶ 30. In that case, the defendant appealed his conviction for aggravated driving while under the influence of intoxicating liquor or drugs. Id. ¶ 1. Among other issues, the defendant argued that the trial court acquitted him of aggravated DWI during the proceedings and therefore violated double jeopardy protections when the court found him guilty later on in the same proceedings. Id. The defendant argued that oral remarks and a written interlocutory order made by the trial court constituted an acquittal of the refusal basis for aggravated DWI. Id. ¶ 4. This Court concluded that there was no double jeopardy violation because “neither the trial court’s oral comments nor its interlocutory order subjected Defendant to the harassment of a second prosecution after a verdict of acquittal.” Id. ¶ 30.

{18} Our task here is to consider whether the substance of the jury verdict acquitting Defendant of second-degree deliberate intent murder represented a resolution, correct or not, of some or all of the factual elements of the second-degree felony murder theory, under which Defendant was convicted. Id. ¶ 9. We agree that the jury verdict finding Defendant not guilty under the deliberate intent theory is a resolution of guilt for that particular theory of the step-down for Count 1, first-degree deliberate intent murder. Those verdicts, however, did not terminate jeopardy for Count 1 because the jury was also instructed on the alternative for felony murder and its lesser offense of second-degree murder during the same proceeding. The jury’s acquittal of first-degree felony murder was a final resolution for that degree of the crime, but there remained the question of Defendant’s guilt under the alternative theory of second-degree murder.

{19} In this case, the State was entitled to charge Defendant in the alternative, and the jury was entitled to convict Defendant of a lesser offense under either one of the first-degree murder theories. The deliberate intent theory of murder requires that the killing be accomplished “with the deliberate intention to take away the life of” the victim. UJI 14-201 NMRA. The felony murder alternative does not require a deliberate intention, but that alternative does require the element of aggravated burglary as the predicate felony. See State v. Tanton, 88 N.M. 333, 335, 540 P.2d 813, 815 (1975) (holding that the rule that an acquittal or conviction of a lesser included offense bars subsequent prosecution of a greater offense does not apply where the charges are brought in the alternative). Compare UJI 14-201 with UJI 14-202 NMRA. “A person may by one act violate more than one statute or commit more than one offense.” State v. Ortiz, 90 N.M. 319, 321, 563 P.2d 113, 115 (Ct. App. 1977). “Also, a statute may be violated in several ways by different acts.” Id. at 322, 563 P.2d at 116. The concept of double jeopardy is not involved, since the charges were in the alternative. Id. “When alternative charging is to the effect of a crime being committed in various ways and the various ways are pursuant to a statute the charge is not legally deficient.” Id.

{20} We do not disagree with Defendant’s statement of the general rule that “when a defendant has been acquitted at trial[,] he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous.” Sanabria v. United States, 437 U.S. 54, 64 (1978); see also Fong Foo v. United States, 369 U.S. 141, 143 (1962). However, given the fact that the jury convicted Defendant during the same proceedings, we do not think that the policies behind the double jeopardy acquittal rule support a holding in Defendant’s favor.

{21} First, finally, or the defendant’s legitimate expectation of repose, is one of the most fundamental policies on which the acquittal rule is based. See County of Los Alamos v. Tapia, 109 N.M. 736, 742, 790 P.2d 1017, 1023 (1990) (“Much of the policy—not all, to be sure—behind the Double Jeopardy Clause is thus simply to protect the defendant’s interest in repose.”); Peter Westen & Richard Drubel, Toward a General Theory of Double Jeopardy, 1978 Sup. Ct. Rev. 81, 124 (1979) (“Defendants may have come to expect that jury acquittals will be final and, because of that expectation, may breathe the proverbial sigh of relief when acquitted by a jury.”). Here, Defendant was convicted by the jury and so cannot have had any legitimate expectation that the jury’s not guilty verdict meant that he would go free. In fact, he did not think that the jury’s not guilty verdict was meaningful at all until after his appeal of the guilty verdict and judgment. It is also noteworthy that no judgment was entered on the not guilty verdict and that the judgment adjudicated Defendant guilty of second-degree murder under Count 1.

{22} Second, double jeopardy prevents the government from simply trying a case repeatedly until it gets a conviction. Green v. United States, 355 U.S. 184, 187-88 (1957) (“[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”). In this case, the State has already gotten a conviction, and so allowing the State to retry the case would not mean giving the State an opportunity to correct its past mistakes that led to an acquittal, which is one outcome that double jeopardy is designed to prevent. Moreover, given the guilty verdict, Defendant was not found to be “innocent” of the crime of murder, so his claims regarding the acquittal are not persuasive. See Arizona v. Washington, 434 U.S. 497, 503 (1978) (“If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.”).

{23} Finally, the acquittal prong of double jeopardy jurisprudence protects jury nullification, or the right of the jury to acquit against the weight of the evidence. Westen & Drubel, supra, at 129-32 (arguing that the most persuasive rationale behind the rule that acquittals are unreviewable is that there is no such thing as an “erroneous acquittal” because in any given case, the jury might have been exercising its right to acquit against the evidence); see also United States v. DiFrancesco, 449 U.S. 117, 130 n.11 (1980) (noting Professor Westen’s statement that “[t]he prohibition on retrial following an acquittal is based on a jury’s prerogative to acquit against the evidence”). Here, the jury examined all of the evidence and found Defendant guilty. Thus, we are not called upon to safeguard the jury’s right to disregard the evidence.
and acquit Defendant in the interests of leniency.

{24} The jury was presented with two separate theories of murder; the members rejected one theory and convicted Defendant of a lesser offense on the other. This method of having the jury consider the charges resulted in two second-degree murder verdict forms. The jury found Defendant guilty of second-degree murder under the step down to felony murder. Retrial on this conviction does not violate double jeopardy.

D. Failure to Object and Fundamental Error

{25} Because Defendant’s double jeopardy claim is without merit, any remaining or related claim that the verdicts were inconsistent or confusing has been waived, and there is no other valid claim on appeal. While Defendant would have preferred another approach to the organization of the instructions, he never objected to the instructions or questioned the verdicts. See Rule 5-611(E), (F) NMRA (stating that any party may request that the jury be polled after a verdict is returned but before it is recorded and that no irregularity in the verdict may be raised, unless it is raised before the jury is discharged).

{26} Although Defendant urges this Court to rely on fundamental error in the event that this Court finds that he did not properly object to the verdicts or instructions, reliance on fundamental error is not appropriate under the circumstances of this case. According to State v. Cunningham, 2000-NMSC-009, 128 N.M. 711, 998 P.2d 176, fundamental error will be found only when there exist “circumstances that shock the conscience or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked.” Id. ¶ 21 (internal quotation marks and citation omitted). Fundamental error review describes our affirmative duty to guard against injustice, despite the procedural deficiency of a particular claim. State v. Reyes, 2002-NMSC-024, ¶ 42, 132 N.M. 576, 52 P.3d 948 (holding that fundamental error review is applied to “prevent a miscarriage of justice”); see also State v. Osborne, 111 N.M. 654, 662, 808 P.2d 624, 632 (1991) (same).

{27} Defendant does not make any claim that his conviction of second-degree murder is dubious or that there was not sufficient evidence for the conviction. Defendant does not provide any support for the idea that the jury was confused by the instructions or verdict forms. While it appears Defendant would have preferred that the jury been instructed on the two theories of first-degree murder and then been given one instruction on second-degree murder, Defendant had no questions about the instructions at the time they were given to the jury, he did not question the verdict forms, and he did not request that the jury be polled. There is no contention that the jury was improperly instructed on the elements of the offenses or that the instructions were contradictory; it appears that juries elsewhere have been instructed in a similar fashion. See State v. Montoya, No. 28,404, slip op. ¶¶ 23-24 (N.M. Sup. Ct. Mar. 8, 2006).

{28} The evidence presented at trial established that Defendant armed himself with a rifle and went to Gonzales’s residence. There was evidence that he entered the residence and told his codefendant, “Shoot them. Shoot them. Kill them[.]” The codefendant shot and killed Gonzales, and Defendant left the scene. This provides sufficient evidence to convict Defendant of second-degree murder, a conviction he appealed, and the circumstances of the guilty verdict for second-degree murder do not “shock the conscience.” See Cunningham, 2000-NMSC-009, ¶ 21 (internal quotation marks and citation omitted). Consequently, fundamental error is not applicable.

III. CONCLUSION

{29} There is no double jeopardy violation. The trial court’s order dismissing the charge against Defendant is reversed, and the case is remanded for retrial.

{30} IT IS SO ORDERED.

CELI A FOY CASTILLO, Judge

WE CONCUR:
LYNN PICKARD, Judge
MICHAEL E. VIGIL, Judge (dissenting)

VIGIL, Judge (dissenting).

{31} The fundamental flaw in the reasoning of the majority is its premise that two separate theories of second-degree murder were presented to the jury. This is not correct. While the first-degree murder charge was in the alternative, the lesser included offense to each alternative was the same second-degree murder. Because the jury instructions were structurally flawed, it superficially appears the jury was allowed to consider two separate theories of second-degree murder. The jury found Defendant not guilty of second-degree murder. In my view, the constitutional prohibition against double jeopardy precluded the jury from subsequently finding Defendant guilty of the same second-degree murder. Since the majority concludes otherwise, I dissent.

{32} Defendant encountered Lorenzo Martinez and Victor Gonzales, and got into a fist fight with them following an argument. Defendant and codefendant then went to the home of Defendant’s uncle and retrieved a rifle. When they could not figure out how to load it, they picked up a third individual, who loaded the rifle. The three then proceeded to the home of Cecilia Gonzales, who was the mother of Lorenzo Martinez and Victor Gonzales. Upon arriving, Defendant went to the house unarmed and knocked on the door while codefendant and the third person remained in the car with the rifle. As Defendant and Mrs. Gonzales were talking on the porch, codefendant went running into the house with the loaded rifle, looking for Lorenzo Martinez and Victor Gonzales. Mrs. Gonzales and her sister, Maria Martinez, who lived with her, got hysterical and started screaming. When Mrs. Gonzales started going towards the kitchen, codefendant shot her, killing her. He also shot and wounded Mrs. Martinez when she started running to the rear of the home. Defendant and codefendant then ran to the car outside and drove away.

{33} The indictment in pertinent part charged Defendant with first-degree murder by a deliberate killing or, in the alternative, first-degree murder in the commission or attempt to commit a felony. The jury was instructed to consider whether Defendant was guilty of first-degree murder by a deliberate killing. The jury was then told it could consider whether Defendant was guilty of second-degree murder “as an included offense of first-degree murder by a deliberate killing.” A separate instruction then told the jury it could consider whether Defendant was guilty of felony murder “which is first degree murder, as charged in the alternative” to deliberate first-degree murder. In a fourth separate instruction, the jury was told to consider whether Defendant was guilty of second-degree murder “as an included offense of felony murder.” Prior to its deliberations, the trial court orally instructed the jury that it was first to consider first-degree murder by a deliberate killing, then second-degree murder as an included offense of first-degree murder by a deliberate killing. After considering these offenses, the jury was told it could then consider whether Defendant was guilty of felony murder as the alternative to murder by a deliberate killing and then second-degree murder as an included offense of
The defendant is acquitted; State v. Cooper, 1997-NMSC-058, ¶ 52, 124 N.M. 277, 949 P.2d 660 (stating that the New Mexico Constitution also protects against a second prosecution for the same offense after an acquittal).

Defendant was found not guilty of second-degree murder. Once that occurred, he was no longer subject to being convicted or punished for that same second-degree murder. Stated another way, once Defendant received an acquittal on second-degree murder, the double jeopardy clause prohibited him from being placed in jeopardy for that “same offense.” There is no question that there was only one first-degree murder charge and one second-degree murder charge as a lesser included offense of first-degree murder in this case. Although NMSA 1978, Section 30-2-1(A) (1994), sets forth alternative theories of first-degree murder (willful, deliberate, and premeditated killing; felony murder; and depraved mind murder), our Supreme Court has specifically held that these are not separate offenses, but alternative ways of committing the same offense. State v. Lucero, 1998-NMSC-044, ¶¶ 24-25, 126 N.M. 552, 972 P.2d 1143. Under Section 30-2-1(B), “[m]urder in the second degree is a lesser included offense of the crime of murder in the first degree.” Aside from the foregoing, the facts in this case demonstrate that there was only a single second-degree murder and that the elements set forth in each separate second-degree murder instruction are identical. Specifically, the jury was told in both instructions that in order to find second-degree murder it had to find the following elements were proven beyond a reasonable doubt: (1) that Defendant killed Mrs. Gonzales; (2) that Defendant knew that his acts created a strong probability of death or great bodily harm to Mrs. Gonzales; and (3) that it happened on or about October 28, 1998. The State concedes this point when it acknowledges in its brief in chief and reply brief that if the jury had returned two convictions for second-degree murder, the trial court would have been required to vacate one as violative of double jeopardy.

The jury determined that Defendant was not guilty of second-degree murder. The only reason the jury was then allowed to consider the offenses mirrored the written instructions. The only reason the jury was then allowed to consider the offenses mirrored the written instructions. {34} The jury found Defendant not guilty of first-degree murder by a deliberate killing “as charged in Count 1,” not guilty of second-degree murder “as an included offense of first-degree murder by a deliberate killing as charged in Count 1,” not guilty of felony murder “as charged in the alternative to Count 1,” and guilty of second-degree murder “as charged as an included offense of felony murder which is first degree murder as charged in the alternative to Count 1.”

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states, “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb,” and it applies to the states through the Fourteenth Amendment. U.S. Const. amend. V; Benton v. Maryland, 395 U.S. 784, 794 (1969). Our own constitution provides, “[N]or shall any person be twice put in jeopardy for the same offense[.]” N.M. Const. art. II, § 15. At its most basic level, the constitutional prohibition against double jeopardy means that once a defendant has received an acquittal for an offense, the defendant is no longer subject to being placed in jeopardy for that same offense. In Vaughn, we recently reiterated:

Under the doctrine of double jeopardy, a verdict of acquittal is given absolute protection to guarantee finality of that verdict because the defendant’s interest in such finality is at its zenith. Also, once an accused is actually, and in express terms, acquitted by a court, the finality of that judgment will not yield to any attempts to dilute it.

2005-NMCA-076, ¶ 9 (internal quotation marks, citation, and brackets omitted). We also recognized in Vaughn that the United States Supreme Court has said that it is “the most fundamental rule” that a defendant cannot be re-tried after a verdict of acquittal, even if that verdict is egregiously erroneous,” id. (citing Martin Linen Supply Co., 430 U.S. at 571), and that “[a]fter an acquittal, any type of fact-finding proceeding going to elements of the charged offense violates the federal double jeopardy clause.” Id. (citing Smallis v. Pennsylvania, 476 U.S. 140, 142 (1986)); see also Sanabria, 437 U.S. at 75 (holding that no exceptions permit a retrial once the
eral Kearney, and it expressly prohibited double jeopardy, stating: “That no person after having once been acquitted by a jury can be tried a second time for the same offense.” Kearney Bill of Rights, cl. 8 (1846). Proposed constitutions were subsequently drafted in anticipation of statehood in 1850, 1872, 1889, and 1910, and all of them had provisions prohibiting double jeopardy protection. See Lynch, 2003-NMSC-020, ¶¶ 31-33 (Maes, J., dissenting) (describing the constitutional history of New Mexico’s constitutional prohibition against double jeopardy). The present provision came from the 1910 draft. Id. In addition, our legislature has expressed itself in directing that this constitutional right is so valuable, it cannot be waived, even by a defendant, and the courts must determine whether jeopardy was violated anytime the issue is presented: “No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment.” Section 30-1-10.

{40} For the foregoing reasons, I respectfully dissent.

MICHAEL E. VIGIL, Judge
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