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Special Insert:
IOLTA News

www.nmbar.org
TO: The Lawyers in Hobbs, Lovington, Roswell, Carlsbad, Alamogordo and Las Cruces

RE: Recent Trip to Local Bar Associations

On April 16, 17 and 18, I attended local bar meetings in Hobbs, Lovington, Roswell, Carlsbad, Alamogordo and Las Cruces. In all, I think I met with more than 150 attorneys. Executive Director Joe Conte and I sincerely appreciate the turnout at these events and the cordial welcome we received at each. At every location, you especially expressed satisfaction that we came, that we presented issues that we thought were important to the practice of law and the judiciary, and that we gave the opportunity for comment. I have reported your thoughts on the issues of non-partisan judicial elections, reciprocity and the Fair Judicial Elections Committee to the Board of Bar Commissioners.

I was also very pleased to hear how excited and enthused everyone is about the State Bar Annual Meeting that will be held at the Inn of the Mountain Gods in July, the debates that will occur at the Annual Meeting, and the current topics that will be discussed.

I hope to get the remainder of the state covered before the end of the year and truly look forward to it.

Sincerely,

Dennis E. Jontz
President, State Bar of New Mexico
Currently taking space reservations for our newest publication
  • Quarterly 12-page supplement to the Bar Bulletin

Please contact: Marcia Ulibarri
505.797.6058 • mulibarri@nmbar.org
**Program Schedule**

8:30 a.m.  Registration/Check-in
9:00 a.m.  New Mexico Claim Practices Update
           David J. Stout, Esq.
9:30 a.m.  What is Claims Profit?
           Gary T. Fye
10:45 a.m. Break
11:00 a.m. Redesigned (Outcome-Oriented) Claim Handling
           Steven L. Strzelec
12:00 p.m. Lunch (on own)
1:00 p.m.  Discovery in Claim Practices Cases
           Gary T. Fye
2:15 p.m.  Negotiations and Communicating With Claim Handlers
           Steven L. Strzelec
3:30 p.m.  Break
3:45 p.m.  Panel Discussion, Q & A
           Gary T. Fye
           Steven L. Strzelec
           David J. Stout, Esq.
4:30 p.m.  Adjourn

Geoffrey Romero, Program Chair

**Faculty**

Gary T. Fye
Gary Fye became a multi-line insurance adjuster in 1962. He now analyzes insurance claim practices. He was first designated as a claim practices expert in 1977 and was the plaintiff’s lead witness in Campbell v. State Farm.

Stephen L. Strzelec, CPCU, CLU
In his 18 year career at State Farm, Steve Strzelec held all of the claims positions, ending as Auto/Fire Section Manager for Alaska. He was also the Claims Manager for the Alaska Insurance Guarantee Association. He is now an insurance claim practices consultant in the Seattle area, with a national practice.

David J. Stout, Esq.
David Stout is a 1982 graduate of the University of New Mexico School of Law. He practices law with Bill Carpenter and Dick Ransom.

A SEMINAR FOR NMTLA PLAINTIFF ATTORNEY “GENERAL” MEMBERS ONLY
PHOTO ID REQUIRED AT THE DOOR
This seminar will not be taped nor will the materials be available for purchase.

**Seminar Registration**

“Navigating Insurance Claim Quagmires”
Friday, May 25, 2007
5.8 CLE Credits
UNM School of Law
1117 Stanford NE
Albuquerque, New Mexico

**Pre-Registration Required**
Registration Must be Received by 05/21/07
We Will Not Accept Phone or Door Registrations

All registrants must complete the following:
I understand that the “Navigating Insurance Claim Quagmires” seminar is limited to NMTLA Plaintiffs’ Attorney members. I do hereby certify that I do not regularly and generally represent the defense of personal injury litigation.

**Tuition:** $180.00 (Tuition includes seminar syllabus, CLE fees and break service.)

Name ____________________________
State Bar ID ____________________________
Address ____________________________
City/State/Zip: ____________________________
Phone ____________________________ Fax ____________________________
E-mail ____________________________

**Payment:**
Check Enclosed  MasterCard  Visa  AmEx

Signature ____________________________ (cardholder signature required)
Card No. ____________________________ Exp. Date ____________________________ CVC Code ____________________________
Billing Address ____________________________ Zip ____________________________

Signature (Required) ____________________________ Date ____________________________
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NMRA of the Rules Governing Discipline

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**Professionalism Tip**

With respect to opposing parties and their counsel:

I will cooperate with opposing counsel’s requests for scheduling changes.

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**Meetings**

**May**

14 Taxation Section Board of Directors, noon, via teleconference
15 Solo and Small Firm Practitioners Section Board of Directors, 11:30 a.m., Section meeting, noon, State Bar Center
16 Committee on Women and the Legal Profession, noon, Lewis and Roca Jontz Dawe LLP
16 Law Office Management Committee, noon, State Bar Center
16 Quality of Life Committee, noon, State Bar Center

**State Bar Workshops**

**May**

15 Common Legal Issues Affecting Seniors, 10:30 a.m., Truth or Consequences Senior Center
17 Common Legal Issues Affecting Seniors 10:30 a.m., Corrales Senior Center, Corrales
23 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque
24 Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces
31 Common Legal Issues Affecting Seniors 10 a.m., Los Lunas Senior Center, Los Lunas

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**Cover Artist:** Russ Ball is known for his exquisite drawings and paintings of birds and dalmatians in oil and pastel. He also paints large and surreal acrylic and oil paintings of harlequins on tightropes and dreamlike “horsewomen” riding the range. Ball painted the official poster of the 2006 Albuquerque Balloon Fiesta. His work is shown at the Weems Galleries in Albuquerque and the Joe Wilcox Gallery in Sedona, Arizona. Ball is well known in Albuquerque for his illustrations in the Albuquerque Journal, where he has worked for the past 27 years.
Fourth Judicial District Court
Judicial Vacancy

A vacancy on the 4th Judicial District Court will exist in Las Vegas as of July 1 upon the creation of a new judgeship by the state legislature. The chair of the 4th Judicial District Nominating Commission solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14, of the New Mexico Statutes Annotated 1978. Applications may be obtained via e-mail [call Sandra Bauman, (505) 277-4700] or downloaded from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/application.doc. All applicants are strongly encouraged to complete a new application as the application forms are updated frequently. The deadline for applications is 5 p.m., June 8. Applications received after that date will not be considered.

The District Judicial Nominating Commission will meet at 9 a.m., June 26, at the San Miguel County Courthouse, Las Vegas, N.M., to evaluate the applicants for this position. The commission meeting is open to the public.

Sixth Judicial District Court
Judicial Vacancy

A vacancy on the 6th Judicial District Court will exist in Deming as of July 1 upon the creation of a new judgeship by the state legislature. The chair of the 6th Judicial District Nominating Commission solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14, of the New Mexico Statutes Annotated 1978. Applications may be obtained via e-mail [call Sandra Bauman, (505) 277-4700] or downloaded from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/application.doc. All applicants are strongly encouraged to complete a new application as the application forms are updated frequently. The deadline for applications is 5 p.m., June 8. Applications received after that date will not be considered.

The District Judicial Nominating Commission will meet at 9 a.m., July 6, at the Luna County Courthouse, Deming, N.M., to evaluate the applicants for this position. The commission meeting is open to the public.

State Bar News
Annual Meeting

According to its bylaws, the State Bar is required to hold an annual meeting of its members. As part of this year’s annual meeting, which will be held at the Inn of the Mountain Gods in Mescalero, the State Bar will conduct a CLE session on
discussion topics from 3 to 4:45 p.m., July 12. Possible discussion topics include nonpartisan judicial elections, reciprocity, tort reform and electronic filing. Members who have suggestions on other possible topics or who are interested in speaking to a specific topic or moderating a discussion, should contact Joe Conte, (505) 797-6099 or jconte@nmbar.org.

**Attorney Support Group**

The next Attorney Support Group meeting will be held at 5:30 p.m., June 4, 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 Training and Technology Workshop**

**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. Training on using Casemaker will be held from 3 to 4 p.m., May 21, at the State Bar Center. Seating is limited. Call (505) 797-6000 to reserve a seat.

**Committee on Diversity in the Legal Profession**

**Reception and Third Study of Status of Minority Attorneys in New Mexico**

The State Bar's Committee on Diversity in the Legal Profession will host a reception from 5 to 6:30 p.m., June 22, at the State Bar Center to commemorate the work of the committee and celebrate the beginning of the third study of minorities in the profession. The study will be a comprehensive look over the past three decades at bar passage rates, disciplinary matters, State Bar leadership, judicial selection and more. All members are welcome and encouraged to attend this important event. R.S.V.P. to (505) 797-6000 by June 8.

**Solo and Small Firm Practitioners Section**

**Luncheon Presentation**

A meeting of the Solo and Small Firm Practitioners Section will be held at noon, May 15, at the State Bar Center. Forensic experts Nelson Welch and David Torres will present *Accident Reconstruction in the 21st Century: A Civil and Criminal Attorney’s Guide to the Solo and Small Firm Practitioners Section*, which involves computer animation and other progressive techniques. Lunch will be served to those who R.S.V.P. by May 14 to Tony Horvat, thorvat@nmbar.org or (505) 797-6033. Each attendee should bring a $5 check made payable to the State Bar Solo and Small Firm Practitioners Section to help defray the cost of the lunch. The board of directors will meet at 11:30 a.m.

**Young Lawyers Division Hispanic Bar Association**

**Seeking Volunteers**

The Young Lawyers Division and the Hispanic Bar Association are seeking volunteers to spend an hour with high school students on a new ABA/YLD program called *Choose Law: A Profession for All*. The program encourages diversity in our profession and, specifically, high school students of color to become attorneys. Attorney volunteers will spend one hour with a classroom of high school students to teach the importance of the legal profession and how law impacts many aspects of their lives. A video, written curriculum and Web site are available. Attorney volunteers will present the video and provide a meaningful discussion. For more information and to volunteer, contact Briana Zamora, bhzamora@btblaw.com, or Martha Chicoski, mchicoski@cabq.gov.

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**N.M. Defense Lawyers Association**

**2007 Outstanding Civil Defense Lawyer Nominations**

Nominations are being accepted for the 2007 Outstanding Civil Defense Lawyer. The award will be presented at the 2007 DLA Annual Meeting on Oct. 18 in Albuquerque. This award is given to one or more attorneys who, over long and distinguished legal careers, have, by their ethical, personal, and professional conduct, exemplified for their fellow attorneys the epitome of professionalism and ability. Letters of nomination should be sent to: NMDLA, PO Box 94116, Albuquerque, NM 87199; fax to (505) 858-2597; or e-mail nmdefense@nmdla.org. Deadline for submissions is May 31.

**UNM School of Law Library Spring Hours**

**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.

**Reference**  
**Monday–Friday** 9 a.m. to 6 p.m.  
**Saturday** Closed  
**Sunday** Noon to 4 p.m.

**Phone:** (505) 277-6236

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**Other Bars**

**Albuquerque Bar Association**

**Luncheon and CLE**

The Albuquerque Bar Association’s Membership Luncheon will be held at noon, June 5, at the Doubletree Hotel, 201 Marquette, NW. Ann Lerner, Film Liaison for the Albuquerque Economic Development Department, will be the speaker. The CLE will immediately follow the luncheon at 1:15 p.m. and will qualify for 1.0 general CLE credits. Criminologist Bruce A. Jacobs, Ph.D., will present *Third Party Premises Liability: Lessons from Criminology*. This CLE is directed to all lawyers who represent premises operators, landowners, employers, and victims of violent crime. Lunch only: $20 members/$25 non-members with reservations, $5 additional at door; lunch and CLE: $40 members/$55 non-members with reservation, $5 additional at door; CLE only: $20 members/$30 non-members with reservation, $5 additional at door. Register for lunch by noon, May 31. 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.

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**Other News**

**Thirteenth Judicial District Attorney’s Office Change of Address**

The 13th Judicial District Attorney’s Office in Los Lunas (Valencia County) has moved to the Wells Fargo Bank Building, 101 South Main Street, Suite 201, Belen, NM 87002. The mailing address is PO Box 1919, Los Lunas, NM 87031. The phone number is (505) 861-0311, and the fax number is (505) 861-7016.
The Albuquerque Bar Association once again hosted the annual Law Day Luncheon May 1 at the Marriott Uptown in Albuquerque. A national day set aside to celebrate the rule of law, Law Day underscores how law and the legal process have contributed to the freedoms that all Americans share.

**Supreme Court Justice Edward L. Chávez** read the In Memoriam list of State Bar members. **ABA President William Stratvert** introduced the 2007 Mock Trial State Championship Team from Sandia High School. Attorney at Law **Cristen Conley**, chair of the Public Legal Education Committee, announced the winners of the State Bar Annual Essay Contest, and **R. E. Thompson**, president of **Modrall Sperling Roehl Harris Sisk PA**, sponsors of the contest, presented checks to the winners. **The Honorable Harris Hartz**, U.S. Court of Appeals for the 10th Circuit, introduced the keynote speaker, **Chief Justice Wallace B. Jefferson**, Supreme Court of Texas. Chief Justice Jefferson told of his own legacy grounded in the Old South and of a certain Judge Nicholas William Battle who, like many in the judiciary, acted bravely by imposing the rules of law even when contrary to the public will. Chief Justice Jefferson is the great, great, great grandson of Cedric Willis, a slave owned by Judge Battle. In an historic case, Judge Battle courageously ruled that no freedman could sell himself into slavery under the laws of the state of Texas and that any such contract was null and void. His opinion was upheld by the Texas Supreme Court. Chief Justice Jefferson said that our Constitution, the very reason that we live free, inspires us to confront challenges and is a document to be revered.
Law Day 2007

PLEC Student Essay Contest

Modrall Sperling Sponsors Essay Contest for 10th Straight Year

The annual essay contest, begun in 1991, is administered by the Public Legal Education Committee of the State Bar. It has been generously sponsored by Modrall Sperling since 1997. This year’s topic was School Bullies, which focused on the liability of both a school and an individual in a fictitious case involving injuries resulting from incidents of bullying. The essays were judged by PLEC members Cristen Conley, David Berlin, Beth Collard and Audrey McKee. The six finalists were judged by Judge John Pope, 13th Judicial District Court; Judge Freddie Romero, 5th Judicial District Court; and Judge Jerry Valentine, 3rd Judicial District Court.

First Place
$1,000
Mark Macaron II
Evangel Christian Academy
Albuquerque

Second Place
$500
Vera Jo Bustos
West Las Vegas High School
Las Vegas, N.M.

Third Place
$250
Daniel Aguilar
Capital High School
Santa Fe

To encourage an appreciation for the law and to promote higher education.

R.E. Thompson (upper right), president of Modrall Sperling, presents Mark Macaron II with a check for $1,000, a plaque for his school and a classroom prize of $100. Macaron is a four-year varsity basketball letterman and plans to major in engineering at UNM. Third place winner Vera Jo Bustos (left) is an honor roll student and a four-sport letterman in volleyball, basketball, track and softball. She is the vice-president of student council and the senior class. Vera Jo plans to attend Adams State College on a basketball scholarship.

Cristen Conley, chair of PLEC, announced the winners of the essay contest. Judge John W. Pope, 13th Judicial District Court, was one of the finalist judges.

Mark Macaron II (center), winner of this year's essay contest, sits with his father, Judge Mark A. Macaron, 2nd Judicial District Court (left), and his grandfather, Joe Macaron, at the Law Day Luncheon.

Daniel Aguilar (left) accepts his third-place prize from R.E. Thompson. Aguilar was last year's first-place winner. He hopes to one day hold a medical or law degree and a bachelor's degree in theater or music.
Law Day 2007
PLEC Student Essay Contest

Jeff had been a cheerleader for two years and always enjoyed the activity. The cheerleaders and football team rode buses together to the games and had a great time. Early in the season and for no apparent reason, that all changed. A few of the players started harassing Jeff, calling him “sissy” and other names. It started out low key but intensified week after week. Jeff had become the object of their merciless teasing and ridicule.

The school district has in place policies which prohibit unwelcome physical contact of a sexual nature including touching, pinching, patting or brushing against. In addition, there is a policy which prohibits students from threatening, name calling, bullying, assaulting or battering another student. Any such action can result in suspension or expulsion.

Jeff complained more than once to Coach Taylor, who seemed supportive at first but then began telling him to “be a man” and “suck it up.” Jeff also appealed to the cheerleading sponsor, and she told him to tell his counselor, which Jeff did. Nothing changed, and the bullying and teasing continued. Jeff’s parents wrote a letter about the bullying to Mr. Carter, the principal, informing him that Jeff’s grades had fallen, and, for the first time, he didn’t want to go to school. Mr. Carter told Coach Taylor that if it happened again, the involved players would be suspended.

On the next bus trip, several players walked past Jeff on the bus, “accidentally” lurched into him, and stomped on his feet. “We’re gonna get you,” they told him. “You’re a dead man for snitching.” His foot and arm were slightly injured, enough so that he was limping at the game that night and couldn’t do lifts for the cheers. On the way to the game the following week, a player poured a bottle of soda on Jeff’s head. All the kids sitting around Jeff howled in laughter. Jeff, humiliated, angry, and frightened, snapped. He turned in his seat and stabbed the kid behind him with his pencil. Unfortunately, the kid Jeff hit was Tony, the star athlete on the team and not the person who doused Jeff with the soda. The pencil severed a tendon in Tony’s right hand, an injury which will diminish, and possibly eliminate, Tony’s chances of getting a much-needed college athletic scholarship.

Jeff was under a lot of stress and was immature and showed everyone how undisciplined and scared he really was. It was also an atrociously mishandled event by the school and its administrators. There were many things that could have happened if this had been handled correctly; for instance, Jeff would not have felt that he had to take matters into his own hands and defend himself against what he had become—the favorite target of “merciless teasing and ridicule.” The school failed to act on several occasions when presented the opportunity. The background information provided is more than enough to show that the school is indeed liable for Tony’s injuries. It also tells us that Jeff can be convicted if criminal charges are filed against him.

In the school’s case, the root of the problem lies in their neglect to deal with or handle the problem correctly. If the necessary actions or precautions were taken, the whole incident may have been prevented. Section 41-4-2 NMSA 1978 states:

“Any party may sue a governmental entity for negligence or other torts, but only within the limitation set forth in the New Mexico Torts Claims Act.”

Section 41-4-3 states, “A public school is a governmental entity within the meaning of this statute.” Section 41-4-5 allows a person to bring a law suit against a governmental entity for bodily injuries or wrongful death caused by the negligence of public employees while acting within the scope of their duties.

First Place Essay

by Mark Macaron II
Evangel Christian Academy, Albuquerque

Although it was unfortunate and irrational what Jeff did, his actions were immature and showed everyone how undisciplined and scared he really was. It was also an atrociously mishandled event by the school and its administrators. There were many things that could have happened if this had been handled correctly; for instance, Jeff would not have felt that he had to take matters into his own hands and defend himself against what he had become—the favorite target of “merciless teasing and ridicule.” The school failed to act on several occasions when presented the opportunity. The background information provided is more than enough to show that the school is indeed liable for Tony’s injuries. It also tells us that Jeff can be convicted if criminal charges are filed against him.

In the school’s case, the root of the problem lies in their neglect to deal with or handle the problem correctly. If the necessary actions or precautions were taken, the whole incident may have been prevented. Section 41-4-2 NMSA 1978 states:

“A private party may sue a governmental entity for negligence or other torts, but only within the limitation set forth in the New Mexico Torts Claims Act.”

Section 41-4-3 states, “A public school is a governmental entity within the meaning of this statute.” Section 41-4-5 allows a person to bring a law suit against a governmental entity for bodily injuries or wrongful death caused by the negligence of public employees while acting within the scope of their duties.

The last big player in this game against the school would be the Upton v. Clovis Municipal School District, 2006-NMSC-040, which states that a person can sue a school district, even if part of the claim was for what could be defined as negligent supervision, if the school failed to follow its safety policies or ignored instructions given by the parents regarding the child’s health. The school failed to do all of these things as they failed to follow school policy which prohibits touching of a sexual nature which also includes pinching, patting or brushing against. There are also other school policies that strictly prohibit students from threatening, name-calling, bullying, assaulting or battering another student. Any such actions can result in suspension or expulsion.

The responsibility falls squarely on the shoulders of Coach Taylor, who failed to respond to Jeff’s calls for help, requests for protection, and pleas for the coach to take action and put a stop to this. Coach Taylor ignored policy, seeing all these events unfold, and took the side of his players when Jeff told him about the inappropriate behavior taking place. The coach responded by telling Jeff to “suck it up” and “be a man.” The bullying, taunting, humiliating and finally the hurt of Jeff under the negligent eyes of the coach ultimately led to the untimely snap of Jeff’s patience and will to let his superiors handle the situation.

To address the final of the three failed requirements, directions or notification of the parents, Jeff had his parents write a letter to the principal, who did very little. In fact, the bullying not only continued but increased to an intolerable level. All these things show negligence by an employee of a governmental entity, making the school completely eligible for a law suit and proving it liable for Tony’s injury.

continued on page 11
Unfortunately in Jeff’s case, he is not eligible for self-defense, seeing as he acted after the event took place out of fear with every intention of hurting the now dormant attacker. He acted offensively, not defensively. Another drawback for Jeff is his stroke was delivered without considering the ramifications of what should happen if he should miss, and he did miss and hit an innocent bystander. With the overwhelming evidence, the witnesses to the event, and the extensive damage to Tony’s right hand, Jeff can be charged with many things, although he is most closely eligible for a third degree felony. According to criminal laws Section 30-3-5 NMSA:

A. Aggravated battery consists of the unlawful touching or application of force to the person of another with the intent to injure that person or another.
B. Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.
C. Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in a manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony.

These laws show that the school is liable for Tony’s injury, and Jeff is liable for criminal charges. The story also shows what actions a scared and tormented teenager is capable of if the necessary precautions are not taken to make him feel safe. Furthermore, it shows how a simple problem like bullying can turn into a life-threatening situation if not handled correctly.

“Those who have the ability to take action have the responsibility to take action.” Unknown

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**LAW DAY 2007**

**Dialogue on the Jury System**

Students in Anne Young’s Law I class at Valley High School in Albuquerque participated in the Dialogue on the Jury System with The Honorable Frank Sedillo, Metropolitan Court, The Honorable Ernesto J. Romero, 2nd Judicial District Court and Charles Daniels, Freedman Boyd Daniels Hollander Goldberg & Ives PA. The Dialogue, sponsored in Albuquerque by the State Bar and the American Bar Association, is an initiative of the ABA and was conceived of and outlined by Supreme Court Justice Anthony M. Kennedy in the belief that the terrorist attacks of 9/11 underscore the need for serious and constant discussion about American civic values and their compatibility with the values of other cultures.

Charles Daniels, Judge Frank Sedillo and Judge Ernesto J. Romero discuss the jury system with Anne Young’s Law I class at Valley High School. They summarized the origin of the system, took general questions about being a lawyer and described how a trial works. Juries, they pointed out, are a cross-section of society who bring life experiences to the courtroom. They might not know the law or be the most intelligent, but the beauty of the system is that they will be fair and honest in reaching a decision. Our jury system, they noted, takes justice out of the hands of the powerful elite, which makes it the best system in the world.

Matt Scott, Brandon Velasquez and Josh Kloeppe are seniors in the Law I class at Valley High School.

Omar Uribe is a member of the Valley Mock Trial Team.

Sharmain Brito gets involved in the discussion.
On a sunny Saturday morning, April 28, the Young Lawyers Division sponsored the annual Ask-a-Lawyer call-in for citizens seeking legal assistance. Lawyers were staffing phones in four cities throughout the state. Morris “Mo” Chavez, N.M. Public Regulation Commission, organized the event in Albuquerque; Dustin Hunter, Kraft and Hunter LLP, organized a group in Roswell; Joe Sawyer, 11th Judicial District Attorney’s Office, headed the effort in Farmington; and David Lutz, Martin Lutz Roggow Hosford & Eubanks PC, led the team in Las Cruces.

The purpose was to provide legal information, not legal advice. Callers might be directed to state or local agencies that could lend aid and support. They might be educated as to their rights in a certain matter and advised to seek the counsel of an attorney, or they might simply be told how to find the help they need.

All were eager to help and glad to be there. As one participant put it, “It’s the right thing to do.”
### Legal Education

**May**

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<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>14</td>
<td>Scientific Evidence–Practical Solutions to Real World Problems Teleconference TRT 2.0 G (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>15</td>
<td>Employee Overtime: Determining Who is “Exempt” Teleseminar Center for Legal Education of NMSBF 1.0 G (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>Lawyer As Problem Solver: 2007 Professionalism VR, State Bar Center Center for Legal Education of NMSBF 1.0 P (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>Legal and Tax Advantages of Limited Liability Companies VR, State Bar Center Center for Legal Education of NMSBF 5.5 G, 1.0 E (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>Prevention, Reporting and Representing Victims of Identity Theft VR, State Bar Center Center for Legal Education of NMSBF 2.7 G (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>Professionalism–Practicing Law Without Fear Teleconference TRT 1.0 E, 1.0 P (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>Road and Access Law VR, State Bar Center Center for Legal Education of NMSBF 3.0 G (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>16</td>
<td>Arbitration–Theory and Practice Teleconference TRT 2.0 G (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>16</td>
<td>Successful Financial Settlements for Your Divorce Client Albuquerque National Business Institute 6.0 G (715) 835-8525 <a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court

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

**Effective May 14, 2007**

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(Parties preparing briefs)

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<tr>
<td>30,259</td>
<td>State v. Cummings</td>
<td>(12-501)</td>
<td>4/10/07</td>
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<tr>
<td>30,289</td>
<td>State v. Contreras</td>
<td>(COA 25,526)</td>
<td>4/16/07</td>
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<tr>
<td>30,263</td>
<td>State v. Downey</td>
<td>(COA 25,068)</td>
<td>4/16/07</td>
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<tr>
<td>30,209</td>
<td>Varoz v. Varoz</td>
<td>(COA 25,935)</td>
<td>4/20/07</td>
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<tr>
<td>30,301</td>
<td>State v. Moreland</td>
<td>(COA 25,831)</td>
<td>4/20/07</td>
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<tr>
<td>30,318</td>
<td>State v. Trujillo</td>
<td>(COA 25,898)</td>
<td>4/20/07</td>
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<tr>
<td>30,278</td>
<td>Sanders v. FedEx</td>
<td>(COA 25,577)</td>
<td>4/20/07</td>
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<tr>
<td>30,293</td>
<td>State v. Campbell</td>
<td>(COA 24,899)</td>
<td>4/24/07</td>
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<tr>
<td>30,342</td>
<td>Brown v. Janecka</td>
<td>(12-501)</td>
<td>4/24/07</td>
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</tbody>
</table>

**Certiorari Granted and Submitted to the Court:**

<table>
<thead>
<tr>
<th>Submission Date</th>
<th>Case Name</th>
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<tbody>
<tr>
<td>12/13/05</td>
<td>Benavidez v. City of Gallup (COA 25,373)</td>
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<tr>
<td>4/10/06</td>
<td>Montoya v. Ulubari (12-501)</td>
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<tr>
<td>5/22/06</td>
<td>State v. Gutierrez (COA 25,279)</td>
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<tr>
<td>6/12/06</td>
<td>Smith v. City of Santa Fe (COA 24,801)</td>
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<tr>
<td>8/15/06</td>
<td>Maes v. Audubon Indemnity Ins. Group (COA 25,598)</td>
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<tr>
<td>9/12/06</td>
<td>State v. Grogan (COA 25,699)</td>
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<td>11/14/06</td>
<td>State v. Hughey (on rehearing) (COA 24,732)</td>
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<tr>
<td>11/27/06</td>
<td>McMinn v. MBF Operating Acquisition Corp. (COA 25,006)</td>
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<tr>
<td>12/12/06</td>
<td>State v. Kirby (COA 24,845)</td>
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<td>12/12/06</td>
<td>State v. Lucero (COA 24,891)</td>
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<tr>
<td>1/22/07</td>
<td>State v. Lopez (COA 24,566)</td>
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<td>1/23/07</td>
<td>Cruz v. FTS Construction (COA 25,708)</td>
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<td>1/23/07</td>
<td>Board of Veterinary Medicine v. Rieger (COA 25,610)</td>
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<td>State v. Neal (COA 25,864)</td>
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<td>State v. Graham (COA 25,836)</td>
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<td>2/12/07</td>
<td>Hydro Resources Corp. v. Gray (COA 24,012)</td>
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<td>State v. Lizzol (COA 25,794)</td>
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<td>3/13/07</td>
<td>State v. Walters (COA 24,585)</td>
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<td>3/13/07</td>
<td>Gardiner v. Galles Chevrolet (COA 26,560)</td>
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<tr>
<td>3/14/07</td>
<td>Stennis v. City of Santa Fe (COA 25,549)</td>
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<td>3/14/07</td>
<td>Baldonado v. El Paso Natural Gas Co. (COA 24,821)</td>
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<td>Moriarty Schools v. Thunder Mountain Water (COA 26,031)</td>
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<td>State v. Moya (COA 25,546)</td>
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<td>Monks Own v. Monastery of Christ (COA 25,787)</td>
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<td>State v. Day (COA 25,290)</td>
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<td>Davis v. Farmers Insurance (COA 25,312)</td>
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<td>State v. Rogers (COA 25,950/25,968)</td>
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<tr>
<td>4/30/07</td>
<td>State v. Worrick (COA 24,557)</td>
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<tr>
<td>5/7/07</td>
<td>State v. Drennan (COA 26,002)</td>
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<tr>
<td>5/7/07</td>
<td>State v. Martinez (COA 24,601)</td>
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<tr>
<td>5/7/07</td>
<td>Heimann v. Kinder (COA 25,735)</td>
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**Petition for Writ of Certiorari Denied:**

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<th>Case Name</th>
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<tbody>
<tr>
<td>State v. Torro (COA 27,010)</td>
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<tr>
<td>State v. Tania A. (COA 26,901)</td>
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<tr>
<td>State v. Owings (COA 27,009)</td>
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<td>Jones v. State (12-501)</td>
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<td>State v. Ford (COA 24,934)</td>
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<td>Griego v. Patriot Erectors, Inc. (COA 26,378)</td>
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<tr>
<td>Varela v. Tafoya (12-501)</td>
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<td>McDow v. State (12-501)</td>
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<td>Dimarco v. Presbyterian (COA 26,528)</td>
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<td>Lohman v. US Testing Co. (COA 25,752/25,753)</td>
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<tr>
<td>State v. Herr (COA 27,056)</td>
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<tr>
<td>State v. Plumeri (COA 26,991)</td>
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<tr>
<td>State v. Gallegos (COA 26,922)</td>
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<tr>
<td>Baca v. Painted Desert (COA 26,850)</td>
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<td>Enfield v. Old Line Insurance (COA 27,399)</td>
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<tr>
<td>Brown v. Burlington Resources, Inc. (COA 25,904/26,023)</td>
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<tr>
<td>State v. Clay (COA 26,651)</td>
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**Writ of Certiorari Quashed:**

<table>
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<tr>
<th>Case Name</th>
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<tr>
<td>State v. Cook (COA 25,137)</td>
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<tr>
<td>State v. Vincent (COA 23,832)</td>
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<tr>
<td>State v. Parra (COA 25,484)</td>
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</tbody>
</table>
**OPINIONS**

**AS UPDATED BY THE CLERk OF THE NEW MEXICo COURT OF APPEALS**

Gina M. Maestas, Chief Clerk New Mexico Court of Appeals

PO Box 2008 • Santa Fe, NM 87504-2008 • (505) 827-4925

**EFFECTIVE MAY 4, 2007**

**PUBLISHED OPINIONS**

<table>
<thead>
<tr>
<th>No.</th>
<th>Dist</th>
<th>Case Name</th>
<th>Decision</th>
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<tbody>
<tr>
<td>25732</td>
<td>2nd Jud Bernalillo CV-03-8083</td>
<td>COMPUTER ONE v GRISHAM (affirm)</td>
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</tr>
<tr>
<td>25862</td>
<td>2nd Jud Bernalillo CV-04-4374</td>
<td>R FISER v DELL COMPUTER (affirm)</td>
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<tr>
<td>26143</td>
<td>2nd Jud Bernalillo CV-05-3691</td>
<td>AMERICAN CIVIL v CITY OF ALBUQUERQUE (reverse)</td>
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**UNPUBLISHED OPINIONS**

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<th>Case Name</th>
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<tr>
<td>24937</td>
<td>9th Jud Curry CV-02-491</td>
<td>J LEE v D OPPLIGER (affirm in part, reverse in part)</td>
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<tr>
<td>26733</td>
<td>9th Jud Curry CR-03-828</td>
<td>STATE v M HOLT (affirm)</td>
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<tr>
<td>26853</td>
<td>11TH Jud San Juan LR-06-16</td>
<td>STATE v F BENALLY (affirm)</td>
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<td>27064</td>
<td>2nd Jud Bernalillo LR-06-13</td>
<td>STATE v W BOKOR (reverse)</td>
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<tr>
<td>27178</td>
<td>11th Jud San Juan CR-06-83</td>
<td>STATE v J SANTIESTEBAN (affirm)</td>
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<td>27271</td>
<td>WCA-04-65902, O HOLBROOKS v EXCEL TECH (affirm)</td>
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<td>27394</td>
<td>9th Jud Curry CR-05-961</td>
<td>STATE v B WELLS (reverse and remand)</td>
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<td>25388</td>
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<td>STATE v R WOLF (reverse and remand)</td>
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<tr>
<td>27172</td>
<td>3rd Jud Dona Ana CV-05-203</td>
<td>L CAMPOS v R QUESADA (affirm)</td>
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<td>27293</td>
<td>1st Jud Santa Fe CV-05-747</td>
<td>S MONTOYA v AG (reverse and remand)</td>
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<tr>
<td>27343</td>
<td>1st Jud Santa Fe CV-05-757</td>
<td>S MONTOYA v P MADRID (reverse and remand)</td>
<td></td>
<td>5/2/2007</td>
</tr>
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</table>

Slip Opinions for Published Opinions may be read on the Court’s Web site:

2007 Grant Committee

Annual IOLTA grant awards are based on the recommendations of a seven-member committee composed of lawyers and nonlawyers who are appointed to serve three-year terms by the State Supreme Court, the Center for Civic Values and the State Bar of New Mexico.

The Committee meets once each year to consider applications for IOLTA funding and to develop recommendations which are forwarded to the CCV Board of Directors for review. The recommendations are then submitted to the Court for approval.

Supreme Court Appointees
David M. Berlin, Esq.
The Hon. John Pope
The Hon. Petra Jimenez-Maes

CCV Appointees
John P. Hays, Esq.
Kathy Silva

State Bar Appointees
Kim A. Griffith, Esq.
Edward T. O’Leary

Legal FACS Volunteer: Todd came to the Legal FACS program, an IOLTA grantee, as a then-TVII Paralegal Service Learning Student and has stayed for two years as a Volunteer. “He has been a program saver, when our staff legal assistants have been on vacation or in week-long trainings,” notes Office Administrator Maria Hellwig. Todd is seen here working with a client in the Forms Clinic program. Clinic volunteers help self-represented litigants with the completion of domestic relations paperwork.

“Equal justice under law . . . is not merely a caption on the façade of the Supreme Court Building. . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.”

Justice Lewis Powell, Jr.
United States Supreme Court
January 1972–June 1987
NM Center on Law and Poverty Works to Protect Day Laborers

Day laborers are people who provide manual labor—often in construction or landscaping—on a short-term basis for low wages. You will see day laborers congregating at ‘pick-up’ sites in cities around the state but most get their work through day labor broker agencies. Day laborers have few resources and, for many reasons, are disinclined to go to the authorities to resolve conflict. Thus, they are easy targets for abuse. Some employers whittle away at their already low wage until it is well below minimum wage by, for instance, taking unreasonable deductions for transportation to the work site, for use of protective gear or tools, or for cashing their paychecks. Sometimes, they cheat them out of all the wages they are due.

There are roughly 7,500 day laborers throughout the state of New Mexico. They are very poor and many of them are veterans or immigrants. Three years ago, the New Mexico Center on Law and Poverty collaborated with the Southwest Center for Economic Integrity to survey day laborers here in New Mexico. They found that roughly three-quarters were male and one-quarter were female. Their average age was 43, more than 80% of them had children, and 75% were homeless. An astonishing number had experienced abuse by employers: 40% reported being paid less than the agreed-upon wage and 33% reported not being paid at all for work completed.

In 2005, with IOLTA funding through the Center for Civic Values, the Center on Law and Poverty helped educate state policy makers about day laborers and drafted legislation to protect them. The New Mexico Day Laborer Act was signed into law (codified at 50-15-1 NMSA 1978) that April. The Act protects day laborers from abuses by employers by mandating several requirements. For example, the Act requires that day laborer service agencies: pay workers for all work performed; give workers itemized accountings of any deductions taken from their wages; and not restrict a worker from taking a permanent job. Additionally, the Act limits the amount that an employer can charge for cashing a check to $2.00.

This past summer, staff at the Center began looking into how well the Day Laborer Act was being enforced. They learned that the New Mexico Department of Labor—the agency charged with enforcing its provisions—had not yet written regulations for the Act or begun enforcing it. Center staff called on the Department to begin enforcing the Act and then rolled up their sleeves to help. After researching the best regulations for similar laws in other states they provided draft regulations, procedures and complaint forms for New Mexico. This past November, the regulations were adopted by the Department with minimal revision.

Now, with IOLTA funding from the Center for Civic Values and from the Bar Foundation’s Pro Hac Vice fund, the Center on Law and Poverty has begun to facilitate and ‘watchdog’ enforcement of the Day Laborer Act. The Department of Labor is now implementing the Act, but this is a difficult law to enforce, since the victims do not easily come forward. The Center plans to meet with groups of day laborers to inform them of their rights and to collect data about violations of the Act including which agencies are committing them. They will also educate organizations that provide services to homeless people and immigrants about the new law and how to help individuals file claims. These organizations too will be asked to track information about the kinds and sources of abuses day laborers are experiencing and the Center will serve as a clearinghouse for the information. Finally, the Center will share the information that is collected with the Department and will monitor its handling of claims and violations.

By ensuring that there is a system in place for day laborers to report and remedy workplace abuses, the Center on Law and Poverty hopes to diminish the level of abuse that these vulnerable working people experience, and enhance the likelihood that they will be able to improve their living conditions and those of their families.
Honor Roll of Financial Institutions

Sincere thanks to the financial institutions below. Because they waive minimum balance requirements, waive processing charges to CCV or offer competitive interest rates, several thousand additional dollars are available annually to help the nearly 1/2 million New Mexicans who benefit from services provided by IOLTA-funded organizations. PLEASE consider banking at one of these IOLTA-friendly institutions.

1st National Bank in Las Cruces
Access Bank
AmBank
Bank 1st
Bank of Albuquerque
Bank of the Rio Grande
Bank of the Southwest at T or C
Century Bank of Santa Fe
Charter Bank
City Bank NM
Community Bank of Santa Fe
Community First National Bank
Compass Bank
First Bank of Clovis and Portales
First Community Bank
First Federal Bank
First Financial Credit Union
First National Bank of Las Vegas
First National Bank of Alamogordo
First National Bank of Artesia
First National Bank of New Mexico
First National Bank of Santa Fe
First Savings Bank of Deming
First State Bank of Socorro
Four Corners Community Bank
Grants State Bank
Ironstone Bank
Lea County State Bank
Los Alamos National Bank
Matrix Bank
New Mexico Educators Federal Credit Union
Pinnacle Bank of Gallup
Pioneer Bank
Portales National Bank
Ranchers Bank
State National Bank of El Paso
State National Bank of Las Cruces
State National Bank of Ruidoso
State National Bank of T or C
Sunrise Bank of Albuquerque
The Bank of Clovis
Union Savings Bank
US New Mexico Federal Credit Union
Valley Bank of Commerce
Valley National Bank
VectraBank
Wells Fargo Bank New Mexico
Western Bank of Alamogordo
Western Commerce Bank

Supreme Court Approves 2007 IOLTA Grants

The State Supreme Court approved distribution of $225,000 in IOLTA grants to 11 nonprofit organizations that provide a wide variety of services to the citizens of New Mexico. The 2007 distribution brings the total awarded by IOLTA to more than $3.7 million, since the first grants were given in 1987. This year's budget represents a 15% increase over 2006, and it is anticipated there will be an additional increase in 2008, if current revenue trends hold. Applications for 2008 funding will be available on the CCV website on October 1 and must be postmarked by November 1. Call 764-9417, extension 12, for more information about IOLTA grants or visit IOLTA on the web at http://www.civicvalues.org/IOLTA_main.htm.

### IOLTA Grants-Inception to Date

<table>
<thead>
<tr>
<th>Legal Services for the Poor</th>
<th>Law-Related Education &amp; Administration of Justice</th>
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<tbody>
<tr>
<td>$2,986,436</td>
<td>$735,134</td>
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<tr>
<td>80.25%</td>
<td>19.75%</td>
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<tr>
<td>Total Awarded: $3,721,570</td>
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</table>
National News and Notes

Comparability Requirements Adopted in Illinois, Minnesota and Texas

Illinois, Minnesota and Texas have become the latest states to adopt interest rate comparability requirements. Under the requirements, lawyers must hold IOLTA accounts only in financial institutions that pay no less on IOLTA deposits than the highest interest rate or dividend paid to a bank’s own non-IOLTA customers when the IOLTA account meets the same balance or other eligibility qualifications. Each of these three states expects the new requirements to increase IOLTA revenues.

The requirements were incorporated in amendments to each state’s IOLTA rule, approved by their respective supreme courts. Texas’ requirement was adopted in December and took effect March 1, 2007. The Minnesota provision was also approved in December, and will take effect July 1. The Illinois requirement was approved in January and will take effect June 1.

The (ABA) Commission on IOLTA and the National Association of IOLTA Programs, through their Joint Technical Assistance committee, continue to assist IOLTA programs considering and drafting interest comparability requirements and other revenue enhancement provision. For assistance or information, contact Commission Counsel Bev Groudine at 312-988-5771 or bgroudine@staff.abanet.org.

From Dialogue-A Publication of the ABA’s Division for Legal Services

Thanks for Your Interest!

Thank you and congratulations to the following attorneys and firms for opening new/additional or converting existing trust accounts to IOLTA. You are making a difference in the lives of nearly half a million New Mexicans who receive services from IOLTA-funded programs. (Law firm names are listed according to the information provided by their financial institutions.)

Alan Malott Professional Corp.  Jana L. Walker Attorney at Law  Pavon Law LLC
Andrew Lewinter Attorney PC  Jennings & Jones LC  Pica Seibel & Vaughn LLP
Barbara Rowe Attorney at Law  John R. Funk  Priscilla A. Shannon
Brigette C. Buynak Atty at Law IOLTA  Jones & Smith LLC  Rachel I. Walker Al-Yasi
Canales-Owen General Client Trust  Kathleen M. Brandt Esq.  Ralph D. Dowden Attorney at Law
Charlotte J. Craig Attorney at Law  Keller & Keller of New Mexico  Rammelkamp Muehlenweg & Cordova PA
Chester A Bowerman  Kenneth G. Egan  Raul A. Lopez Attorney at Law
Clear & Clear PA  Law Office of Christopher B. Mixon  Robert B. Collins
CMS Legal Services LLC  Law Office of Frances A. Crockett  Robert I Waldman
Cohen & Cohen PA  Law Office of Maria D. Preciado PA  Robert L. Lovett PC
Consultants United LLC  Law Offices of Allan L. Wainwright PA  Roscoe A. Woods & Associates LLC
Craig J. LaBree General Trust  Law Offices of Lupe H. Preciado PC  Sanchez Legal Solutions LLC
Craig J. LaBree JL  Lawrence P. Zamzok Esq.  Sarah M. Armstrong, PC
Craig J. LaBree JL  Lee & Ross  Schlenker & Urrea LLP
David I. Rupp Attorney at Law  Legal Solutions PC  Schuchardt Law Firm
Dennis F. Armijo PC  Leonard J. Piazza PA  Standridge Law Firm PC
Dominguez Law  Les W. Sandoval Atty at Law  Tal Young, PC
Eric Sedillo Jeffries LLC  Limkin Law Office PC  The Kassakhian Law Offices
Fang & Ortiz LLC  Long Pound & Komer PA  The Law Offices of Mike Sutin
Finch & Olson PA  Manny M. Aragon  The Pickett Law Firm
George F. Stevens Attorney at Law  Margaret A. Schulze, Attorney at Law  Timothy M. Padilla
Glass & Reynolds  Mark A. Stewart  Tippet Law Firm
Goodwin Law Office  Matthew Vance PC  Wendy E. York Attorney at Law
Gregory Ross PA  Michael C. Crane  William C. Erwin Esq.
Ignacio V. Gallegos  Michael J. Gopin & Ricardo Rios  Williams Law Firm
James A. Chavez PC  Musselman & Associates PC  Youtz & Valdez, PC
NO. 07-8300-10
IN THE MATTER OF THE AMENDMENTS OF
RULE 17-304 NMRA OF THE RULES GOVERNING
DISCIPLINE

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Disciplinary Board to amend Rule 17-304 NMRA of the Rules Governing Discipline, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Richard C. Bosson concurring;

NOW, THEREFORE, IT IS ORDERED that the recommendation hereby is ADOPTED and the amendments of Rule 17-304 NMRA of the Rules Governing Discipline hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rule 17-304 NMRA of the Rules Governing Discipline shall be effective immediately;

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

DONE at Santa Fe, New Mexico, this 30th day of April, 2007.

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

17-304. Confidentiality of investigations; exceptions; hearings.

A. Confidentiality. Except as otherwise provided by this rule, any investigation and any investigatory hearing conducted by or under the direction of disciplinary counsel, or disciplinary counsel’s authorized agents, shall be held entirely confidential by disciplinary counsel and by disciplinary counsel’s authorized agents unless and until they:

(1) become matters of public record by:
   (a) the filing of a formal specification of charges with the Disciplinary Board pursuant to Rule 17-309 NMRA;
   (b) the filing of a summary suspension proceeding pursuant to Rule 17-207 NMRA;
   (c) the filing of an incompetency or incapacity proceeding pursuant to Rule 17-208 NMRA;
   (d) the filing of a reinstatement proceeding pursuant to Rule 17-214 NMRA; or
   (e) the filing of a motion for order to show cause why a respondent should not be held in contempt pursuant to Paragraph G of Rule 17-206 NMRA; or

(2) are otherwise released according to these rules.

B. Exceptions. Information relating to disciplinary proceedings may be released by disciplinary counsel prior to filing formal charges as follows:

(1) where investigation reasonably causes disciplinary counsel to believe in good faith that a crime may have been com-

mitted by an attorney, the name of the subject, general nature of the possible crime, relevant facts and documents and names of known witnesses to relevant facts shall be made available to an appropriate prosecuting authority;

(2) if the respondent-attorney has filed with the office of disciplinary counsel a written waiver of confidentiality; or

(3) upon written request from the Client Protection Fund Commission, such information as may assist the committee in determining the validity or worthiness of a specific claim filed with that commission may be submitted to that commission with the understanding and condition that commission members receiving and reviewing such information are subject to the provisions of Subparagraph (5) of Paragraph C of Rule 17-105 NMRA as well as the rules of confidentiality governing the Client Protection Fund Commission.

C. Exceptions to public record. The Disciplinary Board or a hearing committee may, in the exercise of discretion, place the following matters under seal, upon request of disciplinary counsel, the respondent or sua sponte:

(1) documents, pleadings and testimony relating to the physical or mental condition or treatment of the respondent;

(2) matters regarding allegations of substance abuse by the respondent; or

(3) matters resulting in private discipline or dismissal pursuant to a consent to discipline agreement, the recommendation of a hearing committee, the decision of the Disciplinary Board. Upon the filing of proceedings in the Supreme Court, the proceedings shall no longer be confidential or sealed unless ordered by the Supreme Court on its own motion or the motion of a party. A party may request the proceedings be sealed by the Supreme Court by filing a motion to seal the proceedings with the pleadings and transcript.

D. Immunity from civil suit. Members of the board, members of hearing committees, disciplinary counsel, monitors or any other person acting on their behalf and staff shall be immune from suit as provided by statute or common law for all conduct in the course of their official duties. Immunity from suit shall also extend, as provided by statute or common law, to complainants and witnesses for all communications to the board, hearing committees or disciplinary counsel relating to lawyer misconduct or disability.

E. Witness immunity. If a person has been or may be called to testify or to produce a record, document, or other object in an official proceeding conducted under the disciplinary authority of a hearing officer, hearing committee, the board or the Supreme Court, disciplinary counsel may file a written application with the Supreme Court requesting the Court to issue a written order requiring the person to testify or to produce the record, document or other object notwithstanding his privilege against self-incrimination. Disciplinary counsel shall give the appropriate prosecuting authority notice of any application filed pursuant to this paragraph. Upon consideration of the application and any objection that may be filed by the appropriate prosecuting authority, the Court may grant the application and issue a written order pursuant to this paragraph if it finds:

(1) the testimony, or the record, document or other object may be necessary to protect the public interest; and
(2) the person has refused or is likely to refuse to testify or to produce the record, document or other subject on the basis of his privilege against self-incrimination.

F. Use of evidence obtained under immunity order precluded. Evidence compelled under an order issued pursuant to the provisions of Paragraph E of this rule requiring testimony or the production of a record, document or other object notwithstanding a privilege against self-incrimination, or any information directly or indirectly derived from such evidence, may not be used against the person compelled to testify or produce in any criminal case, except a prosecution for perjury committed in the course of the testimony or in a contempt proceeding for failure to comply with the order.

G. Hearings. Formal proceedings conducted before a hearing committee or the Disciplinary Board shall be open to the public. Any person may publicly comment thereon. Attorneys remain subject to the restrictions of Rule 16-306 NMRA.

H. Disposition. Complainants shall be advised every six (6) months as to the status of the investigation and shall be immediately advised of the final disposition of their complaints.
I. BACKGROUND

{3} This case arises from a collision on July 13, 2001, at about 7:00 p.m., between a pickup truck driven by Defendant and a pickup truck driven by Dorman Austin. Mr. Austin’s wife, Beth Austin, was a passenger in the Austin vehicle. Defendant, who was sixty-eight years old at the time, was driving south from Melrose, New Mexico on Highway 286, while the Austins were proceeding north on the same highway. Defendant’s truck suddenly swerved into the northbound lane, and the right rear panel of Defendant’s truck collided with the front passenger side of the Austin vehicle. Mrs. Austin was killed in the collision.

{4} Immediately following the accident, Defendant left the scene, but he returned after five to ten minutes. At least three law enforcement officers arrived to investigate the accident, two of whom testified to smelling alcohol on Defendant’s breath. Defendant denied having any alcohol to drink and told the officers that he could not drink because he has diabetes. One of the officers had Defendant perform field sobriety tests shortly after 10:00 p.m. and then transported Defendant to a hospital, where blood was drawn at 1:05 a.m., roughly six hours after the accident. The result was “0.04 grams per 100 mils of alcohol.”

{5} Although there was testimony that Defendant stayed in his truck during the entire investigation at the scene, there was also testimony that Defendant was left by himself for periods of time. Officers discovered a nearly-empty whiskey bottle at the scene, which Defendant admitted belonged to him.

{6} Defendant was charged with vehicular homicide under two alternative theories: operating a motor vehicle while under the influence of intoxicating liquor, and operating a motor vehicle in a reckless manner. At trial, the State sought to introduce the testimony of Ron Smock, a toxicologist. Smock employed retrograde extrapolation to give an opinion as to Defendant’s likely BAC at the time of the accident based on the known BAC determined from the blood test taken six hours after the accident. Defense counsel objected to the admission of this testimony on the ground that it was unreliable and not scientifically valid. After hearing Smock’s foundation testimony and defense counsel’s voir dire of Smock, the trial court determined Smock’s testimony to be admissible. Smock testified that, using the body’s standard rate of alcohol absorption and a range of alcohol elimination, Defendant’s BAC at the time of the accident was between 0.085 and 0.115. He testified that the range he used took into account variables such as the presence of food, metabolism, and health issues.

{7} Defendant called Dr. Edward Reyes, a pharmacologist, as an expert witness. Reyes agreed with Smock that retrograde extrapolation, or relation back calculations, can be used to determine BAC at an earlier time, based on a known BAC, but he opined that Smock had failed to take into account several variables that would affect the accuracy of the calculation. These variables include how the person slept, what he ate, what medication he was on, when he last drank, how much he had to drink, and whether he had experienced a release of adrenaline. While Reyes agreed with Smock as to the rate the body eliminates alcohol, he questioned Smock’s opinion because it assumed that the entire time between the accident and Defendant’s blood test was post-absorptive. Any of the many variables could result in a delay in the absorption of alcohol, which could mean
that Defendant’s BAC at the time of the accident was actually lower than the 0.04 BAC in Defendant’s blood six hours after the accident.

{8} The jury returned a general verdict finding Defendant guilty of vehicular homicide. This appeal followed.

II. DISCUSSION

A. Admissibility of Smock’s Testimony

{9} Defendant argues that the trial court erred in admitting Smock’s testimony because: (1) Smock was not qualified to testify as an expert witness, and (2) Smock’s retrograde extrapolation calculation was unreliable because it failed to take into account the many variables that could impact the conclusion reached. Both of these arguments are rooted in Rule 11-702 NMRA, which provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

This rule establishes three prerequisites for the admissibility of expert testimony: (1) the expert must be qualified; (2) the testimony must aid the fact finder; and (3) the expert may testify only as to “scientific, technical or other specialized knowledge.”


1. Smock’s Qualification as an Expert

{10} In the headings in his brief in chief Defendant contends that Smock was not competent to testify as an expert because he had no independent expertise in alcohol retrograde extrapolation. These headings appear to focus on the first prerequisite listed in Alberico, the qualification of the expert witness. However, it is clear that the substance of Defendant’s argument is not directly related to Smock’s qualifications. Instead, Defendant’s arguments focus on Smock’s purported failure to satisfy the third prerequisite listed in Alberico because Defendant claims Smock failed to consider relevant factors impacting the conclusions he reached in giving an opinion as to Defendant’s likely BAC range at the time of the accident. In these arguments, Defendant relies on Alberico, and the cases following it, to discuss the requirement that expert testimony be based on reliable scientific or other technical knowledge. Alberico did not analyze or discuss what is required to establish the qualification of an expert witness, but instead focused on the third prerequisite to expert testimony.

Lopez v. Reddy, 2005-NMCA-054, ¶ 12, 137 N.M. 554, 113 P.3d 377. Consequently, Defendant’s emphasis on Alberico and the gaps in Smock’s analysis is irrelevant to the contention in his brief’s headings that Smock was not qualified. We therefore conclude Defendant is not in fact challenging Smock’s background and qualifications.

{11} Even if Defendant appropriately challenged Smock’s qualifications, we conclude the trial court did not err in finding Smock to be qualified to testify as an expert. A trial court “has wide discretion” in determining whether an expert witness is qualified to testify, “and the court’s determination of this question will not be disturbed on appeal, unless there has been an abuse of this discretion.”

Lopez, 2005-NMCA-054, ¶ 14 (internal quotation marks and citation omitted). “[N]o set criteria can be laid down to test [an expert’s] qualifications. An expert can be qualified under a wide variety of bases: knowledge, skill, experience, training, or education.”

Fleming v. Town of Silver City, 1999-NMCA-149, ¶ 16, 128 N.M. 295, 992 P.2d 308 (alteration in original) (internal quotation marks and citations omitted).

{12} Smock is the chief toxicologist, certifying scientist, and assistant director for a forensic drug testing laboratory. He has specialized in testing “drugs of abuse,” which includes alcohol, for about twenty-four years. He did some research and development in toxicology for about four-and-a-half years. Although he does not have a college degree, he has the “B.S. equivalent as a medical technologist.” He has testified as an expert about three hundred times, but this was only the second time he testified about elimination of alcohol over a period of time.

{13} We cannot say that the trial court abused its discretion in determining Smock to be qualified. While his experience in retrograde extrapolation may not have been vast, “[a]ny perceived deficiency in . . . education and training is relevant to the weight accorded by the jury to [the] testimony and not to the testimony’s admissibility.”

State v. McDonald, 1998-NMSC-034, ¶ 21, 126 N.M. 44, 966 P.2d 752 (alterations in original) (internal quotation marks and citation omitted); see also State v. Dorsey, 93 N.M. 607, 609, 603 P.2d 717, 719 (1979) (stating that the jury assesses the relative weight of lay or expert testimony).

2. Reliability of Retrograde Extrapolation

{14} Defendant’s primary contention on appeal is that Smock’s failure to account for many variables potentially impacting Defendant’s absorption rate rendered Smock’s opinion scientifically unreliable under Alberico’s third prerequisite. Defendant argues that Smock “simply assumed [Defendant] was in a post-absorption state at the time of the accident” and failed to consider whether Defendant consumed any alcohol between the accident and the blood test, whether he was on medication, what Defendant ate and when, whether Defendant was in shock from the accident, or the impact of Defendant’s diabetes on the absorption of alcohol. Defendant cites to several articles stating that these factors are important to performing retrograde analysis, and he relies on courts in other jurisdictions that have refused to admit retrograde extrapolation testimony.

{15} We agree with Defendant that “[t]he trial court acts as a gatekeeper to ensure that the factfinder only considers reliable and relevant scientific evidence.”

Banks v. IMC Kalium Carshab Potash Co., 2003-NMSC-026, ¶ 32, 134 N.M. 421, 77 P.3d 1014. However, we conclude that Defendant’s objection goes to the reliability of Smock’s conclusions, which was a factual determination for the jury to make. We explain our conclusion by first reviewing the development of New Mexico’s jurisprudence in this area, beginning with Alberico.

{16} In Alberico, our Supreme Court addressed the admissibility of a diagnosis of post traumatic stress disorder and listed the previously mentioned three prerequisites to the admission of expert testimony. 116 N.M. at 158, 166, 861 P.2d at 194, 202. Discussing the third prerequisite, the Court stated that the focus “should be on the validity and the soundness of the scientific method used to generate the evidence.”

Id. at 167, 861 P.2d at 203 (emphasis added).

{17} In the cases following Alberico, the Supreme Court continued to emphasize that a trial court’s gatekeeping function must focus on the validity of the relevant scientific technique itself. In State v. Anderson, 118 N.M. 284, 881 P.2d 29 (1994), the Court addressed the FBI’s method of “determining the probability of a coincidental DNA match” in a criminal case. Id. at 285-86, 881 P.2d at 30-31. The Court noted that while “scientists in population genetics have engaged in a heated debate over the accuracy of the FBI’s methods,” this was “a question of weight and not of admissibility.”

Id. at 298, 881 P.2d at 43. The Court then concluded “that the trial court may only examine whether the principles and
methodology used are scientifically valid and generally accepted. The assessment of the validity and reliability of the conclusions drawn by the experts, however, is a jury question.” *Id.* at 301, 881 P.2d at 46.

{18} Several years following *Anderson*, the Supreme Court continued in this vein when it addressed the admissibility of the field sobriety test known as horizontal gaze nystagmus in *State v. Torres*, 1999-NMSC-010, 127 N.M. 20, 976 P.2d 20. Again, the Court emphasized that a trial court’s inquiry is the “threshold determination that the underlying ‘scientific technique’ is based upon well-recognized scientific principle and . . . is capable of supporting opinions based upon reasonable probability rather than conjecture.” *Id.* ¶ 40 (quoting *Alberico*, 116 N.M. at 167, 861 P.2d at 203) (emphasis added).

{19} Similarly, in *Lee v. Martinez*, 2004-NMSC-027, 136 N.M. 166, 96 P.3d 291, the Court determined that polygraph test results are sufficiently reliable to be admitted, “provided the expert is qualified and the examination is conducted in accordance with Rule 11-707.” *Id.* ¶ 4. After noting various potential problems with polygraph results, the Court nonetheless concluded that “any doubt about the admissibility of scientific evidence should be resolved in favor of admission. The remedy for the opponent of polygraph evidence is not exclusion; the remedy is cross-examination, presentation of rebuttal evidence, and argumentation.” *Id.* ¶ 48 (citation omitted).

{20} In summary, our Supreme Court’s cases in this area can be distilled into several guiding principles. First, a trial court’s gatekeeping function is confined to an assessment of the reliability of the scientific technique underlying an expert’s opinion, not the validity of the conclusions drawn by an expert employing that technique. Second, any deficiencies or infirmities in the actual performance of a scientific test go to the weight of the evidence, not to its admissibility. Third, doubt regarding the admissibility of scientific evidence should be resolved in favor of admissibility.

{21} Turning now to the present case, Defendant does not challenge the validity or reliability of retrograde extrapolation as a scientific methodology; instead, Defendant criticizes Smock’s performance of retrograde extrapolation. Defendant’s expert at trial, Dr. Reyes, did not testify that retrograde extrapolation, which he referred to as “relation back” technique, is scientifically unreliable or invalid. Indeed, Reyes testified that he has himself qualified to testify as an expert about the pharmacokinetics of alcohol about fifty-four times, and almost every case involved relation back. He testified that it is easy to perform a relation back calculation if he knows the person is in the elimination phase at the time of testing and if he knows how fast the person is eliminating the alcohol. Similarly, if he knows the person is in the absorption phase and how fast the person is absorbing, he can do a relation back calculation. Reyes agreed with Smock that almost everyone will fall within the elimination range of .015 to .03 per hour. However, variations occur in the rate of absorption, which can be impacted by medications, adrenaline, the amount of water in the body, and when and what the person ate or drank. Because Smock did not consider these things, Reyes concluded that Smock’s calculation of relation back was not reliable.

{22} Thus, even Defendant’s expert did not claim that retrograde extrapolation is an invalid or unreliable scientific technique. Reyes said only that Smock did not reliably perform the extrapolation. Defendant’s arguments on appeal highlight this distinction. Defendant cites various articles in scientific journals emphasizing the need for consideration of the various factors impacting the relation back calculation. For example, Defendant cites an article stating that “[g]ood interpretation is unlikely to be made unless the forensic scientist has a thorough knowledge of the many factors [that] influence the absorption, distribution and metabolism of alcohol.” A. R. Stowell & L. I. Stowell, *Estimation of Blood Alcohol Concentrations After Social Drinking*, 43(1) J. Forensic Science 20 (1998). This statement assumes that “good interpretation” is possible, which in turn means that relation back is a scientifically reliable technique. In addition, Defendant cites to other writers who “contend under certain conditions retrograde analysis can be valid.”

{23} We think the assessment of the scientific validity of retrograde extrapolation technique is analogous to the assessment of the validity of the FBI’s DNA-matching technique in *Anderson*. In that case, our Supreme Court noted that the defendant, “by attempting to refute the FBI’s theory and methods with evidence about deficiencies in both the results and the testing of the results, the defendants have conceded that the theory and methods can be tested[,]” thus satisfying one aspect of scientific reliability. 118 N.M. at 291, 297, 881 P.2d at 36, 42. Similarly, Defendant’s emphasis on the deficiencies in Smock’s results constitutes a concession that relation back technique can be tested. And, as in *Anderson*, the competing arguments about the adequacy or deficiency of Smock’s calculation “involve[] a dispute over the accuracy of the . . . results, and thus this criticism goes to the weight of the evidence, not its admissibility.” *Id.* at 299, 881 P.2d at 44 (internal quotation marks and citations omitted). When accuracy of the results is at issue, “[w]ith adequate cautionary instructions from the trial judge, vigorous cross-examination of the government’s experts, and challenging testimony from defense experts, the jury should be allowed to make its own factual determination as to whether the evidence is reliable.” *Id.* at 301, 881 P.2d at 46 (internal quotation marks and citation omitted).

{24} This is precisely what the trial court permitted in the present case. Defense counsel conducted an extensive voir dire of Smock while the jury was present and vigorously cross-examined Smock regarding the paucity of literature he relied on, the assumptions he made, and the many variables that could impact the relation back calculation. Defense expert Reyes’s testimony noted the flaws in Smock’s calculation, including Smock’s use of averages and the many factors that Smock failed to consider that affect the calculation. Reyes explained in detail why Smock’s calculation was unreliable and opined that “[t]here are too many things I don’t know to be able to give an alcohol level at [the time of driving].” Reyes testified that he did not consider Smock’s opinions “seriously because [Smock] assumed that [Defendant] was in the post-absorptive phase all the way through that whole [post-accident] time period.” In addition, the trial court instructed the jury:

You should consider each opinion received in evidence in this case and give it such weight as you think it deserves. If you should conclude that the reasons given in support of the opinion are not sound or that for any reason an opinion is not correct, you may disregard the opinion entirely.

{25} These tools for weighing the validity of Smock’s testimony permitted the jury to determine whether to give more weight to the testimony of Smock or Reyes, which is the jury’s function. Defendant objected to Smock’s misuse of the retrograde extrapolation technique, not to the invalidity of the technique itself. Under these circumstances, we cannot say the trial court abused its
discretion in admitting Smock’s testimony and allowing the jury to assess the validity of Smock’s opinions through consideration of defense counsel’s cross-examination, Reyes’s challenging testimony, and the relevant jury instruction.

{26} We are not persuaded otherwise by Defendant’s reliance on cases from other jurisdictions. In Commonwealth v. Gonzales, 546 A.2d 26 (Pa. 1988), the expert witness himself testified that he could not give an opinion as to the defendant’s BAC, based on a test taken three hours after the accident, without knowing when the defendant had taken his last drink. Id. at 32. Smock did not make such an admission. In State v. Wolf, 605 N.W.2d 381, 385 (Minn. 2000), the court affirmed the exclusion of expert testimony on retrograde extrapolation because the defendant failed to make an offer of proof in the trial court, and, therefore, the record was insufficient for review. In Smith v. City Tuscaloosa, 601 So. 2d 1136 (Ala. Crim. App. 1992), where the court rejected the defendant’s unpreserved objections to retrograde extrapolation testimony, the court quoted a law review article critical of retrograde extrapolation but only in support of its cautionary note that its opinion “should not be interpreted as any tacit approval of the use of retrograde extrapolation.” Id. at 1140. As for Commonwealth v. Shade, 681 A.2d 710 (Pa. 1996), we were not able to find in it the proposition for which Defendant cites.

{27} We are also unpersuaded by the case Defendant cites for “[t]he most thorough discussion” of the issue, Mata v. State, 46 S.W.3d 902 (Tex. Crim. App. 2001) (en banc). In that case, the appellate court reversed the trial court’s admission of the state’s expert opinion testimony as to a range of BACs at the time of driving based on breath tests taken from the defendant two hours later. Id. at 904. This case is not persuasive for two primary reasons. First, in Texas, the proponent of scientific evidence “must demonstrate by clear and convincing evidence that the evidence is reliable.” Id. at 908. In New Mexico we do not impose such an enhanced burden of proof on the proponent of evidence. Second, the court in Mata imposed an additional requirement on the proponent: to show “proper application of the technique on the occasion in question.” Id. (footnote omitted). This requirement is contrary to New Mexico law, which holds that “[t]he assessment of the validity and reliability of the conclusions drawn by the experts . . . is a jury question.” Anderson, 118 N.M. at 301, 881 P.2d at 46. Interestingly, the dissent in Mata expressed a view closer to New Mexico law, stating that “[d]isagreements between experts about the variables and correct elimination rates to be applied go to the weight of the evidence as do the differences in the experts’ credentials.” 46 S.W.3d at 925 (Keller, P.J., dissenting) (internal quotation marks, citation, and footnote omitted).

{28} We do not agree with Defendant that our decision in State v. Hughey, 2005-NMCA-114, 138 N.M. 308, 119 P.3d 188 compels reversal in this case. In Hughey, we affirmed the trial court’s exclusion of the defendant’s BAC level measured four hours after driving. Id. ¶ 12, 14. We concluded that BAC is relevant only if it “tells the fact finder something about the defendant’s BAC at the time of the accident.” Id. ¶ 9. The State’s expert did not provide an opinion as to the defendant’s likely BAC at the time of driving, and he relied on several assumptions about the defendant’s drinking pattern. Id. ¶ 4. We stated that the expert’s testimony “was so vague and general as to provide no real assistance to the trier of fact.” Id. ¶ 11.

{29} Hughey is distinguishable from the present case for two reasons. First, the trial court in Hughey, unlike the trial court in this case, excluded the evidence. Under an abuse of discretion standard of review, we appropriately gave considerable deference to the trial court’s ruling. State v. McClauherty, 2003-NMSC-006, ¶ 17, 133 N.M. 459, 64 P.3d 486. We give the same deference to the trial court’s decision to admit the evidence in this case. Second, in Hughey the issue was the admissibility of the BAC reading, while the focus in this case is the admissibility of expert testimony. The present case falls squarely within the ambit of the Alberico line of cases, and those cases persuade us that the alleged flaws in Smock’s testimony go to the weight of his testimony, not to its admissibility.

{30} This distinction between weight and admissibility highlights our difficulty with the position advanced by the dissent. The dissent promotes the view that a trial court should insert itself into disputes among experts and exclude expert opinions that the court concludes are based on flawed methodology. The danger with this approach is that in many instances a trial court will become a third expert who assesses the strengths and weaknesses of competing opinions and who ultimately eviscerates one party’s case by excluding its expert’s testimony. Instead of allowing a trial court to resolve such a conflict between experts, our Supreme Court has properly determined that this assessment is best left to the fact finder.

{31} Before concluding our discussion of this issue, we briefly mention our recent opinion in State v. Day, 2006-NMCA-124, 140 N.M. 544, 144 P.3d 103, cert. granted, 2006-NMCERT-009, 140 N.M. 543, 144 P.3d 102. In that case, we reversed the defendant’s DWI conviction based on insufficient evidence, holding that scientific evidence was required to relate the defendant’s BAC, measured an hour and six minutes after the defendant was driving, to the time of driving. Id. ¶ 2. In that opinion we made several statements suggesting that any retrograde extrapolation testimony should include information regarding the variables upon which Reyes placed so much emphasis in the present case. See id. ¶¶ 4, 21, 25 (stating that evidence regarding the defendant’s characteristics and the consumption of food and alcohol “will likely be required” because they affect absorption and elimination). In addition, we said that

[a] court evaluation of the reliability of retrograde extrapolation evidence presented in expert testimony should take into consideration the relevant factual circumstances. Ambiguous or insufficient facts will often make an expert’s opinion of the BAC at an earlier driving time supported by nothing more than arbitrary assumptions and therefore a scientific absurdity.

Id. ¶ 19 (citation omitted).

{32} While these comments appear to support Defendant’s position in this case, we do not consider ourselves bound by them because they exceeded the scope of Day’s holding. See Phoenix Indem. Ins. Co. v. Pulis, 2000-NMSC-023, ¶ 18, 129 N.M. 395, 9 P.3d 639. The holding in Day was simply that scientific evidence was necessary to relate a BAC result obtained one hour and six minutes after driving to the time of driving. The particulars of retrograde extrapolation and its reliability were not necessary to that holding.

{33} In summary, we hold that the trial court did not abuse its discretion in admitting Smock’s testimony. We are not implying that retrograde extrapolation is a scientifically valid and reliable technique as a matter of law. Defendant’s expert did not challenge the validity of retrograde
extrapolation as a scientific technique, but there may be other cases where such a challenge is made. In this case Defendant’s challenge was to Smock’s conclusions based on the technique, and Defendant had the opportunity to highlight the deficiencies in Smock’s calculation for the jury. Under these circumstances and consistent with our Supreme Court’s guidance in the Alberico line of cases, evaluation of Smock’s testimony was for the jury.

B. Speedy Trial Analysis

{34} Defendant contends his right to speedy trial was violated by the 30-month delay from the time of his arrest to his trial. The trial court denied Defendant’s motion to dismiss the charges on this basis, finding that (1) “Defendant . . . has participated in the delays that have occurred in bringing this case to trial[,]” (2) “Defendant is not in custody[,]” and (3) “Defendant did not assert a demand for speedy trial until late in the proceedings.”

{35} The constitutional right to speedy trial attaches when a defendant becomes an accused, State v. Laney, 2003-NMCA-144, ¶ 10, 134 N.M. 648, 81 P.3d 591, which in this case occurred when Defendant was arrested on July 14, 2001. A defendant who claims violation of the right must make an initial showing that the length of the delay is presumptively prejudicial. Id. If the defendant makes that showing, “the burden of persuasion shifts to the State to show, on balance, that the four factors [from Barker v. Wingo, 407 U.S. 514 (1972)] do not weigh in favor of dismissal.” Id. The four factors are: “(1) the length of delay, (2) the reason for delay, (3) the defendant’s assertion of the right, and (4) prejudice to the defendant.” Id. (internal quotation marks and citation omitted). Although our review is deferential to the trial court’s fact finding, we conduct an independent evaluation of the four factors. Id.

1. Length of the Delay

{36} In assessing the length of the delay we first determine whether the delay is presumptively prejudicial. Id. If it is, we continue with further analysis. Our Supreme Court has held that “a minimum of nine months delay is necessary to trigger further inquiry . . . in simple cases, twelve months in cases of intermediate complexity, and fifteen months in complex cases.” State v. Coffin, 1999-NMSC-038, ¶ 56, 128 N.M. 192, 991 P.2d 477. While the trial court never made a finding on presumptive prejudice, Defendant contends this case is a simple one and the State claims it is of intermediate complexity. We agree with the State. A simple case generally requires less investigation and tends to rely primarily on the testimony of police officers. State v. LeF ebre, 2001-NMCA-009, ¶ 11, 130 N.M. 130, 19 P.3d 825. Here, Defendant faced the serious charge of vehicular homicide, the trial lasted three days, and there were sixteen witnesses, five of whom were experts. See Laney, 2003-NMCA-144, ¶ 14 (noting that trials of intermediate complexity “seem to involve numerous or relatively difficult criminal charges and evidentiary issues, numerous witnesses, expert testimony, and scientific evidence”). Because a twelve-month delay is presumptively prejudicial in an intermediate complex case, we conclude Defendant has met his initial burden, and we proceed to weigh the length of delay against the other factors. Id. ¶ 11 (explaining that if a delay is presumptively prejudicial, “we balance the length of the delay against the remaining three factors to assess whether the constitution has been violated”).

{37} Before proceeding to the other factors, we consider whether the delay beyond the presumptively prejudicial period weighs against the State. Id. ¶ 16. The length of delay is eighteen months beyond the minimum period. Because the presumption of prejudice to the defendant intensifies over time, we conclude that this relatively long period of additional delay should weigh against the State.

2. Reasons for the Delay

{38} “We examine the reasons for delay, allocating the reasons for the delay to each side and determining the weight attributable to each reason.” State v. Pl ease, 2003-NMCA-048, ¶ 45, 133 N.M. 495, 64 P.3d 522 (internal quotation marks and citation omitted). In doing so, we consider the State’s role in causing the delay. The State’s culpability runs the gamut from light—for negligent delay, such as that related to caseload—to heavy, for intentional delay, such as tactical delay. Laney, 2003-NMCA-144, ¶ 17.

{39} The trial court originally scheduled the trial for March 4-6, 2002. In January 2002, defense counsel told the prosecutor that Defendant had undergone heart surgery in early January and that he would not be released by his doctor in time for the March trial setting. Defendant concurred in the State’s motion seeking an extension of the six-month rule until June 18, 2002. Although this delay should not weigh against Defendant, neither should it weigh against the State. See In re Darcy S., 1997-NMCA-026, ¶ 28, 123 N.M. 206, 936 P.2d 888 (explaining that “delays attributable to the defense are not charged against the State”).

{40} The trial court rescheduled the trial for October 7-11, 2002. It is not clear from the record why the trial was scheduled to take place so long after expiration of the initial extension, but because there is no other explanation for it, we can reasonably assume this setting was the first available to the trial court. In any event, at a hearing on conditions of release in May 2002, the trial court noted that the extension was not long enough, and both the prosecutor and defense counsel stated they had agreed to an additional extension through the last day set for trial. Consequently, this extension should not weigh against the State either. Id.; see also State v. Ortiz-Burciaga, 1999-NMCA-146, ¶ 32, 128 N.M. 382, 993 P.2d 96 (declining to attribute to either party court’s inability to schedule trial).

{41} Another series of events accounted for the next period of delay in this case. On October 29, 2001, which was several months before the initial trial setting, Defendant moved for production of the grand jury tapes, and the trial court granted the motion on October 31, 2001. Based on the tapes, Defendant ultimately asked the trial court to quash the indictment, but he did not file this motion until August 7, 2002, nearly ten months after obtaining the tapes. The trial court granted the motion and quashed the indictment on October 7, 2002. While the defect in the indictment may be attributable to the State because it failed to present exculpatory evidence to the grand jury, Defendant was responsible for the long delay in moving to quash the indictment.

{42} Upon remand to the magistrate court after the indictment was quashed, Defendant moved for a continuance of the preliminary hearing on the ground that defense counsel had a scheduling conflict. Defendant then agreed to a 60-day extension of the hearing. When the trial was scheduled for August 2003, Defendant moved for a continuance because the trial court had scheduled a one-day trial rather than a five-day trial. As a result of this continuance, the State requested an extension of the six-month rule, which was granted through March 20, 2004. The trial ultimately took place in January 2004.

{43} In summary, the only delay attributable to the State flowed indirectly from its failure to present exculpatory evidence to the grand jury. While this failure weighs heavily against the State, we note that Defendant could have moved to quash
the indictment on this basis as soon as the grand jury tapes were ordered to be produced, which was within four months of Defendant’s arrest. Instead, Defendant waited ten months from the tapes’ production to file his motion. In light of this, the trial court’s heavy docket, and the partial responsibility Defendant bears for all other delay, we conclude that this factor overall weighs only moderately against the State.

3. Assertion of the Right

{44} Defendant first asserted his right to a speedy trial when he filed a motion to dismiss on that ground on January 15, 2004. This was eleven days prior to trial and thirty months after Defendant’s arrest. Consequently, we conclude this factor does not weigh in Defendant’s favor. See Coffin, 1999-NMSC-038, ¶ 67 (concluding that assertion of speedy trial right two weeks prior to trial did not weigh in favor of the defendant).

4. Prejudice

{45} “The right to a speedy trial protects the following three interests of a criminal defendant: (i) to prevent oppressive pretrial incarceration[,] (ii) to minimize anxiety and concern of the accused[,] and (iii) to limit the possibility that the defense will be impaired.” Id. ¶ 68 (internal quotation marks and citation omitted). To establish prejudice, “the evidence [must show] a nexus between the undue delay in the case and the prejudice claimed.” Laney, 2003-NMCA-144, ¶ 25 (alteration in original) (internal quotation marks and citation omitted).

{46} Defendant contends he was prejudiced in three ways. First, he claims the publicity surrounding the accident was pervasive. Second, he suffered anxiety and concern over the charges against him. Third, he argues that the delay of the trial impaired his defense due to the fading of witnesses’ memories. These claims relate to two of the three interests protected by the right to speedy trial; Defendant does not claim oppressive incarceration because he was released on bond during the pretrial period.

{47} All defendants experience pretrial anxiety and concern. The question is whether these concerns caused undue prejudice. See United States v. Henson, 945 F.2d 430, 438 (1st Cir. 1991) (“[C]onsiderable anxiety normally attends the initiation and pendency of criminal charges; hence only undue pressures are considered.”) (internal quotation marks omitted); Coffin, 1999-NMSC-038, ¶ 69 (noting that “the constitutional inquiry focuses on undue prejudice”). While we have no doubt that the delay of the trial caused Defendant stress, we conclude it weighs only lightly in his favor. Because Defendant was not incarcerated while awaiting trial, his anxiety was likely no greater than that experienced by other criminal defendants who await trial in jail.

{48} As for Defendant’s claim that the delay impaired his defense, he points to a physician witness who testified that he no longer remembered certain aspects of his examination of Defendant. The witness, Dr. Patty, an internist and cardiologist, was hired by the defense to testify about the effects of diabetes. He wanted to examine Defendant before testifying and testified about this examination. Although Patty had moved and no longer had access to the record of this examination, he testified that Defendant suffered from some of the ramifications of diabetes, such as peripheral and visceral neuropathy, circulation problems requiring a shunt, and that Defendant had arthritis. He testified at length about the effects of diabetes on the body, including visceral neuropathy’s effect on the stomach’s absorption rate and potential impairment of the ability to perform field sobriety tests, and about the effect of stress on a diabetic’s body. On direct examination, Patty said nothing about his inability to recall anything. On cross examination, Patty said he could not recall the names of other physicians Defendant was seeing or the medications Defendant was taking.

{49} Defendant does not specify how Patty’s fading memory impaired his defense, and we see nothing in Patty’s testimony suggesting that Defendant’s defense suffered as a result. To the contrary, it appears that Patty’s lengthy testimony provided considerable support to the defense.

{50} In conclusion, any prejudice to Defendant resulting from the delay of the trial was not undue. In light of this and Defendant’s considerable responsibility for the delay, we hold that Defendant’s constitutional right to a speedy trial has not been violated.

CONCLUSION

{51} For the foregoing reasons, we affirm Defendant’s conviction.

{52} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

I CONCUR:

A. JOSEPH ALARID, Judge

MICHAEL D. BUSTAMANTE, Judge (concurring in part and dissenting in part).

{53} I agree with the speedy trial analysis in Judge Fry’s majority opinion, but I disagree with the evidentiary discussion. I have no quarrel with the discussion of prior cases dealing with application of the Daubert/Alberico standard in general. However, I do think that the opinion ultimately goes too far in finding a strict dichotomy between assessing the validity and reliability of scientific techniques versus deficiencies in the actual application of a technique or principle. As the opinion notes, courts are to consider the method used to generate offered scientific evidence. Thus, I disagree that New Mexico does not require a proponent of evidence to show “proper application of the technique on the occasion in question.” Majority Opinion, ¶ 26 (quoting Mata, 46 S.W.3d at 908).

{54} There can be instances where application or performance of a valid and reliable technique is so flawed that the results are not trustworthy enough to be admissible. For example, an accident reconstruction opinion as to whether a party had sufficient time to avoid a collision would likely not be admissible if the expert refused to include a factor for driver perception and reaction time in the mathematical calculation or if the expert assumed a coefficient of friction that the scientific literature indicated was unrealistically high or low in the circumstances. This case presents a similar problem. I think the method used by the State’s expert is so flawed that it cannot be deemed sufficiently reliable to be admitted.

{55} There is no need here to re-canvass the literature or case law concerning retrograde extrapolation. It is enough to acknowledge that the technique is recognized by the scientific community as “valid”; that is, a reasonably accurate—though not precise—calculation of BAC at a given time pre-test can be achieved when the technique is correctly applied with sufficiently reliable data. The universally recognized difficulty with proper application of the technique is assuring that the various factors which can affect the final value dramatically are appropriately assessed, quantified and applied. Our opinion in Day discusses these factors at length. Day may be too categorical in its apparent requirement that all factors should be dealt with explicitly in all cases, but that does not erase the point that retrograde extrapolation in an uncontrolled environment is devilishly difficult.

{56} The State’s witness evaded all of these difficulties through the use of assumption,
negating any need to figure out how the considerations described in Day affected his work. He avoided the need to calculate an actual rate of elimination by using a range of values rather than calculating Defendant’s specific rate. He could assume a range of values for the rate of elimination in this case because the State did not care about proving a specific BAC; all it wanted to do was show some not insignificant level. In a case which does not require proof of a specific BAC, this approach might be acceptable since it appears that once a person is post-absorptive and post-peak, the rate of elimination—whatever it is—is reasonably constant for a given person. This aspect of the case clearly swayed the district court to admit the testimony.

What destroys the trustworthiness of the approach here is the assumption that Defendant was post-absorptive when the accident occurred. I see no basis in the record for the assumption. Accepting the assumption turns the extrapolation into a simple arithmetic operation. No expertise is required to extrapolate if you assume all variables away. Given his unrealistic and unsupported assumptions, the State’s expert’s approach provides no more than theoretically possible values untethered from the actual case at hand. The fact that taking the usual factors into account yields values ranging from less than .04 to over .12 at the time of the accident tells me that the State’s approach is not valid and should have been excluded.

Proper assessment of method in this case would not have made the district court a “third expert.” Rather, it would have been the essence of gatekeeping.

MICHAEL D. BUSTAMANTE,
Judge
January 12, 2004, and directed that Defendant was to be taken to Dr. Roll’s office for the evaluation on January 19, 2004.

[7] The sentencing hearing was set for February 25, 2004. At that time Defendant’s attorney asked that the hearing be continued because he was filing a motion for new trial based on the two evaluations. However, Dr. Roll had asked for raw data which he had not yet received and he had not yet completed his forensic evaluation report. The State objected, arguing that under Rule 5-614(C) NMRA, Defendant’s motion for a new trial was untimely because more than ten days had passed since the verdict. The district court wanted to consider Dr. Roll’s assessment, and vacated the hearing, directing defense counsel to have the sentencing hearing reset upon receipt of Dr. Roll’s report. Dr. Roll completed his findings in a report dated June 18, 2004. In the meantime, the district court had ordered a separate trial on certain counts in the indictment, and they were set to be tried on June 28, 2004. Defendant had undergone a competency examination to ascertain whether he could proceed to trial on the severed counts, but the results of the examination were not available. The State therefore did not oppose Defendant’s motion, filed on June 22, 2004, to vacate that trial setting. A stipulated order vacating that trial was filed on June 24, 2004.

[8] On September 7, 2004, the district court set Defendant’s motion for new trial to be heard on January 20, 2005. At the hearing, the court and the parties realized that Defendant’s motion for a new trial had been placed in the back of the court file and not file stamped. Defendant said he thought the motion was filed in open court at the original sentencing hearing on February 25, 2004. He said that when the State had asserted that the motion for new trial was not timely, more that ten days having elapsed since the verdicts, it should have been noted that the motion was filed in open court on that day. The State agreed, and the district court certified that Defendant’s motion for a new trial was filed as of February 25, 2004. Following the January 20, 2005 hearing, the district court issued a letter on April 20, 2005, stating it was going to grant Defendant’s motion for new trial. The State appealed from the formal order, which was subsequently filed on May 25, 2005, granting the motion. The State argues that the district court had no jurisdiction to grant the motion for two reasons: Defendant did not file the motion on time, and if he did, the district court did not act on time, because it was already deemed denied by operation of law. The State also argues that on the merits, the district court abused its discretion in granting Defendant a new trial. We affirm.

DISCUSSION

Issue 1: The District Court’s Jurisdiction to Grant the Motion for New Trial

[9] The question of whether the district court had jurisdiction to grant Defendant’s motion for new trial presents a question of law, which we review de novo. City of Roswell v. Smith, 2006-NMCA-040, ¶ 10, 139 N.M. 381, 133 P.3d 271. In this case, Rule 5-614 and Rule 5-104(B) NMRA of the Rules of Criminal Procedure for the District Courts are relevant to our jurisdictional inquiry. We apply the same rules to the construction of these rules as we apply to statutes. See In re Michael L., 2002-NMCA-076, ¶ 9, 132 N.M. 479, 50 P.3d 574. As such, our interpretation of the rules is also de novo. See State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) (stating that interpretation of a statute is a question of law reviewed de novo).

[10] Rule 5-614 is entitled “Motion for new trial” and provides:

A. Motion. When the defendant has been found guilty, the court on motion of the defendant, or on its own motion, may grant a new trial if required in the interest of justice.

B. Evidence on motion. When a motion for new trial calls for a decision on any question of fact, the court may consider evidence on such motion by affidavit or otherwise.

C. Time for making motion for new trial. A motion for new trial based on the ground of newly discovered evidence may be made only before final judgment, or within two (2) years thereafter, but if an appeal is pending the court may grant the motion only on demand of the case.

D. Procedure; hearing. When the defendant has been found guilty by a jury or by the court, a motion for new trial may be dictated into the record, if a court reporter is present, and may be argued immediately after the return of the verdict or the finding of the court. Such motion may be in writing and filed with the clerk. Such motion, written or oral, shall fully set forth the grounds upon which it is based.

E. Waiver. Failure to make a motion for a new trial shall not constitute a waiver of any error which has been properly brought to the attention of the court.

[11] The State contends that the district court lacked jurisdiction to grant a new trial in this case. First, the State contends that Defendant’s motion for new trial was filed too late under Rule 5-614(C) because it was filed more than ten days after the verdict. Second, the State argues that even if the motion was based on newly discovered evidence and was filed on time, the district court lost jurisdiction over the motion under Rule 5-614(C) because it was not granted within thirty days from the date it was filed. Considering the motion to have been filed on February 25, 2004, the State asserts it was denied within thirty days from the date it was filed. Since the ten-day limitation under Rule 5-614(C) does not apply to a motion based on newly discovered evidence, we do not consider it further.

[12] We first determine whether Defendant’s motion for a new trial was timely filed. Defendant’s motion asserts it is based on his psychological and psychiatric condition that was not known at the time of trial, and the order granting the new trial is based on Defendant’s psychological disorder, which the district court found was not discoverable at the time of trial. The motion was premised upon, and granted because of, newly discovered evidence. Since the ten-day limitation under Rule 5-614(C) does not apply to a motion based on newly discovered evidence, we do not consider it further.

[13] Concerning newly discovered evidence, Rule 5-614(C) states in pertinent part, “[a] motion for new trial based on the ground of newly discovered evidence may be made only before final judgment, or within two (2) years thereafter.” In this case, no final judgment was entered prior to the district court’s decision to grant the motion for a new trial. The verdicts of the jury do not constitute a final judgment because Defendant still needed to be sentenced. Further, the order to undergo a sixty-day commitment to the Department of Corrections for a diagnostic evaluation
was not a sentence; it was ordered to assist the district court in determining an appropriate sentence. It is well settled that until a sentence for the crime is imposed, there is no final judgment in a criminal case. See State v. Morris, 69 N.M. 89, 91, 364 P.2d 348, 349 (1961) (holding that a judgment in a criminal case is not final until sentence is imposed). The district court determined, with the agreement of the parties, that the motion for new trial was filed as of February 25, 2004. Since no sentence had been filed as of that date, the motion for new trial was filed "before final judgment" as specified in Rule 5-614(C). We therefore hold that Defendant's motion for a new trial, filed as of February 25, 2004, based on newly discovered evidence, was timely filed as required by Rule 5-614(C).

Next, we consider the State's argument that the district court lost jurisdiction to grant the motion for a new trial under Rule 5-614(C), which provides: "If a motion for new trial is not granted within thirty (30) days from the date it is filed, the motion is automatically denied." Clearly more than thirty days elapsed from the time the motion for new trial was filed on February 25, 2004, and the order granting the motion was filed on May 25, 2005. However, the State's argument overlooks another provision of the Rules of Criminal Procedure for the District Courts in the context of what transpired in the district court.

When the parties convened for sentencing on February 25, 2004, Defendant requested and was granted a continuance for the purpose of receiving the forensic evaluation by Defendant's expert, Dr. Roll, whose report had not yet been received. The district court granted the continuance, stating that the report should be received and the sentencing hearing reset.

Rule 5-104(B) states:

B. Enlargement. When by these rules or by a notice given thereunder or by order of court, an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion:

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion made after the expiration of the specified period permit the act to be done.

The court may not extend the time for filing a motion for new trial, for filing a notice of appeal, for filing a motion for acquittal or for filing a motion for an extension of time for commencement of trial. In State v. Sandoval, 2003-NMSC-027, ¶ 11, 134 N.M. 453, 78 P.3d 907, our Supreme Court expressly stated, "[f]or timely-filed motions, ... Rule 5-104(B)(1) recognizes the district court's discretion to enlarge the period within which the act is required or allowed to be done." Since we have already concluded that Defendant's motion for new trial was timely, we consider whether the district court extended the time for it to decide the motion as permitted by Rule 5-104(B)(1).

As we have already pointed out, through some error, it was not originally noted that Defendant's motion for new trial was filed in open court on February 25, 2004. Nevertheless, the district court certified that the motion had in fact been filed as of February 25, 2004, by agreement of the parties when this mistake was discovered. That same day, February 25, 2004, Defendant moved for a continuance, which constituted a request for an enlargement of time for the district court to either rule on the motion for new trial or sentence him. The district court granted Defendant's continuance motion because it wanted to consider Dr. Roll's report and it was not yet completed. The effect of the order was that "for cause shown" the district court exercised its discretion under Rule 5-104(B)(1) and ordered that the time be enlarged within which it would either rule on the motion for new trial or sentence Defendant. The district court's decision to certify the motion for new trial as having been filed in open court as of February 25, 2004, is supported by substantial evidence. In addition, we hold that the district court did not abuse its discretion in ordering a continuance for the purpose of allowing Dr. Roll's evaluation report to be prepared. Finally, we cannot say that under the facts of this case, there was any undue delay or prejudice to the State. Defendant remained in custody. Dr. Roll's evaluation report was not issued until June 18, 2004, and on June 24, 2004, the State agreed to continue trial of the severed counts pending a report of Defendant's competency to stand trial on those charges. On September 7, 2004, the district court set the hearing on Defendant's motion for new trial to be heard on January 20, 2005, and the record contains no objection by the State or prejudice argument concerning the hearing date.

We hold that Defendant's motion for new trial was not automatically denied by Rule 5-614(C) because within thirty days of the filing of the motion (in fact, the very day that the motion was filed in open court), the district court enlarged the time for it to rule on the motion as allowed by Rule 5-104(B)(1). Therefore, the district court had jurisdiction to grant the motion for new trial on May 25, 2005, when the order was filed.

For their separate purposes, the parties cite to three cases as controlling the outcome of this case. They are State v. Lucero, 2001-NMSC-024, ¶¶ 4-10, 130 N.M. 676, 30 P.3d 365; Sanchez v. Saylor, 2000-NMCA-099, ¶¶ 28-29, 129 N.M. 742, 13 P.3d 960; and State v. Ratchford, 115 N.M. 567, 571, 855 P.2d 556, 560 (1993). These cases, however, are not applicable, nor do they conflict with our decision here.

Ratchford was decided before Sandoval and did not consider whether and under what circumstances Rule 5-104(B) has any effect on Rule 5-614(C). Sanchez involved the circumstance of a notice of appeal divesting the district court of jurisdiction. And Lucero involved an untimely motion. Those cases are not helpful to our analysis here.

The State relies on Martinez v. Friede, 2004-NMSC-006, ¶¶ 13, 135 N.M. 171, 86 P.3d 596, to argue that the policy of encouraging the expeditious handling of post-trial motions would be thwarted by a decision holding that the district court retains jurisdiction to decide a motion for new trial under the circumstances of this case. We disagree for several reasons. First, we question how important that policy is inasmuch as the Supreme Court recently adopted revised Rules of Civil Procedure eliminating all thirty-day, deemed-denied language in those rules. See Rules 1-052, 1-054.1, and 1-059 NMRA (as amended effective August 21, 2006). Second, Martinez did not consider the effect of any rule like Rule 5-104(B).

Third, although the Supreme Court ruled that the district court did not have authority under Rule 1-059, it also held that under Rule 1-060(B) NMRA (providing that for specified reasons, "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding"), a district court retains a "reservoir of equitable power" to assure
that justice has been done, and may, in exceptional circumstances, reopen judgment and order a new trial sua sponte. *Martinez*, 2004-NMSC-006, ¶ 15 (internal quotation marks and citation omitted). Ultimately, the district court order granting the motion for a new trial was affirmed. Id. ¶ 28. Consistent with *Martinez*, Rule 5-614(A) could also be construed as reserving to the district court a “reservoir of equitable power” to assure that justice is done, and order a new trial sua sponte beyond the thirty days specified in Rule 5-614(C). Rule 5-614(A) specifically states, “When the defendant has been found guilty, the court on motion of the defendant, or on its own motion, may grant a new trial if required in the interest of justice.” (Emphasis added.)

{23} In summary, we hold that Defendant’s motion for new trial was timely filed and that the district court had jurisdiction to grant the motion because it was not deemed automatically denied under Rule 5-614(C). We therefore proceed to determine whether the district court abused its discretion in granting the motion.

Issue 2: The District Court’s Decision to Grant Defendant’s Motion for a New Trial

{24} The district court found that Defendant suffers from a disorder that, if presented to a jury, would have warranted an instruction on diminished capacity, and that Defendant’s condition was not discoverable by counsel at the time of trial. No instruction on diminished capacity was given at Defendant’s trial. Accordingly, the district court granted Defendant a new trial.

{25} “[W]e will not disturb a district court’s exercise of discretion in denying or granting a motion for a new trial unless there is a manifest abuse of discretion.” *State v. Garcia*, 2005-NMSC-038, ¶ 7, 138 N.M. 659, 125 P.3d 638. “Because the function of passing upon motions for new trial on newly discovered evidence belongs naturally and peculiarly, although not exclusively, to the [district] court, the discretion of a [district] court is not to be lightly interfered with.” *Id.* (internal quotation marks and citations omitted). In *Garcia*, our Supreme Court held that this Court erred in reversing the district court’s order granting a new trial because we did not give sufficient deference to the district court’s determination that the newly discovered evidence would probably change the result in a new trial, and it concluded that the “sum of the district court judge’s findings justified” the decision to grant a new trial.” *Id.* ¶ 17.

{26} To justify a new trial on grounds of newly discovered evidence the newly discovered evidence must satisfy all of the following requirements: “(1) it will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it could not have been discovered before the trial by the exercise of due diligence; (4) it must be material; (5) it must not be merely cumulative; and (6) it must not be merely impeaching or contradictory.” *Id.* ¶ 8 (quoting *State v. Volpato*, 102 N.M. 383, 384-85, 696 P.2d 471, 472-73 (1985)).

{27} The State argues that Defendant failed to prove prongs 2 and 3 of the *Volpato* test. Specifically, the State argues that it was known before trial that Defendant had injected methamphetamine on January 28, 2003. Further, the fact that methamphetamine causes violent behavior was nothing new to Defendant: at trial, the State explored with Defendant’s fiancee her extensive history of violence and drug use, and Defendant’s mother gave a police statement two years before trial in which she said that she was “very frightened” of her son when he was on drugs. Moreover, Defendant’s fiancee testified that she and Defendant shot up methamphetamine and Defendant was “acting crazy” on the date of the incidents. The State further argues that it cannot be said that Defendant suffers from a formally classified “mental disease or disorder”; and that, even if he is considered to be suffering from one, Defendant’s counsel should have exercised due diligence in searching out any basis for a diminished capacity instruction prior to trial. Accordingly, the State contends, the district court misapplied the applicable law or abused its discretion because its ruling was “clearly against the logic and effect of the facts and circumstances of the case.” *See State v. Woodward*, 121 N.M. 1, 4, 908 P.2d 231, 234 (1995).

{28} Finally, the State argues that Defendant’s counsel’s decision not to pursue a diminished capacity instruction in this case was simply a trial strategy decision that failed, and Defendant should not be allowed a second chance to present a new trial strategy. At trial, Defendant’s defense theory rested on efforts to show that Defendant was not a “bad person” who uses drugs, that Defendant tried to stop his fiancee from using methamphetamine, and that she was the methamphetamine user who became violent, hallucinated, and lied about the events at issue. A new trial, the State argues, will allow Defendant to pursue a new defense theory: Defendant’s extensive methamphetamine use exonerates him of the specific intent crimes he committed.

{29} The district court explained its application of *Volpato* in its letter decision, stating:

... [Defendant] argues that he should be entitled to a diminished capacity instruction because of his use of methamphetamine during the events constituting the offenses charged.

[The] Detention officer... testified that [Defendant] has always displayed good behavior during his [two] years incarceration period. She called him a “model prisoner.” She has never seen him act in such a manner to indicate he had any mental defects.

Dr. Samuel Roll testified that he reviewed the Diagnostic Evaluation and performed a Psychological Evaluation of [Defendant]. He determined that [Defendant’s] reaction to methamphetamine is idiosyncratic. [Defendant] is incapable of dealing with overstimulation. When using drugs, [Defendant]’s coping deficit index is over taxed. His executive autonomous functions, or free will is adversely affected resulting in diminished capacity. Dr. Roll testified that this was not discovered during the pre-trial phase without testing. The Diagnostic Evaluation noted ‘There is a possibility that [Defendant] might have some type of impulse control disorder, but none could be substantiated during this evaluation period” (Diagnostic Evaluation Page. 5).

The Court will find that [Defendant’s] condition was not discoverable prior to trial. Had the jury been presented evidence of Dr. Roll’s evaluation, an instruction on diminished capacity [UJI 14-5111 NMRA] would have been appropriate. And, if the jury found [Defendant]’s capacity had been diminished, the result would have been different. Accordingly, the Court will grant the Motion for a New Trial on those counts requiring specific intent.

The formal order granting Defendant a new trial then makes the following specific findings of fact:
[1.] [Defendant] suffered from a disorder that, if presented to the jury in his trial, would have warranted an instruction on diminished capacity pursuant to [UJI 14-5111].

[2.] [Defendant’s] condition was undiscoverable by prior counsel at time of trial.

On the basis of these findings, the new trial was granted. These findings and conclusions of the district court are supported by the testimony presented at the hearing on the motion for a new trial and the diagnostic evaluations prepared by both the State’s and Defendant’s experts.

{30} The State’s expert who performed the diagnostic evaluation after the trial stated that while Defendant produced valid profiles on both structured objective measures of personality, “[h]is profile was inconsistent with any established profile type.” The State’s expert also stated: “It appears that when he is under the influence of illicit substances, he experiences an idiosyncratic type of intoxication and engages in hostile behavior, which he would not normally display, if he were not under the influence of an illicit substance.” Further, the State’s expert said, “There is a possibility that [Defendant] might have some type of impulse control disorder, but none could be substantiated during this evaluation period.”

{31} At the hearing on the motion for new trial, Dr. Roll specifically stated that off of drugs Defendant already has a diminished thinking capacity, which the use of methamphetamine makes more severe: “[W]e cannot expect him to think; to reason; to perceive correctly; to access reality correctly; or to use any other host of intellectual skills that we need for decision making.” Further, and most significantly, Dr. Roll said that a normal lay person could not determine this fact from working and visiting with Defendant. Thus, what was not known and could not be discovered by any lay person such as Defendant’s fiancee, Defendant’s mother, or Defendant’s counsel, was the extent to which, even off methamphetamine, Defendant was “less capable than most people of coming to reasonable conclusions about relationships, between events, and maintaining a connected flow of associations in which they follow each other in a comprehensive manner,” as his brief contends. As such, although looking and acting normally when not under the influence of methamphetamine, Defendant, again in the words of his brief, has “severe . . . deficits,” including “an impaired thinking process”; he is someone who is “incapable, in a very stable way, of dealing with new stimulation and especially with over stimulation”; his “efforts to focus his attention with precision, and to synthesize his experience, falls below that of most people.” Dr. Roll also specifically testified that, given the “level of distortion of his thinking,” his impaired cognitive processes, and his “impaired thinking process” off of drugs, “[Defendant’s] ability to put things together is not there when he is on amphetamines.”

Dr. Roll summarized:

Now, from a psychological point of view, that’s a diminished capacity to make reasonable choices. I am not making a legal decision of course, or legal position. From the psychological position, this interferes. When you put all of these together, you have someone who is walking around, who looks [like] he is just fine, but has a number of very serious deficits that will diminish his capacity for executive acts. And then, when you combine them with the amphetamines, then you have someone who is assuredly . . . going to have some diminished capacities at a very serious level.

{32} We hold that under the circumstances of this case, the district court properly applied the Volpato test. Specifically with regard to prongs 2 and 3, which are contested by the State, the evidence demonstrates that Defendant has a diminished capacity to reason on a day-to-day basis, which is greatly exacerbated by methamphetamine and an idiosyncratic type of intoxication that was not discoverable prior to trial and it could not have been discovered prior to trial with the exercise of due diligence.

{33} The newly discovered evidence is the opinions of the diagnostic experts that Defendant has serious mental deficits including a serious diminished capacity for reasoning and for carrying out executive acts in general, made more severe by an idiosyncratic intoxication from methamphetamine. The State failed to present any evidence challenging the validity or conclusions of either of the two evaluations concerning Defendant. Further, the State does not challenge the fact that Defendant has psychological defects and deficiencies, which interfere with his ability to form specific intent. “When the defendant has advanced evidence that reasonably tends to show an incapacity to form specific intent, the prosecution then has the additional burden of proving the defendant was capable of forming the deliberate intent despite the alleged intoxication or mental disorder.” State v. Balderama, 2004-NMSC-008, ¶38, 135 N.M. 329, 88 P.3d 845. In this case, the jury was not allowed to consider whether Defendant was capable of forming specific intent because the evidence was unknown, and it could not have been discovered prior to trial by the exercise of due diligence. The evidence was discovered only because the district court initially ordered a diagnostic evaluation, which then led to further diagnostic testing.

{34} The district court did not abuse its discretion by granting Defendant a new trial on the basis of this newly discovered evidence on the two crimes requiring specific intent.

CONCLUSION

{35} We affirm the district court’s jurisdiction and its order granting Defendant a new trial on the kidnaping and aggravated assault charges. We decline to address the other issues raised by the State because those issues may or may not be repeated on retrial.

{36} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

JONATHAN B. SUTIN, Chief Judge
LYNN PICKARD, Judge
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-048

STATE OF NEW MEXICO,
Plaintiff-Appellee,

versus

KATRINA G.,
Child-Appellant.

No. 25,781 (filed: March 5, 2007)

APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY

JAY HARRIS, District Judge

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for Appellee

Opinion

MICHAEL D. BUSTAMANTE, Judge

(1) The question presented is whether the children’s court retains jurisdiction to hear a timely petition to revoke a child’s probation after the probation period expires. We hold that Rule 10-226 NMRA governs the time limits within which the children’s court must hear a petition to revoke probation. Concluding that the hearing in this case took place within the applicable time limit, we affirm.

BACKGROUND

(2) On May 10, 2004, the children’s court attorney in San Miguel County filed a petition against Katrina G. (Child) alleging the offense of unlawful carrying of a deadly weapon on school premises contrary to NMSA 1978, § 30-7-2.1 (1994). On September 1, 2004, the Child entered into a plea agreement in which she admitted to the offense and agreed to the entry of a consent decree. The children’s court approved the consent decree and placed the Child on supervised probation for a six-month period beginning September 1, 2004, and ending March 1, 2005.

(3) On February 21, 2005, the children’s court attorney filed a petition styled as a “petition to revoke probation” pursuant to NMSA 1978, § 32A-2-24 (1993). Although neither party raised the issue, it appears that the children’s court attorney actually intended to file a petition to revoke the consent decree under NMSA 1978, § 32A-2-22(D) (2005). The distinction between the two sections is that Section 32A-2-24 governs petitions to revoke a probation incident to an adjudication of delinquency, whereas Section 32A-2-22(D) addresses petitions to revoke a consent decree, which also may have an associated probation period. Compare Section 32A-2-24(A) (“A child on probation incident to an adjudication as a delinquent child . . . may be proceeded against in a probation revocation proceeding.”) (emphasis added) with Section 32A-2-22(D) (“If . . . the child allegedly fails to fulfill the terms of the [consent] decree, the children’s court attorney may file a petition to revoke the consent decree.”) (emphasis added); see also In re Crystal L., 2002-NMCA-063, ¶ 8, 132 N.M. 349, 48 P.3d 87 (“Consent decrees exist as an alternative to adjudication of delinquency in the juvenile justice system.”). Thus, the proper procedure for revoking a child’s probation incident to a consent decree is to petition for revocation of the consent decree itself. The State’s confusion is understandable, however, since the procedure for revoking either type of juvenile probation is the same. See Section 32A-2-22(D) (“Proceedings on the petition [to revoke a consent decree] shall be conducted in the same manner as proceedings on petitions to revoke probation.”). Moreover, despite the misleading title of the petition and the State’s initial citation to Section 32A-2-24, the parties and the children’s court proceeded as if the petition were a petition to revoke the consent decree under Section 32A-2-22(D). We therefore find no error in this regard and treat the petition as a petition to revoke the consent decree—and its associated probation—under Section 32A-2-22(D). Accordingly, we refer to the petition throughout this opinion as the “petition to revoke the consent decree.”

(4) The petition to revoke the consent decree contained allegations that the Child violated the consent decree and the conditions of her probation in that, on or about the dates of January 13 and 14, 2005, she: (1) was charged with the crime of involuntary manslaughter; (2) possessed a handgun; and (3) admitted that she consumed alcohol and/or controlled substances. No hearing on the petition to revoke the consent decree had taken place by the time the Child’s probation ended on March 1, 2005. Several days later, Child filed a motion to dismiss the petition on the grounds that the children’s court no longer had jurisdiction over the matter because the probation period had expired. The children’s court held a hearing on both the Child’s motion to dismiss and the State’s petition to revoke the consent decree on April 7, 2005.

(5) At the hearing, counsel for the Child argued that, under this Court’s decision in State v. Lara, 2000-NMCA-073, 129 N.M. 391, 9 P.3d 74, a hearing on a petition to revoke a consent decree must take place before the associated probation period expires, otherwise the district court lacks jurisdiction to hear the matter. The children’s court disagreed and denied Child’s motion to dismiss. The court reasoned that the Children’s Code, unlike NMSA 1978, § 31-20-8 (1977), which was the statute at issue in Lara, does not require that the hearing on a petition to revoke a consent decree take place before the expiration of the associated probation period. The children’s court entered its written order denying Child’s motion to dismiss on April 15, 2005, and Child timely appealed from that order. The children’s court subsequently entered a written order revoking Child’s consent decree.

(6) The sole issue Child advances on appeal is whether the children’s court had jurisdiction to hear the State’s petition to
revoke the consent decree after the Child's probation period had expired.

DISCUSSION

The Children’s Court May Hear a Timely Filed Petition to Revoke a Consent Decree After the Probation Period Expired.

{7} Whether the children’s court has jurisdiction to hear a petition to revoke a consent decree after the associated probation period expires is a question of law that we review de novo. State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) (“We review questions of law de novo.”). Section 32A-2-22(D) sets forth the conditions under which the children’s court attorney may file a petition to revoke a consent decree and reads as follows:

If either prior to discharge by probation services or expiration of the consent decree the child allegedly fails to fulfill the terms of the decree, the children’s court attorney may file a petition to revoke the consent decree. Proceedings on the petition shall be conducted in the same manner as proceedings on petitions to revoke probation [under Section 32A-2-24]. If the child is found to have violated the terms of the consent decree, the court may:

1. extend the period of the consent decree; or
2. make any other disposition that would have been appropriate in the original proceeding.

Rule 10-225(C) NMRA similarly states:

C. Revocation of consent decree. If, prior to the expiration of the consent decree, the child allegedly fails to fulfill the terms of the decree, the children’s court attorney may file a petition to revoke the consent decree. Proceedings on the petition shall be conducted in the same manner as proceedings on petitions to revoke probation [under Rule 10-232 NMRA]. The committee commentary to Rule 10-225 explains that, “[s]ince a consent decree is essentially a negotiated probationary period, the original committee felt that the proceedings to revoke the consent decree should follow the procedure to revoke probation contained in Section 32A-2-24 and Rule 10-232, respectively.

{8} The State may file a petition to revoke probation “any time prior to expiration of the period of probation.” Rule 10-232(C)(4). Because probation revocation proceedings “shall be conducted in the same manner as proceedings on petitions alleging delinquency,” Rule 10-232(C), the children’s court must hear the petition to revoke probation within the time limits set forth in Rule 10-226. Accord NMSA 1978, § 32A-2-15 (1993) (“The adjudicatory hearing in a delinquency proceeding shall be held in accordance with the time limits set forth in the Children’s Court Rules and Forms.”); see also State v. Doe, 93 N.M. 621, 625, 603 P.2d 731, 735 (Ct. App. 1979) (stating that the time limit for petitions alleging delinquency applies to probation revocation proceedings by operation of Rule 51(a), the predecessor to Rule 10-232(C)).

{9} Child does not allege that the State failed to follow the procedures set forth in Section 32A-2-24 or Rule 10-232 in filing its petition to revoke the consent decree. To the contrary, Child concedes that the State timely filed the petition. Instead, Child’s argument focuses on whether Subsection E of Section 32A-2-22 required the children’s court to hear the petition to revoke the consent decree before the associated probation period expired. Subsection E states, in relevant part:

A child who is discharged by probation services or who completes a period under supervision without reinstatement of the original delinquency petition shall not again be proceeded against in any court for the same offense alleged in the petition or an offense based upon the same conduct and the original petition shall be dismissed with prejudice.

Section 32A-2-22(E). Child’s argument is that she completed the period under supervision without reinstatement of the original delinquency petition because reinstatement could only occur after a hearing and a finding that Child violated the conditions of her probation. Child further points to our decision in Lara as support for her argument that the children’s court could only have heard the petition to revoke the consent decree before the associated probation period expired. Thus, according to Child, the children’s court was deprived of jurisdiction to hear the petition once the probation period expired on March 1, 2005. Finally, Child asserts that, even if the children’s court could have heard the petition to revoke beyond the probation expiration date, Child was in detention when the State filed the petition and, therefore, the court failed to hold the hearing within the applicable time limit set forth in Rule 10-226(A).

{10} We first examine whether there is merit to Child’s contention that Section 32A-2-22(E) imposed a time limit on the children’s court to hear the petition to revoke the consent decree. Next, once we have determined which rule of law governs time limits in this context, we address whether the children’s court timely held the hearing on the petition.

1. Rule 10-226 Governs the Time Within Which the Children’s Court Must Hear a Petition to Revoke a Consent Decree

{11} Child’s argument that Section 32A-2-22(E) imposes a time limit on the children’s court is unpersuasive. First, to the extent Child argues that the April 7, 2005, proceeding on the petition to revoke probation violated her double jeopardy rights under Section 32A-2-22(E), she is mistaken. Section 32A-2-22(E) provides that the State may not proceed against a successful probationer, i.e., one “who is discharged by probation services or who completes a period under supervision without reinstatement of the original delinquency petition,” for the same offense or an offense based upon the same conduct that was alleged in the original delinquency petition. However, we have previously held that a probation revocation proceeding does not implicate double jeopardy because it “is not a new criminal trial to impose new punishment, but instead is a hearing to determine whether, during the probationary . . . period, the defendant has conformed to or breached the course of conduct outlined in the probation . . . order.” In re Lucio F.T., 119 N.M. 76, 77, 888 P.2d 958, 959 (Ct. App. 1994) (internal quotation marks and citation omitted (alterations in original)). “Any disposition resulting from the revocation of [one’s] probation relates back to his [or her] original delinquent act and replaces the original disposition.” Id. at 78, 888 P.2d at 960. Thus, for the purposes of Section 32A-2-22(E), the State was not “proceeding against” Child a second time by virtue of filing its petition to revoke the consent decree.

{12} Second, and more importantly, Child’s reliance on Section 32A-2-22(E) is misplaced because that section does not
specifically address the time limits within which the children’s court must rule on a petition to revoke probation. In contrast, as mentioned above, the Children’s Code explicitly mandates that the time limits set forth in Rule 10-226 govern proceedings on a petition to revoke probation incident to a consent decree, although it does so somewhat circuitously. First, Section 32A-2-22(D) requires petitions to revoke probation incident to a consent decree to be “conducted in the same manner as proceedings on petitions to revoke probation.” Section 32A-2-22(D). Next, Section 32A-2-24 governs petitions to revoke probation and states that “proceedings to revoke probation shall be governed by the procedures, rights and duties applicable to proceedings on a delinquency petition.” Section 32A-2-24(B). This leads to Section 32A-2-15, which requires that adjudicatory hearings in delinquency proceedings follow the time limits “set forth in the Children’s Court Rules and Forms.” Section 32A-2-15. Those time limits are found in Rule 10-226, which is entitled “Adjudicatory hearing; time limits.” Therefore, the Children’s Code explicitly mandates the use of Rule 10-226 for determining the applicable time limit within which the children’s court must hear a petition to revoke a consent decree.

13 Nevertheless, Child appears to argue that Section 32A-2-22(E) provides an implicit time limit in that it requires dismissal of her case with prejudice if she “completes a period under supervision without reinstatement of the original delinquency petition.” Section 32A-2-22(E). According to Child, Section 32A-2-22(E) required the children’s court to hear the State’s petition, revoke the consent decree and reinstate her original delinquency petition before she “completed” the probation. As support for this argument, Child cites to Lara, a case in which we held that, under Section 31-20-8, the district court was without jurisdiction to enter an order of unsatisfactory completion once the defendant’s probation period ended. Lara, 2000-NMCA-073, ¶ 12.

14 The defendant in Lara was an adult who was convicted on a driving while intoxicated (DWI) charge. Id. ¶ 2. He entered a plea of no contest and the district court suspended his sentence and placed him on probation. Id. While on probation, the defendant pled guilty to a charge of disorderly conduct based on a separate incident. Id. ¶ 3. The State moved for an unsatisfactory discharge from probation prior to the expiration of the probation period, but the district court did not hold the hearing on the motion until after the probation period expired. Id. The court eventually found that the defendant had unsatisfactorily completed his probation. Id. The defendant appealed, arguing that, under Section 31-20-8, the district court was without jurisdiction to find that he had unsatisfactorily completed his probation and that, to the contrary, he was entitled to a certificate of completion. Lara, 2000-NMCA-073, ¶ 5. Focusing on the language of Section 31-20-8, we agreed with the defendant. Lara, 2000-NMCA-073, ¶¶ 5, 12.

15 While Lara has some superficial similarities in common with the present case, it is distinguishable in several important respects. First, Lara is an adult case involving a statute that is inapplicable in the juvenile context. Cf. State v. Dennis F., 104 N.M. 619, 621, 725 P.2d 595, 597 (Ct. App. 1986) (discussing differences between the Children’s Code and statutes pertaining to adult offenders in the probation context). Second, Section 31-20-8, the statute at issue in Lara, is very specific in terms of its impact on the district court’s jurisdiction to find that a defendant failed to satisfactorily complete his or her probation. Section 31-20-8 reads as follows:

Whenever the period of suspension expires without revocation of the order, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime. He shall thereupon be entitled to a certificate from the court so reciting such facts.[] Unlike Section 32A-2-22(E), Section 31-20-8 focuses specifically on the expiration of the period of suspension without revocation of the suspension order and mandates that, under such circumstances, the defendant shall “be entitled to a certificate from the court so reciting such facts.” Thus, Section 31-20-8 sets forth an explicit deadline—the expiration of the period of suspension—by which the district court must revoke the defendant’s probation.

16 In contrast, Section 32A-2-22(E) simply states that a child is entitled to have his or her case dismissed if the child “completes a period under supervision without reinstatement of the original delinquency petition.” Section 32A-2-22(E). It is unclear whether completion without reinstatement means what Child here asserts, i.e., that the children’s court has not acted on a petition to revoke a consent decree before the associated probation period expires. Completion without reinstatement could also mean completion without eventual reinstatement. The emphasis appears to be on the lack of reinstatement in general, not necessarily the lack of reinstatement by a certain time.

17 Section 31-20-8 clearly evinces the legislature’s intent to require a hearing before the expiration of the probation period in the adult context. Had it intended to do so, the legislature certainly knew how to draft Section 32A-2-22(E) to have a similar effect. See Patterson v. Globe Am. Cas. Co., 101 N.M. 541, 543, 685 P.2d 396, 398 (Ct. App. 1984) (determining by negative inference that, where legislature demonstrates that it knows how to create certain remedies, the fact that it did not create one suggests that it did not intend 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). We cannot ignore the fact that the legislature chose not to emphasize the expiration of the probation period when it drafted Section 32A-2-22(E). See State v. Davis, 2007-NMCA-022, ¶¶ 7-9. N.M. __ P.3d __ (holding that the rule in Lara has no bearing on when the State may refile charges against a defendant participating in the preprosecution diversion (PPD) program because the PPD Act lacks the specific language of the sentencing statutes at issue in Lara, which address unique jurisdictional concerns).

18 Looking at Section 32A-2-22 in its entirety, it appears that Subsection E is intended for another purpose altogether. We find it significant that Section 32A-2-22 addresses situations in which proceedings have been suspended and there has been no adjudication of delinquency. Under these circumstances, Subsection E provides a double jeopardy-like protection once a child successfully completes his or her obligations under a consent decree. Such a provision is necessary since, in light of the suspended state of the proceedings, jeopardy otherwise would not attach and the State would be free to repose. See State v. Gomez, 2006-NMCA-132, ¶ 9, 140 N.M. 586, 144 P.3d 145 (“Jeopardy begins or attaches when the trier of fact is empowered to decide guilt or innocence[.]” (internal quotation marks and citations omitted)).

19 Finally, Lara is distinguishable in that the statutory scheme in that case did not mandate the use of time limits set forth in the court rules. In the present case, however, the Children’s Code clearly provides...
that the applicable time limits are set forth in Rule 10-226. Given our holding in prior cases that "the Children’s Code must be read as an entirety," State v. Henry L., 109 N.M. 792, 794, 791 P.2d 67, 69 (Ct. App. 1990), we conclude that Section 32A-2-22(E) does not impose a time limit on the children’s court and that Rule 10-226 governs the applicable time limits in this context. We now turn to the question of whether the children’s court timely heard the State’s petition to revoke the consent decree under Rule 10-226.

2. The Children’s Court Timely Heard the Petition to Revoke the Consent Decree Under Rule 10-226.

{20} Rule 10-226 sets forth different time limits depending on whether or not the child is in detention. If the child is in detention, the hearing must take place within thirty days from the latest of a list of triggering events, such as the date the petition is served on the child or the date the child is placed in detention. Rule 10-226(A). If the child is not in detention, the hearing must take place within 120 days from the latest of a similar list of triggering events. Rule 10-226(B). We have previously analyzed Rule 10-226 and stated that the shorter time limit in Rule 10-226(A) applies to a detained child pending adjudicatory hearing because the State has not proven allegations against the child. The shorter time limit protects the child’s liberty interests. When a child is not in detention awaiting the adjudicatory hearing, however, his or her liberty interests are not implicated.

State v. Anthony M., 1998-NMCA-065, ¶ 9, 125 N.M. 149, 958 P.2d 107. Therefore, "the fact that a child is in detention in one case does not ordinarily affect the time schedule of another different case alleging delinquency." State v. Isaiah A., 1997-NMCA-116, ¶ 9, 124 N.M. 237, 947 P.2d 1057 (internal quotation marks and citation omitted). If the children’s court fails to hear a petition to revoke a consent decree within the time limits set forth in Rule 10-226, the proper remedy is to dismiss the petition with prejudice. Rule 10-226(F); Doe, 93 N.M. at 625, 603 P.2d at 735.

{21} Child alleges that she was in detention beginning on January 14, 2005, and that the thirty-day limit under Rule 10-226(A) therefore should have applied. However, Child points to nothing in the record demonstrating that she was in detention on her original delinquency petition and not as a result of the subsequent charges that prompted the children’s court attorney to file the petition to revoke her consent decree. What the record does reflect, however, is that prior to January 14, 2005, Child was not in detention because she was serving out a probation term as a condition of her consent decree. Furthermore, the State’s petition to revoke the consent decree recites that Child “has been cited for, detained and charged with the crime of involuntary manslaughter, which occurred on January 14, 2005.” (Emphasis added). We therefore conclude that Child was not in detention and that the 120-day time limit set forth in Rule 10-226(B) applied. Thus, because the hearing took place on April 7, 2005, which was well within 120 days of any of the triggering events listed in Rule 10-226(B), the children’s court did not err in denying Child’s requested relief.

CONCLUSION

{22} For the foregoing reasons, we affirm.

{23} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
RODERICK T. KENNEDY, Judge
STATE OF NEW MEXICO,
Plaintiff-Appellant,
versus
KENNETH LOVATO,
Defendant-Appellee.
No. 24,469 (filed: March 6, 2007)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
FRANK H. ALLEN JR., District Judge

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OPINION

MICHAEL E. VIGIL, Judge

{1} In this appeal we consider whether a trial court may impose two habitual offender enhancements upon a defendant who has completed service of his sentence on the first of two underlying felonies, but remains incarcerated for the second. See NMSA 1978, § 31-18-17 (providing for an enhanced sentence of a convicted felon upon proof of one or more prior felonies). We conclude that Defendant had a reasonable expectation of finality in the sentence imposed for each underlying felony, and that when Defendant completed serving his sentence on the first felony, that sentence was not subject to being enhanced under the habitual offender statute, although he remained incarcerated on the second felony. We therefore hold that the trial court had no jurisdiction to impose two separate eight-year enhancements upon Defendant under the habitual offender statute and remand this case to the trial court with instructions to vacate the eight-year enhancement of Defendant’s sentence under count one of the indictment.

FACTUAL AND PROCEDURAL BACKGROUND

{2} Defendant was convicted of two fourth degree felonies (possession of a stolen vehicle and contributing to the delinquency of a minor) and a misdemeanor (concealing identity). NMSA 1978, §§ 66-3-505 (1978); 30-6-3 (1990); 30-22-3 (1963). Defendant was ordered to serve consecutive sentences as follows: one year for the vehicle felony, followed by one year of parole; then eighteen months for the contributing felony, followed by one year of parole; which were then followed by six months for the misdemeanor, for a total of three years of incarceration. Because Defendant received 359 days of pre-sentence confinement credit, only six days of incarceration remained to be served on the first felony conviction at the time of sentencing. After serving the remaining six days, Defendant began serving the one-year parole term for the first felony concurrently with the incarceration sentence for the second felony. See Gillespie v. State, 107 N.M. 455, 456, 760 P.2d 147, 148 (1988) (explaining that Brock v. Sullivan, 105 N.M. 412, 414, 733 P.2d 860, 862 (1987) declared that “when a defendant is sentenced to consecutive terms of imprisonment for fourth degree felonies, the parole period for each offense commences immediately after the completion of the period of incarceration for each offense so that the parole period attached to each felony will run concurrently with any subsequent sentence then being served”).

{3} While Defendant was still serving the parole term on the first felony and the incarceration sentence on the second felony, the State filed a supplemental criminal information seeking to add separate eight-year enhancements to each of Defendant’s felony convictions under the habitual offender statute. Section 31-18-17(C) (providing in pertinent part that the basic sentence of a person convicted of a noncapital felony, who has incurred three or more prior felony convictions, shall be increased by eight years which shall not be suspended or deferred). However, when the hearing on the supplemental information was held, Defendant had fully completed serving his sentence on the first felony because by then he had completed serving the parole term imposed for that conviction. Following the hearing, the trial court imposed two eight-year habitual offender enhancements, but ordered that they be served concurrently. Therefore, instead of the nineteen-year incarceration sentence requested by the State (the original three years with an eight-year enhancement on each of the two felonies, to be served consecutively), Defendant received an eleven-year incarceration sentence (the original three years with an eight-year enhancement on each of the two felonies to be served concurrently). Explaining its decision, the trial court said:

Looking at the prior felony convictions . . . they did not seem to be of a serious nature that would cause injury or anything of that nature, so I am going to sentence him to an additional eight years as to each count, but I’m going to run it concurrent to make it a total of eight years.

{4} The State appeals, arguing that the trial court was forbidden from running the habitual offender enhancements concurrently because Defendant had originally been ordered to serve the underlying felony sentences consecutively. In response, Defendant argues that regardless of his continued incarceration on the second felony, the trial court had no jurisdiction to enhance the first felony sentence because he had completely served it when the hearing on the supplemental criminal information was held. We agree with Defendant. Because our holding results in vacatur of the enhancement of the first felony sentence, we need not decide whether the trial court could properly order the two habitual offender enhancements to be served concurrently.

STANDARD OF REVIEW

{5} The legality of a sentence is subject to de novo review on appeal. State v. Brown, 1999-NMSC-004, ¶ 8, 126 N.M. 642, 974 P.2d 136.

ANALYSIS

{6} In New Mexico, the jurisdiction of a trial court to enhance a felony sentence under the habitual offender statute expires once a defendant has completed service of that sentence. State v. Gaddy, 110 N.M.
Gaddy v. State (1990) (holding that the trial court was deprived of jurisdiction to impose a habitual offender enhancement after the defendant had completely served the underlying sentence); March v. State, 109 N.M. 110, 111, 782 P.2d 82, 83 (1989) (holding that the trial court had no jurisdiction to enhance the defendant’s sentence because the earning of meritorious deductions had brought the defendant’s service of his sentence to an end). This jurisdictional limitation is founded upon principles of double jeopardy: once a sentence has been served, a “defendant’s punishment for the crime has come to an end.” State v. Roybal, 120 N.M. 507, 510, 903 P.2d 249, 252 (Ct. App. 1995) (citing Gaddy, 110 N.M. at 122-23, 792 P.2d at 1165-66). At that point, a defendant’s reasonable expectation of finality in the severity of his sentence attaches, and “[f]urther punishment for that crime under any enhancement provision would violate the prohibition on double jeopardy.” Id.

The State acknowledges this general rule, but argues that the trial court nevertheless had jurisdiction to enhance Defendant’s first felony conviction because Defendant’s reasonable expectation of finality attached to his aggregate sentence, rather than each separate sentence. The State therefore urges that we treat the entire three-year period of incarceration as a single unit for the purpose of (1) determining when Defendant’s reasonable expectation of finality in the sentence attached for double jeopardy purposes; and (2) demarcating the trial court’s jurisdiction to enhance each of Defendant’s felony sentences. For the following reasons, we reject the State’s argument.

First, the State’s argument overlooks the plain language of the habitual offender statute, which provides that the “basic sentence” of a person convicted of a felony is subject to being increased if that person has one or more prior felony convictions, with the amount of the increase depending on the number of prior felony convictions. Section 31-18-17. That is to say, in making its enhancement determination, a trial court makes no reference to a defendant’s aggregate sentence; it simply enhances the “basic sentence” for each separate felony conviction. See State v. House, 2001-NMCA-011, ¶ 34, 130 N.M. 418, 25 P.3d 257 (noting that the enhancement of defendant’s sentence was not based upon a single enhancement, but five two-year enhancements, “one enhancement for each basic sentence”).

Second, as discussed at length in Gaddy, double jeopardy concerns arise when a defendant has completed service of a sentence, and the State thereafter seeks to impose additional punishment for that offense. 110 N.M. at 122-23, 792 P.2d at 1165-66; see also State v. Mayberry, 97 N.M. 760, 763, 643 P.2d 629, 632 (Ct. App. 1982) (stating that, once a sentence is enhanced, the original felony sentence and enhancement become a “single sentence for one crime”). Under the State’s argument, the double jeopardy principles which animate this jurisdictional limitation would not attach to each individual offense, but only the aggregate sentence. However, this argument is directly at odds with the plain language of the Fifth Amendment Double Jeopardy Clause, which states, “nor shall any person be subject for the same offense to be twice put in jeopardy.” U.S. Const. amend. V (emphasis added). See also N.M. Const. art. II, § 15 (“nor shall any person be twice put in jeopardy for the same offense” (emphasis added)).

Finally, a defendant’s reasonable expectation of finality in a sentence for double jeopardy purposes encompasses not only its length, but the manner in which the sentence is structured. See State v. Porras, 1999-NMCA-016, ¶ 13, 126 N.M. 628, 973 P.2d 880. The structure of Defendant’s overall sentence meant that, after he served the sentence of incarceration and parole for the vehicle felony, he fully served his sentence for that crime, and his expectation that he could not be further punished for that crime attached. We discern no reason why Defendant’s expectation of finality in his first felony sentence was unreasonable, or was in any way diminished, simply because he remained incarcerated for a second, separate felony offense.

The State’s final argument is that since the supplemental criminal information seeking to enhance Defendant’s sentence was filed before he completed serving his parole for the vehicle felony conviction, the trial court had a “reasonable” time to impose a habitual enhancement for that crime, even after the period of parole for that crime had expired. In support of its argument, the State relies upon State v. Sandoval, 2003-NMSC-027, ¶ 17, 134 N.M. 453, 78 P.3d 907, which held that the district court had a reasonable time after filing to rule on the State’s petition to extend the time for commencement of a habitual offender proceeding that was filed before the time for commencing trial expired, but not ruled upon until after the time had expired. Id.; see Rule 5-604 NMRA (providing in pertinent part that if the trial is not commenced within six months after arraignment the information must be dismissed with prejudice, unless an extension of time to commence the trial is granted). Sandoval is not applicable. It does not address whether a sentence can be enhanced when the information seeking to enhance the sentence is filed before a defendant has fully served the underlying sentence, and the sentence is subsequently enhanced after the defendant has completed serving the underlying sentence. Instead, the State’s argument is directly addressed and answered in Gaddy, where we said: It is reasonable... for a defendant to expect that if he completely serves the valid underlying sentence before the state proves he is a habitual offender, he has extinguished his criminal liability and there is no sentence left to enhance. This is so whether or not habitual offender proceedings have been filed already because the filing of such proceedings is not determinative of whether enhancement will actually occur. Only when a defendant is proven to be a habitual criminal is enhancement of the underlying sentence authorized, and the defendant’s expectations of finality in the underlying sentence consequently destroyed. Up to that point, anything could happen in the habitual proceedings—the state could decide not to pursue them, or fail to prove its case. Therefore, we believe that double jeopardy considerations preclude the enhancement of a defendant’s sentence after the defendant has completed served that underlying sentence, no matter when the habitual proceedings were initiated.

We remand to the trial court with instructions to vacate the eight-year enhancement of Defendant’s sentence under count one of the indictment.

CONCLUSION

We concur.

CYNTHIA A. FRY, Judge
IRA ROBINSON, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-050

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation, Plaintiff-Appellant, versus NEW MEXICO TAXATION & REVENUE DEPARTMENT, a State Agency; and JAN GOODWIN, as Secretary of the New Mexico Taxation & Revenue Department in her official capacity, Defendants-Appellees.

No. 26,349 (filed: March 9, 2007)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

JAMES A. HALL, District Judge

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OPINION

LYNN PICKARD, Judge

{1} Plaintiff, Public Service Company of New Mexico (PNM), a public utility in the business of generating and selling electricity, appeals from a district court order granting summary judgment in favor of Defendants, New Mexico Taxation and Revenue Department (the Department). On appeal, PNM challenges the Department’s denial of a refund for a compensating tax levied upon PNM’s purchase of turbines and related equipment for use in a generating plant in the City of Lordsburg, New Mexico. Both parties agree that the dispositive issue on appeal is whether PNM’s sale of the turbines and related equipment was in the “ordinary course of business.” We conclude that PNM’s sale of the turbines and related equipment was not in the ordinary course of business, and we therefore affirm the district court’s grant of summary judgment in favor of the Department.

BACKGROUND

{2} The material facts in this case are undisputed. PNM is a New Mexico corporation that sells electricity both within New Mexico and outside the state. In 2000, PNM purchased turbines and related equipment from GE Packaged Power, Inc. (GE) in Texas. The turbines and related equipment were to be used in the construction of a generating plant in Lordsburg, which was being financed by industrial revenue bonds. As part of this project, PNM planned to convey the plant site and equipment to Lordsburg, and Lordsburg would then lease the generating plant to PNM during the term of the bonds and eventually sell the plant back to PNM after full payment of the bonds.

{3} The turbines and related equipment were initially stored at a facility in Houston, Texas, and thereafter moved to Hobbs, New Mexico, prior to installation in the generating plant that was being constructed in Lordsburg. PNM reported and paid compensating tax in the amount of $1,522,294.61 on the value of the turbines and related equipment.

{4} PNM subsequently requested a ruling from the Department as to whether it was entitled to a refund with respect to the compensating tax paid. PNM initially claimed that it qualified as a purchasing agent for Lordsburg, which meant that the purchase of the turbines and related equipment would be treated as though it was purchased by Lordsburg for tax purposes, and PNM would therefore be entitled to a refund of the compensating tax paid. See NMSA 1978, § 7-9-54 (2003) (providing for a deduction from gross receipts for sale of tangible personal property, other than construction materials, to a government agency): 3.2.212.22(B) NMAC (2001) (“Receipts from the sale of tangible personal property to the private person who is acting as agent for the government with respect to the bond project are deductible under Section 7-9-54 NMSA 1978 if the tangible personal property is not an ingredient or component part of a construction project.”). PNM withdrew its request for a ruling and filed a formal claim for a refund after the Department issued a preliminary determination contrary to PNM’s position. The Department denied PNM’s claim, and PNM filed suit.

{5} Prior to commencing this action against the Department, PNM filed a second claim for refund on the grounds that the transaction involving the turbines and related equipment was not subject to the compensating tax imposed by NMSA 1978, § 7-9-7 (1995), because the equipment was not acquired within the meaning of that statutory provision. The Department did not act on this second claim for refund and instead consented to PNM’s incorporation of this claim within an amended complaint in its pending suit before the district court.

{6} Before the district court, both parties agreed that the dispositive issue as to PNM’s entitlement to a refund was the definition of “ordinary course of business” within the Gross Receipts and Compensating Tax Act, NMSA 1978, §§ 7-9-1 to -100 (1966, as amended through 2006). Specifically, if PNM’s resale of the turbines and related equipment was considered a sale in the ordinary course of business, PNM would be entitled to a refund of the compensating tax paid. On the other hand, if the sale was considered outside PNM’s ordinary course of business, PNM would not be entitled to a refund of the compensating tax paid.

{7} Both parties filed motions for summary judgment. In its motion, PNM argued that it was entitled to summary judgment and a refund of the compensating tax paid because it resold the turbines and related equipment in the ordinary course of business. Alternatively, PNM argued that even if the definition of ordinary course was construed against it, the Department was statutorily estopped from denying a refund. The Department countered that it was entitled to summary judgment because PNM

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did not sell the turbines and related equipment in the ordinary course of business because the sale was highly unusual and not routine. Both parties stipulated to the fact that PNM had not previously bought and sold turbines and has not done so since the transaction at issue.

[8] The district court granted summary judgment in favor of the Department, finding that no material facts were in dispute and that PNM’s purchase and resale of the turbines and related equipment were not in the ordinary course of business. Additionally, the district court found that none of the Department rulings or regulations cited by PNM supported a claim of estoppel by PNM. PNM appeals.

DISCUSSION

[9] PNM raises three issues on appeal: (1) whether the district court erred in concluding that “ordinary course of business” covers only those transactions by a business that are usual and routine; (2) whether the district court erred as a matter of law in determining that the Department was not estopped, based on previous Department regulations, from imposing a compensating tax on PNM; and (3) whether the district court erred in concluding that as a matter of law, the Department was not bound by the policy reflected in prior regulations and rulings interpreting the statutes incorporating the ordinary course of business standard. After briefly addressing the applicable standard of review and then discussing the relevant statutory provisions, we will analyze each of PNM’s asserted errors in turn.

Standard of Review

[10] “The standard of review for a motion for summary judgment is whether there are any genuine issues of material fact and whether the moving party is entitled to summary judgment as a matter of law.” *Williams v. Cent. Consol. Sch. Dist.*, 1998-NMCA-006, ¶ 7, 124 N.M. 488, 952 P.2d 978; see also *Johnson v. Yates Petroleum Corp.*, 1999-NMCA-066, ¶ 3, 127 N.M. 355, 981 P.2d 288 (“Summary judgment is the appropriate remedy if the facts are undisputed and it is only the legal interpretation of the facts that remains.”). Where, as here, there are no genuine issues of material fact, we “conduct a de novo review of the district court’s ruling to ascertain whether summary judgment was properly granted.” *Wiste v. Neff & Co.*, 1998-NMCA-165, ¶ 6, 126 N.M. 232, 967 P.2d 1172.


[11] At issue in the present case is the application of the State’s “compensating tax,” which is a tax “designed to subject out-of-state sellers of goods that are used in New Mexico to a tax similar to the [gross receipts tax].” *Kmart Corp. v. N.M. Taxation & Revenue Dep’t*, 2006-NMSC-006, ¶ 19, 139 N.M. 172, 131 P.3d 22; see also *Siemens Energy & Automation, Inc. v. N.M. Taxation & Revenue Dep’t*, 119 N.M. 316, 322, 889 P.2d 1238, 1244 (Ct. App. 1994) (stating that “[c]ompensating tax is paid by a New Mexico purchaser only if the sales occurred outside of New Mexico,” whereas “[g]ross receipts tax is due from the seller on its receipts from the sales only if the sales occurred inside New Mexico”). New Mexico’s compensating tax, as described in Section 7-9-7 of the Gross Receipts and Compensating Tax Act, “is imposed on the buyer where property or services were acquired as the result of a transaction which was not initially subject to the gross receipts tax, but because of the buyer’s subsequent use of such property or services, should have been subject to the gross receipts tax.” *Continental Inn v. N.M. Taxation & Revenue Dep’t*, 113 N.M. 588, 589-90, 829 P.2d 946, 947-48 (Ct. App. 1992). Specifically, Section 7-9-7 provides that

A. For the privilege of using tangible property in New Mexico, there is imposed on the person using the property an excise tax equal to five percent of the value of tangible property that was:

1. (1) manufactured by the person using the property in the state;
   (2) acquired outside this state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state; or
   (3) acquired as the result of a transaction which was not initially subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax but which transaction, because of the buyer’s subsequent use of the property, should have been subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax.

[12] At issue in the present case is whether PNM’s purchase and resale of turbines and related equipment is within the purview of Section 7-9-7. PNM argues that the compensating tax imposed in this case was inappropriate for two reasons. First, PNM argues that it did not use the turbines and related equipment as contemplated by Section 7-9-7(A). Section 7-9-7(A) provides that in order for a compensating tax to be imposed, the tangible personal property at issue must be used by the taxpayer. “Use” or “using,” as defined in the Act, “includes use, consumption or storage other than storage for subsequent sale in the ordinary course of business or for use solely outside this state.” Section 7-9-3(N). PNM argues that its importation of the turbines and related equipment into New Mexico, and subsequent storage in Hobbs, constituted “storage for subsequent sale in the ordinary course of business” and the equipment was therefore not “used” as required by the Act.

[13] Second, PNM contends that even if the property was “used” as defined in the Act, the transaction resulting in PNM’s purchase of the turbines and related equipment would not have been subject to the gross receipts tax had it occurred within New Mexico; therefore, the transaction does not fall under Section 7-9-7(A)(2), which is the relevant subsection under which the compensating tax was imposed. PNM argues that although a gross receipts tax technically would have been applied to GE’s sale of the turbines and related equipment, the sale falls under an exception within the Act and thus GE would not have paid a gross receipts tax on the sale. More specifically, PNM argues that the deduction enumerated in Section 7-9-47 is applicable to the sale from GE to PNM. Section 7-9-47 provides that

[r]eceipts from selling tangible personal property or licenses may be deducted from gross receipts or from governmental gross receipts if the sale is made to a person who delivers a nontaxable transaction certificate to the seller. The buyer delivering the nontaxable transaction certificate must resell the tangible personal property or license either by itself or in combination with other tangible personal property or licenses in the ordinary course of business.

PNM contends that if the sale involving the turbines and related equipment happened within the state, PNM, as a buyer planning to resell the property in the ordinary course of business, would have delivered a nontaxable transaction certificate (NTTC) to the seller, GE, who would then be able to deduct the proceeds of the sale from its gross receipts. Thus, according to PNM, the sale would not have been subject to gross receipts tax in New Mexico and therefore
does not fall under Section 7-9-7. See, e.g., Vivigen, Inc. v. Minzner, 117 N.M. 224, 226 n.1, 870 P.2d 1382, 1384 n.1 (Ct. App. 1994) (stating that a deduction from gross receipts tax also provides a deduction from compensating tax).

{14} As indicated by both of PNM’s arguments, and agreed on by both parties, the central question in this appeal is whether PNM’s subsequent sale of the turbines and related equipment was a sale in the ordinary course of business. The phrase “ordinary course of business” is not defined within the Act and its meaning within the context of the Act has not yet been construed by our courts. Below, the district court construed the phrase as meaning the “routine activities of the business.” Although we do not construe the phrase as narrowly as the district court, we nevertheless conclude that PNM’s resale of the turbines and related equipment was not in the ordinary course of business.

Sale in the Ordinary Course of Business

{15} Although we have not previously addressed the meaning of the phrase, “ordinary course of business” within the context of New Mexico’s compensating tax, its meaning has been examined in other contexts. Accordingly, we will examine these other contexts and endeavor to define the phrase, giving effect to the relevant statutory provisions as written, and attributing to the words their plain meaning. See Waksman v. City of Albuquerque, 102 N.M. 41, 43, 690 P.2d 1035, 1037 (1984); Amoco Prod. Co. v. N.M. Taxation & Revenue Dep’t, 2003-NMCA-092, ¶ 12, 134 N.M. 162, 74 P.3d 96.

{16} In Wilson v. Massachusetts Mutual Life Insurance Co., 2004-NMCA-051, 135 N.M. 506, 90 P.3d 525, we examined the meaning of “course of business,” as used in the New Mexico Uniform Unclaimed Property Act, NMSA 1978, §§ 7-8A-1 to -31 (1997, as amended through 2006). In concluding that the defendant’s issuance of certificates as part of a settlement agreement was not in the regular course of business, we held that “course of business” means a “business practice that is routine, regular, usual, or normally done.” Wilson, 2004-NMCA-051, ¶ 32. We observed that the defendant was in the business of selling insurance and other financial products and that the certificates were not part of the defendant’s regular line of products, nor were such certificates routinely issued by the defendant. Id. As such, we held that the issuance of the certificates was not in the course of the defendant’s business. Id.

{17} Applying Wilson’s definition of “course of business” to the case at bar, we cannot conclude that PNM’s purchase and resale of the turbines and related equipment were in the ordinary course of PNM’s business. PNM has never purchased turbines previously, nor is there any evidence in the record to suggest that PNM plans to engage in related purchases and sales in the future. Moreover, there is no indication in the record that PNM had previously constructed generating plants. This transaction was essentially a brand new business venture for PNM. Thus, the transaction at issue does not appear to be “business practice that is routine, regular, usual, or normally done.” Id.

{18} The phrase “ordinary course of business” has also been examined in the context of bankruptcy proceedings. Under the Bankruptcy Code, a trustee may sell estate property in the ordinary course of business without notice and a hearing. 11 U.S.C. § 363(c)(1) (2000). Additionally, the Code prevents a trustee from avoiding a debtor’s payment of a debt that was incurred in the ordinary course of business. 11 U.S.C. § 547(c)(2) (2000). In the bankruptcy context, a transaction is in the ordinary course of business if the “transaction is of a type that other similar businesses would engage in as ordinary business” and if the transaction does not subject “a creditor to economic risks of a nature different from those he accepted when he decided to extend credit.” In re Springfield Contracting Corp., 154 B.R. 214, 226 (Bankr. E.D. Va. 1993) (mem.). Further, a transaction is considered in the ordinary course of business “when there is a showing that the transaction is the sort occurring in the day-to-day operation of the debtor’s business.” Id.

{19} We disagree with PNM’s assertion that bankruptcy cases construing the meaning of ordinary course of business support its claim that the sale of the turbines and related equipment was in the ordinary course of business. PNM has not presented any evidence to suggest that its transaction was typical or customary within its industry. Further, PNM readily admits that the transaction was the first of its kind and thus the sale cannot be considered a transaction that occurs in the day-to-day operation of its business. Lastly, the fact that PNM had not previously engaged in the business of the construction of new generating plants suggests that the transaction created new economic risks for PNM. Thus, we conclude that under the Bankruptcy Code, PNM’s purchase and resale of the turbines and related equipment would not be considered in the ordinary course of business.

{20} Interpretations of “course of business” in other contexts present a much closer question for this Court. Under the Uniform Division of Income for Tax Purposes Act (UDITPA), NMSA 1978, §§ 7-4-1 to -21 (1965, as amended through 2002), “income arising from transactions and activity in the regular course of the taxpayer’s trade or business” is considered “business income” under the Act. Section 7-4-2(A). PNM argues that cases construing the meaning of “regular course of the taxpayer’s trade or business” under the UDITPA support its claim that the one-time purchase and sale of turbines and related equipment was in the ordinary course of PNM’s business. While we agree that the cases cited by PNM construe the phrase “course of business” more broadly than the district court, we nevertheless conclude that these cases do not support PNM’s claim.

{21} In the first New Mexico case to examine the phrase under the UDITPA, our Court examined a number of different transactions entered into by a company that specialized in the manufacture and sale of wood products. See Champion Int’l Corp. v. Bureau of Revenue, 88 N.M. 411, 412, 540 P.2d 1300, 1301 (Ct. App. 1975). The lead opinion, written by Judge Sutin, held that the phrase “regular course of the taxpayer’s trade or business” encompassed “[b]usiness deals and the performance of a specific function in the normal, typical, customary or accustomed policy or procedure of the taxpayer’s trade or business.” Id. at 414, 540 P.2d at 1303 (internal quotation marks and citation omitted). Based on this definition, Judge Sutin concluded that the interest income earned by the company in short term investments constituted business income because “a normal and customary practice by Champion was to invest excess capital, not needed for business purposes, in short-term securities.” Id. Although ostensibly not related to the manufacture or sale of wood products, the investments were transactions routinely entered into by the company. Id. Similarly, Judge Sutin concluded that the company’s rents from the rental of excess office space constituted business income because the rentals were customary and regularly done by the company. Id. at 415, 540 P.2d at 1304. Finally, Judge Sutin held that the sale of logs by the company was also business income because, like the investments and rents,
“[t]he sale of logs was a normal, customary procedure in the business of Champion” and had been so for several years. *Id.*

{22} Judge Wood specially concurred in *Champion.* See *id.* at 417-18, 540 P.2d at 1306-07 (Wood, C.J., specially concurring). In his concurrence, Judge Wood stated the phrase “regular course of [the taxpayer’s] *trade or business*” was not limited to the main course of a company’s business. *Id.* at 417, 540 P.2d at 1306. Thus, the company’s claim that it was not in the business of investing, renting property, or making occasional sales of logs, but instead in the business of “manufacturing and selling finished [wood] products,” did not carry any weight with Judge Wood. *Id.* (internal quotation marks omitted). Rather, Judge Wood argued that it made “no difference whether the income derives from the main business, the principal business, the occasional business or the subordinate business so long as the income arises from the ‘regular course of business.’” *Id.* Judge Wood further concluded that the pertinent factors in deciding whether a transaction is in the regular course of business were the “nature of the particular transaction,” “former practices of the business entity,” and how the income was used. *Id.* at 418, 540 P.2d at 1307 (internal quotation marks and citation omitted).

{23} Likewise, Judge Lopez specially concurred in the *Champion* opinion. See *id.* at 418-19, 540 P.2d at 1307-08 (Lopez, J., specially concurring). “Judge Lopez’s approach was to look to whether the income in question was ‘independent’ of a taxpayer’s business, relying on the case law addressing the unitary business concept to determine if the income is sufficiently ‘independent’ to be nonbusiness income.” *Kewanee Indus., Inc.* v. Reese, 114 N.M. 784, 788, 845 P.2d 1238, 1242 (1993) (citing *Champion Int’l Corp.*, 88 N.M. at 418, 540 P.2d at 1307). As an example of this approach, Judge Lopez described a hypothetical proffered by the Bureau of Revenue’s counsel in response to a question regarding what constituted nonbusiness income: “Well, if you took that money out and invested in yachts for an unrelated purpose or bought property not related to your business of logging or whatever it is and you derived income from it, then it would be non-business income.” *Champion Int’l Corp.*, 88 N.M. at 419, 540 P.2d at 1308. Thus, according to Judge Lopez, “the relationship of the income source to the business activities of the taxpayer determined whether income was business in nature. If the source were independent of these activities, the income was nonbusiness.” *Tipperary Corp.* v. N.M. Bureau of Revenue, 93 N.M. 22, 25, 595 P.2d 1212, 1215 (Ct. App. 1979).

{24} Approximately four years later, our Court once again addressed the meaning of the phrase “‘regular course of the taxpayer’s trade or business.’” *See id.* In *Tipperary Corp.*, a company engaged in the “business of exploring, developing and processing oil and gas” argued that the purchase and subsequent sale of coal leases was not taxable income because the company was not engaged in the business of coal leases. *Id.* at 24-25, 595 P.2d at 1214-15. To determine whether Tipperary’s transactions were in the regular course of its business, this Court analyzed the transactions under each of the approaches discussed in *Champion.* See *Tipperary Corp.*, 93 N.M. at 27-28, 595 P.2d at 1217-18. Under each approach, our Court concluded that Tipperary’s sale of coal leases was in the regular course of its business:

Although there is evidence that [Tipperary] had never sold coal leases prior to the Mobil sale, there is substantial evidence to support the conclusions that [Tipperary] is in the business of exploring and developing oil, gas and mineral properties and that it is customary for [Tipperary] to dispose of its property interests through transactions similar to the Mobil sale. In addition, the fact that [Tipperary] is in the business of exploring and developing oil, gas and mineral properties and Judge Wood’s rejection of a narrow meaning of trade or business further supports the conclusion that the lease sale was an accustomed procedure in [Tipperary]’s business. Furthermore, the evidence is substantial that the monies from the Transco option agreement and Mobil sale were used for [Tipperary]’s general operating needs. Thus, the use test for business income has been met. *Id.* at 28, 595 P.2d at 1218. This Court further concluded that the coal leases were not independent from Tipperary’s general business as “the management and maintenance of the coal leases were interrelated with [Tipperary]’s general endeavors and these endeavors were, in turn, benefited by the revenues generated from the coal acreage.” *Id.* at 29, 595 P.2d at 1219.

{25} More recently, in *Kewanee Indus-tries, Inc.*, an oil and gas company bought coal draglines from another company and then leased the draglines back to the same company. 114 N.M. at 786, 845 P.2d at 1240. The company argued that the income from the lease of the draglines did not constitute business income because the leases were not part of the company’s regular course of business. *Id.* at 789, 845 P.2d at 1243. The Court disagreed, holding that the company’s income from the leases “was business income because the leases generated substantial capital for Kewanee’s general business purposes, and the leases were ongoing, recurring transactions constituting a regular or customary portion of Kewanee’s overall business.” *Id.* at 790, 845 P.2d at 1244. In coming to this conclusion, the Court examined the purpose of the transactions, the use of the income earned from the transactions, and whether such a transaction was typical or customary for business entities. *Id.* at 789, 845 P.2d at 1243.

{26} In the present case, PNM admits that it has not previously purchased turbines and related equipment, nor does it plan to in the future. Moreover, there is no indication in the record that PNM has ever constructed a generating plant; rather, PNM’s typical business practices include owning, operating, leasing, and controlling generating plants and facilities for the “generation, transmission and distribution of electricity to the public at retail.” NMSA 1978, § 62-3-3(G)(1) (2005) (defining “public utility”). Indeed, PNM states in its brief-in-chief that, with the purchase and sale of the turbines and related equipment, it “was for the first time developing a facility dedicated to generating electricity for the wholesale market.” However, PNM argues that as a publicly held company, it will “in the ordinary course of business, expand, discontinue or modify its business activities in order to increase its overall profitability and please its shareholders.” According to PNM, such activities include the transaction at issue in the present case, which under *Champion, Tipperary,* and *Kewanee,* must be considered in the ordinary course of PNM’s business. We disagree.

{27} Applying the analyses described in *Champion, Tipperary,* and *Kewanee,* we are not convinced that PNM’s purchase and sale of the turbines and related equipment was in the ordinary course of business. For one, PNM’s activities with respect to the turbines and related equipment cannot be considered “[b]usiness deals and the performance of a specific function in the normal,
typical, customary or accustomed policy or procedure of the taxpayer’s trade or business.” Champion Int’l Corp., 88 N.M. at 414, 540 P.2d at 1303 (internal quotation marks and citation omitted). As previously mentioned, PNM has never purchased such items before, nor has it engaged in the construction of a generating plant. While we agree with PNM that this is not a dispositive factor, we do consider the frequency of the transaction at issue to be a relevant consideration. See Kewanee Indus., Inc., 114 N.M. at 790, 845 P.2d at 1244 (concluding that the lease of coal draglines was in the ordinary course of business in part because “the leases were ongoing, recurring transactions constituting a regular or customary portion of Kewanee’s overall business”); Champion Int’l Corp., 88 N.M. at 415, 540 P.2d at 1304 (“The sale of logs was a normal, customary procedure in the business of Champion for the year 1972 and had been for several years.”). Moreover, PNM has not presented any evidence to suggest that it is typical or customary for other public utilities to construct such facilities. See Kewanee Indus., Inc., 114 N.M. at 789, 845 P.2d at 1243 (“Applying the transactional test, the evidence also supports the conclusion that the acquisition of tax benefits is normal, typical, and customary procedure of many business entities.”).

(28) Further, an examination of the nature of the transaction and the prior activities of PNM reveals that it was a new type of undertaking for PNM. See Champion Int’l Corp., 88 N.M. at 418, 540 P.2d at 1307 (Wood, C.J., specially concurring) (“Pertinent in determining whether income arises from transactions in the regular course of business is ‘the nature of the particular transaction’ and ‘former practices’ of the business entity.” (citation omitted)). PNM concedes that this was the first transaction of its kind entered into by PNM. Although PNM argues that it has entered into a variety of financing opportunities in the past, we note that PNM also admits that the resale portion of the transaction at issue was structured differently from previous generating plant projects. Moreover, there is no indication in the record that PNM intends to enter into similar transactions in the future. Thus, while we agree with PNM that it does not have to be in the business of constructing power plants for its sale of turbines and related equipment to be in the ordinary course of its business, we nevertheless believe that PNM’s actions must be considered “normal, typical, customary or accustomed policy or procedure of the taxpayer’s trade or business” in order to be considered within the ordinary course of PNM’s business. Id. at 414, 540 P.2d at 1303 (internal quotation marks and citation omitted).

(29) PNM argues that it has previously bought and resold tangible personal property that was considered nontaxable by the Department because it was considered sold in PNM’s ordinary course of business. These purchases included electrical and plumbing supplies, equipment, and building materials. However, PNM does not explain the nature of these purchases, the frequency of such purchases, or how such purchases relate to its business. Moreover, the fact that PNM has purchased and sold tangible personal property in the past does not necessarily mean that the transaction at issue was in the ordinary course of business. If it did, any sale of tangible personal property by a company would be considered in the ordinary course of business, provided that the company had sold tangible personal property in the past. We therefore do not believe that, under the facts of the case at bar, PNM’s previous sales of tangible personal property have any bearing on whether the transaction at issue is a sale in the ordinary course of business.

(30) Examining the transaction at issue under the test described by Judge Lopez in his special concurrence in Champion presents a closer question. See id. at 418-19, 540 P.2d at 1307-08 (Lopez, J., specially concurring). We note that a transaction relating to the construction of a generating plant is not wholly unrelated to PNM’s business of generating and selling electricity. Thus, although PNM has not previously engaged in the construction of a generating plant, we cannot say that it is something completely divorced from what PNM does on a regular basis. That being said, however, we are not convinced that the fact that a transaction is related to what a company does regularly is dispositive of the issue of whether the transaction occurred in the ordinary course of business. Rather, the transaction still must be “normal, typical, customary or accustomed policy or procedure of the taxpayer’s trade or business.” Id. at 414, 540 P.2d at 1303 (internal quotation marks and citation omitted); see also Ind. Bell Tel. Co. v. Ind. Dep’t of State Revenue, 627 N.E.2d 1386, 1388 (Ind. Tax Ct. 1994) (“A sale in the ordinary course of business is not an isolated, nonrecurring sale.”).

(31) We note that the purpose of the UDITPA statutory scheme in “providing uniform division for income tax purposes of the income of a multistate business,” Champion Int’l Corp., 88 N.M. at 412, 540 P.2d at 1302, differs from the purposes of the Gross Receipts and Compensating Tax Act. Although we analyze this case under the framework of the line of cases interpreting UDITPA, we by no means wish to suggest that PNM’s activities in this case would not be subject to business income tax under the UDITPA statutory scheme even though we hold that they are not activities in the ordinary course of business under the Gross Receipts Act.

(32) Our conclusion that PNM’s sale of the turbines and related equipment was not in the ordinary course of business is further supported by a number of policy considerations. “There is a presumption that receipts of a person engaging in business are subject to the gross receipts tax.” Kewanee Indus., Inc., 114 N.M. at 791, 845 P.2d at 1245. Under this presumption, the party claiming entitlement to an exemption or deduction from the gross receipts tax bears the burden of clearly overcoming this presumption. Id. “The exemption ‘must be clearly and unambiguously expressed in the statute, and must be clearly established by the taxpayer claiming the right thereto.’” Id. (quoting Chavez v. Comm’r of Revenue, 82 N.M. 97, 99, 476 P.2d 67, 69 (Ct. App. 1970)). Moreover, the statute will be “construed strictly in favor of the taxing authority.” Id. Although PNM makes a number of persuasive arguments in favor of its position, we do not believe that it has clearly demonstrated its entitlement to a refund of compensating tax paid.

(33) In contrast to the narrow construction given to a statutory deduction, there is a presumption in favor of taxation and therefore statutes such as UDITPA are construed to effectuate such a presumption. See NMSA 1978, § 7-1-17(C) (1992) (“Any assessment of taxes or demand for payment made by the department is presumed to be correct.”). UDITPA is “a widely-used, system-wide system of apportioning and allocating the income of taxpayers who operate in multiple states.” Kmart Props., Inc. v. Taxation & Revenue Dep’t, 2006-NMCA-026, ¶ 46, 139 N.M. 177, 131 P.3d 27, rev’d on other grounds, 2006-NMSC-006, 139 N.M. 172, 131 P.3d 22. Under UDITPA, corporate income is apportioned based on a formula that seeks to “fairly represent the extent of the taxpayer’s business activity in this state.” Id. ¶ 46-48 (internal quotation marks and citation omitted); see also § 7-4-19 (allowing a taxpayer or the Department to adjust the apportionment formula where
the formula does not “fairly represent the extent of the taxpayer’s business activity in this state”). Thus, cases such as Champion, Tipperary, and Kewanez, must necessarily construe the provisions of UDITPA under the presumption that the imposition of taxes was correct and that, to the extent that the taxpayers were doing business within the state, a fair tax should be imposed. See also Nakashima v. Allstate Insurance Co., 2007-NMCA-____ ¶ 30, 114 N.M. ___, P.3d ___, (N.M. Ct. App. No. 26,155, filed Jan. 18, 2007) (indicating that definitions contained in taxing provisions have a broad application because the purpose of those provisions is to exact payments). Conversely, the deduction sought by PNM is not construed with the presumption that it is applicable, but rather, as a narrow exception to the general rule in favor of taxation. See Kewanez Indus., Inc., 114 N.M. at 791, 845 P.2d at 1245.

Moreover, the purpose of deductions or exemptions for sales for resale in the ordinary course of business is to prevent double taxation. See, e.g., Nev. Tax Comm’n v. Nev. Cement Co., 36 P.3d 418, 420 (Nev. 2001) (per curiam); USA Waste Servs. of Houston, Inc. v. Strayhorn, 150 S.W.3d 491, 495 (Tex. Ct. App. 2004). PNM has not shown that the tax herein will be paid by someone else or at another time, and therefore does not raise the specter of double taxation. Rather, PNM appears to be attempting to avoid taxation entirely on this transaction.

Additionally, we note that PNM’s proffered construction of the phrase “ordinary course of business” would render the phrase meaningless within the context of the statute. We do not agree that any transaction entered into by a company with the intention of making money for its shareholders is necessarily in the ordinary course of that company’s business. Rather, we believe that the phrase “ordinary course of business” contemplates some evidence that the transaction at issue is customary, normal, or regular within the company’s own business or within the relevant industry at large. In the present case, we are not convinced that PNM made such a showing.

In light of these considerations, we conclude that PNM has not clearly established that it is entitled to refund for the compensating tax paid in connection with PNM’s purchase and resale of turbines and related equipment. For these same reasons, we conclude that to the extent that PNM argues that holding that its sale of turbines and related equipment was not in the ordinary course of business will thwart the purpose behind the Industrial Revenue Bond Act, NMSA 1978, §§ 3-32-1 to -16 (1965, as amended through 2005), such an issue is best addressed by the legislature. See TPL, Inc. v. N.M. Taxation & Revenue Dep’t, 2003-NMSC-007, ¶ 40, 133 N.M. 447, 64 P.3d 474 (Minzner, J., dissenting) (“It is not this Court’s place to allow for the exemption when the statute does not, even if the policies behind the statute may be furthered by doing so.”). We therefore agree with the district court’s conclusion that PNM’s sale of the turbines and related equipment was not in the ordinary course of business.

Estoppel

PNM next argues that even if the transaction at issue is not within the ordinary course of business, the Department is estopped under NMSA 1978, § 7-1-60 (1993) from denying a compensating tax refund to PNM. Section 7-1-60 provides that the Department is estopped from taking action against a party who acted “in accordance with any regulation effective during the time the asserted liability for the tax arose or in accordance with any ruling addressed to the party personally and in writing by the secretary.” PNM argues that it acted in accordance with a Department regulation, 3.2.205.17(A) NMAC (2001), in determining whether its transaction was subject to a compensating tax. We disagree with PNM’s contention that estoppel is applicable in the present case.

PNM claims that it relied on a regulation that describes a sale of tangible personal property to an electric cooperative association. See 3.2.205.17(A) NMAC. The pertinent regulation states:

A. Receipts from selling tangible personal property to an electric cooperative association which later sells the property to a person engaged in the construction business for incorporation into the construction project are receipts from selling tangible personal property for resale and may be deducted from gross receipts if the electric cooperative association delivers a nontaxable transaction certificate ([NTTC]) to the seller pursuant to Section 7-9-47 NMSA 1978.

B. If the electric co-operative association delivering the [NTTC] does not resell the tangible personal property in the ordinary course of business, the compensating tax is due.

While 3.2.205.17(A) NMAC presents a similar factual scenario to the case at bar, the regulation in no way suggests that the electric cooperative association’s actions are in the regular course of its business. Subsection A of 3.2.205.17 presents a scenario in which an electric cooperative association may issue NTTCs in connection with its purchase and resale of tangible personal property. Because the cooperative will issue the NTTC to the seller of the tangible personal property at the time of purchase or shortly thereafter, it is not yet apparent whether the cooperative will actually resell the property, or if it resells the property, whether the sale will be in the ordinary course of business. Cf. Gas Co. of N.M. v. O’Cheskey, 94 N.M. 630, 632, 614 P.2d 547, 549 (N.M. Ct. App. 1980) (“The issuance of a [NTTC] does not operate to transform an otherwise taxable transaction into a nontaxable transaction. It represents a statement by the purchaser of goods that its use is such that the seller is entitled to a deduction from its taxable receipts.” (emphasis added)). Subsection B makes it clear that the electric cooperative association must eventually resell the tangible personal property in its ordinary course of business and that if the sale is not in the ordinary course of business, a tax will be due. See 3.2.10.9(A) NMAC (2001) (“When a person has delivered a nontaxable transaction certificate for a taxable purpose but then uses the service or tangible personal property in a manner other than indicated on the nontaxable transaction certificate, then the person who delivered the nontaxable transaction certificate is liable for the compensating tax on the value of the service or the tangible personal property.”). To interpret this regulation in any other manner would make Subsection B superfluous. See Regents of Univ. of N.M. v. N.M. Fed’n of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236 (“Statutes must be construed so that no part of the statute is rendered surplusage or superfluous.” (internal quotation marks and citation omitted)).

We therefore conclude that PNM’s reliance on 3.2.205.17 NMAC is misplaced and the Department is not estopped under Section 7-1-60 from denying a compensating tax refund to PNM.
Administrative Gloss

{40} Relying on High Ridge Hinkle Joint Venture v. City of Albuquerque (Hinkle), 1998-NMSC-050, 126 N.M. 413, 970 P.2d 599, and Smith v. Board of County Commissioners, 2005-NMSC-012, 137 N.M. 280, 110 P.3d 496, PNM argues that the Department has impermissibly changed its position with respect to Section 7-9-47. PNM argues that three different Department rulings demonstrate that the Department has a longstanding policy with respect to the term “ordinary course of business.” PNM contends that the Department did not follow this longstanding policy with respect to PNM’s purchase and resale of the turbines and related equipment. As such, PNM argues that the Department should be compelled to follow its previous policy and refund PNM’s payment of compensating tax. We conclude that PNM has not demonstrated that the Department has a longstanding policy with respect to the phrase “ordinary course of business.”

{41} In construing statutes and regulations, courts will “give persuasive weight to longstanding administrative constructions of statutes by the agency charged with administering them.” Hinkle, 1998-NMSC-050, ¶ 5 (internal quotation marks and citation omitted); see also Smith, 2005-NMSC-012, ¶ 18. Such longstanding constructions, also known as “administrative glosses,” constitute de facto agency policies that cannot be changed non-legislatively. See Smith, 2005-NMSC-012, ¶ 32; Hinkle, 1998-NMSC-050, ¶ 9.

{42} In order to demonstrate that such a policy exists in the present case, PNM must present evidence that the Department has previously and consistently construed the phrase “ordinary course of business” in a manner different than in the case at bar. Although none of the three rulings relied upon by PNM squarely addresses the definition of the phrase “ordinary course of business,” we will nonetheless examine each in search of a longstanding Department policy.

{43} PNM first relies on Department Ruling 405-04-2 (2004) to argue that the Department has not traditionally applied such a strict construction of “ordinary course of business.” In this ruling, a company operating a “water collection, production and treatment system and a wastewater treatment and reclamation facility” for a municipality asked the Department for a ruling on whether it could issue NTTCs for purchases of various materials and services used in connection with its water systems. The Department concluded that the company could issue NTTCs for those materials and services that it purchased for resale. Thus, for example, the company could purchase “water system repair and maintenance services and parts” and such transactions would be nontaxable, as such items were being resold to the municipality at the end of the contract term.

{44} PNM argues that Ruling 405-04-2 demonstrates that the Department will consider a sale in the ordinary course of business where such sales are contemplated by contract. Moreover, PNM argues that this ruling demonstrates that the Department does not inquire into a company’s main line of business or whether sales of tangible property are routinely made before concluding that a sale is in the ordinary course of business. We disagree.

{45} Initially we note that the ruling does not address the issue of “ordinary course of business”; thus, we can only assume that it was not an issue on which the company requested a ruling or that it was an issue agreed on by the Department and the company. Moreover, the central issue in the ruling was whether the tangible personal property purchased by the company was actually to be consumed by the company in the course of its provision of services to the municipality or whether the company was actually selling the property to the municipality. See 3.2.205.10(A)(1) NMAC (2001) (“When a taxpayer uses tangible personal property in the performance of a service, the tangible personal property is acquired for use and not for sale in the ordinary course of business. Therefore, a nontaxable transaction certificate may not be executed under Section 7-9-47 NMSA 1978 to acquire the tangible personal property.”). Thus, the taxability of the various transactions at issue clearly hinged on whether the company was actually selling tangible personal property and not whether the company was selling the property in the ordinary course of business. We therefore cannot conclude that this ruling provides an administrative gloss on the phrase “ordinary course of business.”

{46} Likewise, we consider PNM’s reliance on Department Ruling 430-00-4 (2000) equally misplaced. Ruling 430-00-4 involves a company that had contracted with the Department of Energy (DOE) to operate a training facility in the State. The company was required, by contract, to provide accommodations for those students attending training at the facility. The company asked the Department for a ruling on whether it could issue NTTCs in connection with its purchase of hotel rooms when the DOE’s facilities were not available. The Department concluded that the company could issue NTTCs, as it was purchasing a license to use hotel rooms and reselling that license to the DOE.

{47} PNM argues that this ruling demonstrates that the Department has not always imposed a strict standard for what constitutes a sale in the ordinary course of business, as the Department did not inquire into how often the hotel rooms were used and because it was clear that the housing arrangement was subsidiary to the taxpayer’s main line of business, which was providing training facilities. We disagree. Ruling 430-00-4 provides such a gloss.

{48} Once again, the ruling does not address or even mention the phrase “sale in the ordinary course of business.” As with Ruling 405-04-2, we can therefore only assume that the question of whether the transaction was in the taxpayer’s ordinary course of business was not an issue that the taxpayer requested a ruling on or that it was an issue agreed on by the Department and the taxpayer. Additionally, we believe that the central issue in the ruling was whether the leasing of hotel rooms is actually considered a sale of tangible personal property. We therefore do not believe that this ruling demonstrates that the Department had a long-standing policy with respect to the construction of the phrase “sale in the ordinary course of business.”

{49} PNM next cites to Ruling 405-97-1 (1997) in support of its argument. In Ruling 405-97-1, a contractor entered into an agreement with an agent for two municipalities to design and build facilities funded by industrial revenue bonds. The contractor asked the Department for a ruling on whether it could issue NTTCs for the purchase of various types of equipment, furnishings, and other tangible personal property that would be resold to the agent for the municipalities as part of the construction projects. The Department stated that the contractor could issue NTTCs for those items of tangible personal property that would not be incorporated into the construction project as construction materials. See 3.2.1.11(J)(1) NMAC (2003) (“The term ‘construction materials’ means tangible personal property which is intended to become an ingredient or component part of a construction project.”).

{50} PNM argues that this ruling again demonstrates that the Department does not analyze a taxpayer’s past business activities to determine if a sale is in the ordinary
course of business. Instead, PNM contends that this ruling demonstrates that the Department determines whether a sale is in the ordinary course of business by looking at any applicable contract provisions, as well as the taxpayer’s present activities. We do not believe that the Department’s conclusion that the contractor could issue NTTCs in connection with its purchase and resale of tangible personal property supports PNM’s argument in the case at bar.

Based on the various types of equipment and furnishings listed in the ruling, it is apparent that such items were actually being used within the constructed facilities. Thus, the central issue in the ruling was whether those items constituted construction materials. For example, although the Department stated that NTTCs could be issued for office, shop, and kitchen equipment, the Department also concluded NTTCs could not be issued for communication, security, and electronic equipment because such items are actually incorporated into the construction project and are therefore construction materials. Moreover, we again observe that this ruling does not mention the phrase “ordinary course of business,” thus leading us to conclude that the question of whether such sales were in the ordinary course of business was not an issue on which the Department’s opinion hinged. Just as cases are not authority for propositions not considered, see Fernandez v. Farmers Ins. Co. of Ariz., 115 N.M. 622, 627, 857 P.2d 22, 27 (1993), we do not believe that Department rulings would be entitled to any different effect.

Conversely, Department Ruling 401-99-4 (1999), which is not cited by either party, does mention the phrase “ordinary course of business.” In this ruling, a company engaged in the business of selling computer systems asked the Department whether it could accept NTTCs from a particular buyer. The Department concluded that the company could accept NTTCs, provided certain requirements were met. First, the NTTC must be properly executed by the buyer. Second, the buyer must sell the computer system in the ordinary course of its business. Thus, “[i]f [the buyer’s] sale of the computer system to the leasing company is an isolated transaction and [the buyer] is not regularly engaged in the business of selling computer systems, [the company’s] receipts are not deductible under Section 7-9-47.” Ruling 401-99-4.

This ruling makes it clear that in order to properly claim a deduction under Section 7-9-47, the buyer of the tangible personal property must actually sell the property in the ordinary course of its business and that the ordinary course of a buyer’s business is one that is regularly engaged in by the business.

We are therefore not persuaded that the Department rulings cited by PNM support its claim of a longstanding administrative policy with respect to the phrase “ordinary course of business.” As such, the doctrine of administrative gloss is not applicable to the case at bar.

CONCLUSION

For the foregoing reasons, we affirm the district court’s grant of summary judgment in favor of the Department.

IT IS SO ORDERED.

LYNN PICKARD, Judge

I CONCUR:

RODERICK T. KENNEDY, Judge

CYNTHIA A. FRY, Judge

KENNEDY, Judge (concurring in part and dissenting in part).

I believe the Champion/Tipperary/Kewanee cases leave room for businesses to include new entrepreneurial avenues and innovation in their ordinary course of business. Indeed, the present case arose from PNM responding to a changing regulatory environment. Change and adaptation are inherent components of the ordinary course of business. Looking at any of the three views in Champion: routine practice of engaging in collateral business for profit (Sutin, J.); the nature of the transaction viewed in context with business practice (Wood, C.J.); or the independence of the new enterprise from a unitary view of business practice (Lopez, J.), there is room for PNM to expand its generating capacity as a matter of “ordinary course,” even though its business model for this project differs from, say, their four corners or Palo Verde partnerships. Tipperary is in accord with this view. Excluding “new” from “ordinary” is a view of business practice with which I cannot agree. I concur as to the other issues.

RODERICK T. KENNEDY, Judge
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and Honorable Chris Berkheimer

Helmut Kuhne, German Representative to the EU Parliament, is a member of the Social Democratic Party of Germany and has represented Germany in the EU Parliament since 1994 in three consecutive terms. During this time, he has served on the Committee on Foreign Affairs, the Subcommittee on Security and Defense, the Parliamentary Group of the Party of European Socialists, the Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, and as a member of the Substitute Delegation for relations with the United States. In this seminar, Kuhne will examine current developments in immigration, EU’s citizenship, asylum harmonization norms, International Criminal Court, and EU Parliament’s perspective on torture.

INTERNATIONAL ADOPTION

Friday, June 8, 2007 • State Bar Center, Albuquerque  
4.2 General & 2.2 Ethics CLE Credits

☐ Standard Fee $179  ☐ Government, Legal Services Attorney, Paralegal $169

The Hague Convention on International Law created a multilateral treaty for the protection of children and families involved in intercountry adoption. The United States became a signatory to the Hague Convention on March 31, 1994. On September 20, 2000, Congress enacted implementing legislation for the Convention – the Intercountry Adoption Act (the IAA). Since that time, the State Department has been creating regulations governing its implementation. Those regulations will be completed in 2007, and the Convention will enter into force three months thereafter. More than 70 countries have ratified the Convention. These countries include many countries from which U.S. families have adopted children. Last year, nearly 60% of intercountry adoptions to the U.S. were from Convention countries. Even more are expected this year. This seminar is designed to help district court judges, federal court judges, adoption, family law, and immigration attorneys, adoption agencies, and others better understand how this treaty will change their responsibilities in international adoption.

FOUR WAYS TO REGISTER

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