BAR BULLETIN

Official Publication of the State Bar of New Mexico

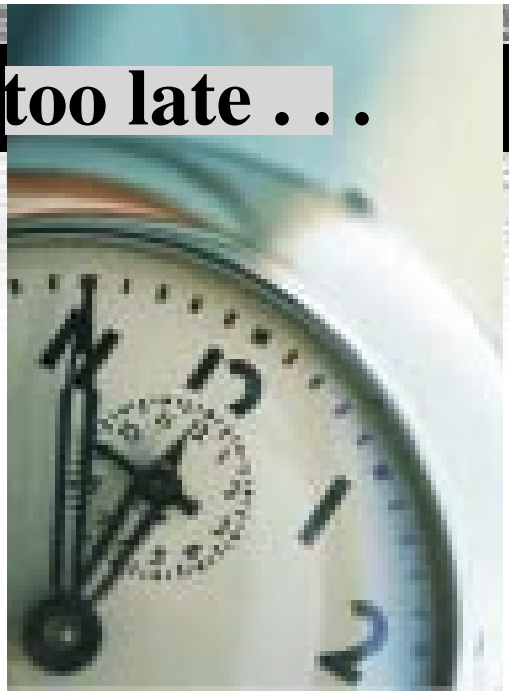
January 15, 2004 • Volume 43, No. 2

Kelley S. Hestir New Mexico Surpeme Court, Santa Fe

Inside This Issue:

It's not too late . . .

to join a State Bar Practice Section for 2004



What is a practice section?
A voluntary organization within the State Bar that focuses on a particular area of law, such as bankruptcy, or a type of practice, such as public law or solo and small firm.

Why join?
To obtain networking and educational opportunities with colleagues. Continuing legal education programs, newsletters, electronic discussion groups and legislative advocacy are just a few of the activities in which section members may become involved.

Become a member by:

- Completing the section membership portion of the State Bar 2004 Dues/Licensing form (also available online at www.nmbar.org)
- Visiting a section page of www.nmbar.org. Click on Divisions/Sections/Committees and select the section you wish to join.
- Completing the form below.

Please check the section(s) you wish to join and indicate method of payment.

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____ Appellate Practice	$10
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____ Commercial Litigation	$15
____ Criminal Law	$15
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Professionalism Tips

With respect to parties, lawyers, jurors and witnesses:

I will maintain control in the courtroom to ensure that all proceedings are conducted in a civil manner.

BAR BULLETIN

Board of Editors

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Editor – Diana Sandoval
Designer/Editorial Assistant – Kelley S. Hestir
Advertising Sales – Marcia C. Ulibarri, (505) 797-6058; fax: (505) 797-6075
Printer – Brian Sanchez
Production Assistant – Donald Chavez

Cite officially as *Bar Bulletin* (ISSN 1062-6611). Vol. 43, No. 2, Jan.15, 2004.
Subscription price $80 per year. Subscriptions are nonrefundable once purchased.
Published weekly by the State Bar, 5121 Masthead NE, Albuq., NM 87109
(505) 797-6000 • 1-800-876-6227 • Fax: (505) 828-3765
E-mail: bb@nmbar.org • www.nmbar.org

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Periodicals postage paid at : Albuquerque, NM 87101

Postmaster send address changes to: Systems Manager • Bar Bulletin • PO Box 92860, Albuquerque, NM 87199-2860

Meetings

January

20
Solo & Small Firm Practitioners Section Board of Directors
noon, Albuquerque Petroleum Club

20
Technology Utilization Committee
2:30 p.m., State Bar Center

22
Membership Services Advisory Committee
2:30 p.m., State Bar Center

23
Appellate Practice Section Board of Directors
3 p.m., AG's Office, First State Bank Bldg., 3rd floor, 111 Lomas NW

23
Business Law Section Board of Directors
3:30 p.m., State Bar Center

24
Paralegal Division Annual Meeting
noon, State Bar Center

27
Bench and Bar Programming Subcommittee
3 p.m., State Bar Center

Workshops

January

22
Family Law Workshop
6 - 8 p.m., Mimbres Valley Learning Center, Rm. 119, Deming, NM

Consumer Debt/Bankruptcy Workshop
5:30 - 7:30 p.m., Branigan Library (2nd Floor-Pearl Higgins Room) Las Cruces, NM

28
Family Law Workshop
5:30 - 7:30 p.m., Branigan Library (2nd Floor-Pearl Higgins Room) Las Cruces, NM

Consumer Debt/Bankruptcy Workshop
6 - 8 p.m., State Bar of New Mexico Albuquerque, NM

For more information call Marilyn Kelley (505) 797-6048 or (800) 876-6227; or visit www.nmbar.org.

NOTICES

COURT NEWS

New Mexico Supreme Court
Judicial Performance Evaluation Commission Meeting Cancelled

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers.

The commission's January meeting has been cancelled. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

First Judicial District Court
Mastering Settlement Facilitation

The First Judicial District Court, through the Alternative Dispute Resolution Program, is sponsoring a complimentary CLE (with attorneys responsible for the MCLE fee of $1 per hour). The CLE is intended for those attorneys who participate or wish to participate as settlement referees in the voluntary settlement conferences of the First Judicial District Court.

The workshop will be held from 8:30 a.m. to 4 p.m., Feb. 19 in Santa Fe at Plaza Resolana. Credit for 6.9 hours of general credit has been requested of the Minimum Continuing Legal Education Board.

There will be three presenters: Mark Bennett of Decision Resources, who is a professional mediator and author of books on mediation; Professor Scott Hughes of UNM is the ADR specialist at the College of Law and has conducted many ADR trainings; and David Levin, director of the Second Judicial District's Court Alternatives Program, who has also conducted many settlement and mediation trainings.

This conference will address the incorporation of mediation techniques in settlement facilitation along with other pertinent topics designed to improve ADR skills.

Contact Carolyn Lumbard, ADR Coordinator, (505) 827-5072 to register. Space is limited.

Bench Bar Conference
Notice to Members

The State Bar of New Mexico will not hold an annual convention in 2004, so mark your calendars for Nov. 4-6, and plan to attend the 2004 State Bar Bench and Bar Conference at the Sheraton Old Town in Albuquerque. The Bench and Bar Relations Committee has begun planning this biannual event which provides attorneys and judges the opportunity to address issues of the New Mexico legal profession in an informal, relaxed setting.

Not only will the conference offer a majority of the year's CLE credit requirements, but it will also be the venue for the State Bar annual award presentations and annual membership meeting. Watch the *Bar Bulletin* and www.nmbar.org for more details.

Second Judicial District Court
Children's Court Monthly Judges' and Managers' Meeting

The Second Judicial District Children's Court will hold its monthly judges' and managers' meeting at noon, Feb. 3, in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, in Albuquerque. Children's Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. For a copy of the meeting agenda, call (505) 841-7644.

Family Court Open Meetings

The Second Judicial District Family Court judges will hold open meetings to discuss ongoing concerns and projects at noon on the first business Monday of each month in the Conference Center, located on the third floor of the Bernalillo County Courthouse. The next regular meeting will be held on Feb. 2. Contact Mary Lovato, (505) 841-6778, for more information or to have something placed on the agenda.

Eleventh Judicial District Court
New Address

The Eleventh Judicial District Court has moved. Judge William C. Birdsall and Judge Douglas Echols can now be reached by regular mail at 851 Andrea Dr., Farmington, NM 87401. The Farmington clerk's office is also located at the new address. The court's phone number is (505) 326-2256; and fax, (505) 326-1179.

Bernalillo County Metropolitan Court
Announcement of Vacancy

One judicial vacancy on the Bernalillo County Metropolitan Court will exist as of Jan. 16, due to the selection of Judge Denise Barela Shepherd by Gov. Bill Richardson to serve as judge of the Second Judicial District Court.

The chair of the Bernalillo County Metropolitan Court Nominating Commission solicits nominations and applications for this position from lawyers who meet the statutory qualifications in Article 8A, Section 34-8A-4 of the New Mexico Statutes Annotated. Applications may be obtained via the Judicial Selection Web site, www.unm.edu/~nmjudsel, or from the UNM School of Law, 1117 Stanford NE, Albuquerque, or requested to be mailed or e-mailed by calling Reva Chapman, (505) 277-4700. The deadline for applications/nominations is 5 p.m., Jan. 30.

Cellular Phones Banned

Bernalillo County Metropolitan Court officials have decided to ban the use of cellular phones, pagers and cameras in

the new Bernalillo Metropolitan Courthouse, due to security concerns. The ban begins Jan. 20, when the new courthouse is slated to open. There will be some exceptions. Law enforcement personnel will be allowed to carry phones only after the devices have been examined and approved by court security.

State Bar News

Board of Bar Commissioners

Meeting Agenda

The State Bar Board of Bar Commissioners will meet at 10:30 a.m., Jan. 23 at the State Bar Center in Albuquerque. The meeting agenda follows.

1. Presentation of Casemaker
2. Approval of Dec. 12, 2003, meeting minutes
3. Finance Committee report
4. Acceptance of Financials
5. President's report
   - A. Swearing-in of new commissioners
   - B. Commissioner orientation/ overview of staff departments
   - C. Bar Commissioner district lists regarding target marketing
   - D. BBC internal committees roster
   - E. Supreme Court order approving State Bar's 2004 budget
   - F. Other
6. Executive Director's report
7. Bylaws/Policies Committee report
8. Committee for the Delivery of Legal Services to People with Disabilities request
9. Task Force to Study the Administration of the Death Penalty in New Mexico final report
10. Committee on Women and the Legal Profession report
11. Membership Services Committee report
12. Request from Chief Justice regarding judicial funding from the 2004 Legislature
13. Division reports
    - A. Young Lawyers Division
    - B. Senior Lawyers Division
    - C. Paralegal Division
14. New business
15. State Bar's 118th birthday celebration/reception, 3:30 p.m. (lobby)

2004 License and Dues

- The 2004 License and Dues forms were mailed on Dec. 5, 2003.
- Without exception, dues and license fees are due on Feb. 2. Members who have not received the form should notify the State Bar, (505) 797-6083 / (505) 797-6035.
- For members' convenience, dues may also be paid online through secured e-commerce at www.nmbar.org.
- License and disciplinary fees are mandatory for active attorneys and must be paid to maintain license status (inactive and judges exempt from disciplinary fees).
- The Supreme Court approved a fee increase of $30 for the Disciplinary Board, bringing the total Disciplinary Fee for 2004 to $130. **This is not a State Bar fee.**
- Late fees will be assessed if payment is not postmarked by Feb. 2.

Center for Legal Education

State Bar Hires New Director

Rob Koonce is the new director of the State Bar Center for Legal Education and Professional Development, effective Jan. 12. Koonce has been a small business owner for the past five years, has served on three boards of directors, a medical ethics committee, and comes to the CLE program with more than a decade of significant experience in research and educational training. He has undergraduate degrees in biology, chemistry and psychology, has previously completed considerable graduate work in business, and is a current graduate student at the University of New Mexico, where he ultimately plans to complete his doctorate degree in the Organizational Learning and Instructional Technologies program. Koonce's work has been published in the international journal of *Pediatrics and Developmental Pathology,* and he has a growing interest in motivational theory, organizational learning and program evaluation.

Koonce can be reached by regular mail at PO Box 92860, Albuquerque, NM 87199; by telephone at (505) 797-6060; and by e-mail at rkoonce@nmbar.org.

Employment and Labor Law Section

Board Meetings Open to Section Members

The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be Feb. 4. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Eric Miller, section chair, (505) 995-8287.

Indian Law Section

Intent to Support Funding

In the Dec. 18, 2003 (Vol. 42, No. 51) *Bar Bulletin,* the State Bar Indian Law Section Board of Directors notified all section members of its intent to support the Tribal State Judicial Consortium's request for funding from the 2004 New Mexico Legislature. The section board plans to send a letter to the finance committee and a section member may testify during the 2004 session of the legislature.

State Bar policy provides that a section may engage in legislative advocacy, provided that section members are given advance notice with the opportunity to express their views to the members of the section board. At its Jan. 9 meeting, a quorum of the section Board of Directors voted unanimously in favor of supporting the funding request.

NOTICES

Lawyers Assistance Committee
Monthly Meeting

The Lawyers Assistance Committee will meet at 5:30 p.m., Feb. 2, at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month.

For more information, contact Bill Stratvert, (505) 242-6845.

Paralegal Division
Annual Meeting

The 2004 Annual Meeting of the State Bar Paralegal Division will be held at noon, Jan. 24 at the State Bar Center in Albuquerque. Lunch will be served courtesy of Thomson West. For information on the Annual Meeting and CLE opportunities check the Paralegal Division section on the State Bar's Web site at www.nmbar.org. The registration form for the Annual Meeting can be downloaded from the Web site to be mailed to the Division at PO Box 1923, Albuquerque, NM 87103; or e-mailed to PD@nmbar.org. Watch for the brochure outlining the CLE events – Civil Case Management by Daniel P. Ulibarri, Esq., of Daniel J. O'Brien & Associates, and HIPPA's Impacts on Discovery in Civil Cases by Judith A. Humphrey, Esq., of Bannerman & Williams, PA. Members of the Paralegal Division will receive an additional discount off the CLE registration fee. Registration for the Annual Meeting luncheon will be separate from the CLE seminars.

Public Law Section
Nominations Sought for Public Lawyer Award

The State Bar Public Law Section is currently accepting nominations for the eighth annual public lawyer of the year award, which will be presented on the day before Law Day, April 30. Prior recipients of the award include Florence Ruth Brown, Frank Katz, Douglas Meiklejohn, Marty Daly, Nick Estes, Mary McInerny, Jerry Richardson and Peter T. White. Send nominations by 5 p.m., March 1 to Douglas Meiklejohn, by e-mail at dmeiklejohn@nmelc.org; or by mail at New Mexico Environmental Law Center, 1405 Luisa St., Ste. #5, Santa Fe, NM 87505. The selection committee (comprised of the three immediate past chairs of the Public Law Section) will consider all nominated candidates and may nominate candidates on its own.

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

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

Solo and Small Firm Practitioners' Section
2004 Luncheon Speaker Schedule

The State Bar Solo and Small Firm Practitioners' Section will host monthly luncheon meetings on the third Tuesday through May at the Petroleum Club, 500 Marquette Ave., in Albuquerque.

For all new, first-time members, the first lunch is free. Contact Helen Stirling at the number below to make a free reservation.

Luncheon meetings will begin at noon with a speaker program. Members, guests and any member of the bar are welcome. The charge is $14 in advance and $16 at the door.

Reservations are required. Contact Helen Stirling, Esq., (505) 345-2800. Make the check payable to "State Bar of New Mexico," c/o Helen Stirling, 6125 Fourth St. NW, Ste. A, Albuquerque, NM 87107.

Jan. 20, noon: Demonstration of Solo Section Web site, access and application, Christine Morganti, director of the State Bar Membership and Communications Department and Veronica Cordova, State Bar webmaster.

Upcoming luncheon dates in 2004 are: Feb. 17, March 16, April 20 and May 18.

State Bar Turns 118
Celebration Planned at Bar Center

The State Bar of New Mexico will celebrate its 118th birthday with a reception at 3:30 p.m., Jan. 23 in the lobby of the State Bar Center, Albuquerque. Members of the bar and their guests are invited to participate in the celebration.

The State Bar will honor its oldest and youngest active members, as well as the longest practicing man and woman lawyers. The oldest member is Judge Samuel Mandel, 93, who is now in solo private practice. Mandel was first admitted to the Pennsylvania State Bar in 1942 and has been a member of the State Bar of New Mexico since 1964. The youngest member is Jessica Hernandez, 23, a member of the Rodey Law Firm. The longest practicing lawyer is Milton Seligman, who began practice in 1937. Joyce Stowers, the longest practicing woman, started in 1961. Supreme Court justices, chief judges, bar commissioners and presidents of voluntary bars have also been invited to attend.

Introductory remarks will be given by State Bar President Dan O'Brien, followed by the opportunity for attendees to pay tribute to the honorees. Anyone wishing to attend should contact Kris Becker, kbecker@nmbar.org or (505) 797-6038.

Other Bars

New Mexico Indian Bar Association

Board Meeting

The New Mexico Indian Bar Association board meeting will be held at 4 p.m., Jan. 24, at the State Bar Center in Albuquerque. All Indian Bar Association members are welcomed and encouraged to attend.

Southwest Bench/Bar Conference

Conference Date and Location Set

The Southwest Bench/Bar Conference will be held Feb. 6-7, at the Las Cruces Hilton. The conference will be geared toward attorneys and judges in the Third, Sixth, Seventh and Twelfth judicial districts.

The conference will feature the debut of the 2004 Professionalism course put on by the Commission on Professionalism, which will be an historical perspective on professionalism in New Mexico's legal history.

For more information, contact Mark Filosa, committee chair, (505) 894-7161 or filosa@zianet.com; Bill Lutz, (505) 526-2449 or martin@nm.net; James Roggow, (505) 526-2449 or martin@nm.net; or Mary Torres, (505) 848-1800 or mtorres@modrall.com.

Other News

Center for Civic Values

Mock Trial Attorney Coaches Needed

The Pojoaque High School mock trial team needs an attorney coach. Attorneys and or judges who are interested in volunteering should contact the mock trial program at the Center for Civic Values, (505) 764-9417 or (800) 451-1941, ext. 13, or mocktrial@civicvalues.org.

Mock Trial Judges Needed

Judges are needed for the Albuquerque and Las Cruces regional mock trial competitions (to be held Feb. 21) and for the state finals competition to be held March 19 and 20 in Albuquerque. Interested individuals may register online at the Center for Civic Values' Web site http://www.civicvalues.org/MT_registration.htm, or may print a registration form to mail or fax from the same page.

To receive a judging registration packet by mail, leave a voice mail including name and address at (505) 764-9417, ext. 13, or e-mail name and address to mocktrial@civicvalues.org, specifying "request judging packet" in the subject line. For questions or additional information, visit the mock trial pages on the CCV Web site and then contact the mock trial program via telephone or e-mail.

Health Centers of Northern New Mexico

Board Vacancy for Legal Professional

Health Centers of Northern New Mexico, a New Mexico nonprofit corporation with 15 clinics in 13 communities throughout northern New Mexico, seeks to fill a vacancy on its Board of Directors with someone from the legal profession. Board membership requires attending a full board meeting one day a month, usually in Santa Fe, as well as one or two committee meetings a month (usually by teleconference.) Travel is reimbursed. For more information, call Pat Sanchez, (505) 747-5911 or (800) 284-7284.

Uniform Partnership Act

Online Access to Information Now Available

New Mexico Secretary of State Rebecca Vigil-Giron has announced online access to partnership registrations under the Uniform Partnership Act. Interested parties can now view the official images of certificates of registration, amendments, cancellations and mergers by partnerships that have been filed with the state, as well as order certified copies and certificates of existence online. Research on a limited partnership or name availability for a limited partnership may also be done online at no charge. Original certificates of registration must be filed in person, or through the mail. To access this new online feature, visit the Secretary of State Web site, www.sos.state.nm.us., scroll down to "operations," click on "partnership searches and orders."

U.N.M. Law Library

Spring Semester Hours

The University of New Mexico Law Library has resumed for the spring academic semester and will operate under the following schedule from Jan. 12 through May 14:

Building & Circulation Desk
Monday - Thursday: 7:30 a.m. - midnight
Friday: 7:30 am. - 6 p.m.
Saturday: 9 a.m. - 6 p.m.
Sunday: noon - midnight

Reference Desk
Monday - Thursday: 9 a.m. - 9 p.m.
Friday: 9 a.m. - 6 p.m.
Saturday and Sunday: noon - 4 p.m.

Exceptions:
Martin Luther King Holiday:
Jan. 18: noon - 9 p.m.
Jan. 19: closed

Extended Final Exam Hours
April 30 and May 7: 7:30 a.m. - midnight
May 1 and 8: 9 a.m. - midnight

Workers' Compensation Administration

Notice of Pubic Hearing

The New Mexico Workers' Compensation Administration will conduct a public hearing on the emergency rule change to Part 7 of the Workers' Compensation Rules. The hearing will also consider changes to the medical fee schedule (MAP). The hearing will be conducted at the Workers' Compensation Administration, 2410 Centre Ave. SE, Albuquerque. Videoconferencing may also be made available in the WCA Field Offices. Contact Renee Blechner, (505) 841-6083, by Jan. 22 to reserve videoconferencing. Proposed rule changes and the proposed fee schedule will be available on Jan. 13.

Comments made in writing and at the public hearing will be taken into consideration. Written comments pertaining to these issues will be accepted until the close of business Feb. 23. Oral comments will be limited to five minutes per speaker.

For more information, call (505)

841-6000. Inquire at the WCA Clerk's Office for copies of the fee schedule. If requesting a copy by mail, inquire at the WCA Clerk's Office about the postage cost and envelope size needed to accommodate the request. Plan on including postage and self-addressed envelope.

Individuals with a disability who are in need of a reader, amplifier, qualified sign language interpreter, or any form of auxiliary aide or service to attend or participate in the hearing or meetings, should contact Renee Blechner, (505) 841-6083, or inquire about assistance through the New Mexico relay network, (800) 659-8331.

Legal Education

www.nmbar.org

January

19 **Effective Time Management for Lawyers**
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TRT, Inc.
2.4 P
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www.trtcle.com

20 **Experts-A Primer on Scientific Evidence Under Federal Standards**
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtcle.com

20 **Complex Divorce Issues for the New Mexico Practitioner**
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National Business Institute
6.7 G / 0.5 E
(800) 930-6182
www.nbi-sems.com

20 **How to Select a Trustee: Tax and Non-tax Considerations**
Teleconference
Cannon Financial Institute
1.8 G
(706) 353-3346

20 **Prevent, Detect and Investigate**
Albuquerque
Great West Investigations
3.0 G / 1.5 E
(800) 656-7250

21 **2003 Professionalism - Still in the Dark: Disappointing Images of Professionalism**
VR - State Bar Center - Albuquerque
Commission on Professionalism and SBNM Center for Legal Education
2.0 P
(505) 797-6020
www.nmbar.org

21 **Ethics: Unbundling**
VR - State Bar Center - Albuquerque
SBNM Center for Legal Education
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www.nmbar.org

21 **Should my Client Litigate or Mediate**
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TRT, Inc.
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(800) 672-6253
www.trtcle.com

22 **Just WHO is the Client?**
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2.4 E
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22 **New Mexico Prudent Investor Act-Its Provisions and Applicability**
Albuquerque
Fiduciary Trust International
1.0 G
(213) 489-7400 x 350

22 **Workers' Compensation in New Mexico**
Albuquerque
Lorman Education Services
6.0 G / 1.2 E
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22 **Workers' Compensation in New Mexico**
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23 **Reporting Misconduct-Who, When and Where**
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24 **Civil Case Management**
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24 **HIPAA's Impacts on Discovery in Civil Cases**
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27 **Arbitrator Ethics and Disclosure**
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JANUARY

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www.westgroup.com/training

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28 **Back to the Future: Lawyering and Problem Solving**
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SBNM Center for Legal Education
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SBNM Center for Legal Education
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29 **Tax for Beginners: Forms and Definitions**
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www.lorman.com

29 **Tax Traps and Other Financial Issues of Divorce in New Mexico**
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30 **Employee Benefit Planning**
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WRITS OF CERTIORARI

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As Updated by the Clerk of the New Mexico Supreme Court, Effective January 13, 2004

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
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PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

NO. 28,455 State v. McDaniel (COA 23,030) 1/9/04
NO. 28,454 State v. Smith (COA 24,071) 1/8/04
NO. 28,453 State v. Roman (COA 24,151) 1/8/04
NO. 28,452 State v. Vega (COA 24,006) 1/8/04
NO. 28,449 Lucero v. Tafoya (12-501) 1/8/04
NO. 28,448 Gaby v. Gersonde (COA 22,015) 1/7/04
NO. 28,447 Gaby v. Gersonde (COA 22,015) 1/7/04
NO. 28,446 Mercado v. Miller (COA 23,756) 1/7/04
NO. 28,443 McIntire v. Snedeker (12-501) 1/6/04
NO. 28,445 State v. Haskins (COA 24,312) 1/5/04
NO. 28,442 Valles v. Walmart (COA 23,174) 1/5/04
NO. 28,441 Gormely v. Coca Cola (COA 22,722) 1/5/04
NO. 28,444 Armjo v. Williams (12-501) 12/31/03
NO. 28,424 Cowan v. Velasquez (COA 22,819) 12/31/03
NO. 28,440 State v. Uranga (COA 24,266) 12/30/03
NO. 28,439 Gonzales v. LeMaster (12-501) 12/30/03
NO. 28,438 Marquez v. Allstate (COA 23,385) 12/30/03
NO. 28,437 Truong v. Allstate (COA 24,291) 12/30/03
NO. 28,436 Corliss v. Snedeker (12-501) 12/29/03
NO. 28,435 Gallup LLC v. City of Gallup (COA 22,308) 12/24/03
NO. 28,434 State v. Grubbs (COA 24,356) 12/23/03
NO. 28,432 State v. McGee (COA 23,203) 12/23/03
NO. 28,431 Albuquerque v. Park & Shuttle (COA 24,221) 12/23/03
NO. 28,429 State v. Morgan (COA 24,293) 12/22/03
NO. 28,410 State v. Romero (COA 22,836) 12/22/03
NO. 28,425 State v. Herrera (COA 22,416) 12/19/03
NO. 28,423 Marquez v. Allstate (COA 23,385) 12/19/03
NO. 28,422 State v. O'Neal (COA 24,292) 12/18/03
NO. 28,421 State v. Reveles (COA 24,260) 12/18/03
NO. 28,420 State v. Martinez (COA 23,751) 12/18/03
NO. 28,419 Henry v. Daniel (COA 23,356) 12/18/03
NO. 28,417 Harris v. Snedeker (12-501) 12/18/03
NO. 28,416 Blancett v. Blancett (COA 24,282) 12/17/03
NO. 28,387 State v. Sandoval (COA 23,282) 12/10/03
NO. 28,405 Garcia v. Department of Labor (COA 24,241) 12/8/03
NO. 28,341 Lucero v. State (12-501) 11/18/03 *time to consider petition extended to 1/30/04*
NO. 28,384 Casados-Lujan v. Lujan (COA 22,984) 11/17/03
EFFECTIVE 11/1/03, RULE 12-502 AMENDED AND SUBPARA. E (30 DAYS DEEMED DENIED) WAS REMOVED
NO. 28,091 Ramos v. State (12-501) 5/29/03 *time to consider petition extended to 1/30/04*

CERTIORARI GRANTED AND UNDER ADVISEMENT:

NO. 26,910 Jaramillo v. UNM Bd of Regents (COA 20,805) 5/9/01
NO. 27,269 Kmart v. Tax & Rev (COA 21,140) 1/9/02
NO. 22,283 State ex rel. Martinez vs. City of Las Vegas (COA 14,647) 1/16/02
NO. 27,409 State v. Rodriguez (COA 22,558) 4/3/02
NO. 27,817 Tomlinson v. George (COA 22,017) 1/8/03
NO. 27,816 Warford v. Herrera (COA 22,848) 2/4/03
NO. 27,823 Gill v. Public Employees Retirement Board (COA 21,818) 2/4/03
NO. 27,868 State v. Alvarez-Lopez (COA 22,189) 2/4/03
NO. 27,869 State v. Alvarez-Lopez (COA 22,189) 2/4/03
NO. 27,872 Martinez v. St. Paul Ins (COA 22,343/22,344) 2/11/03
NO. 27,912 State v. Lopez (COA 23,456) 3/11/03
NO. 27,938 State v. Barber (COA 22,706) 3/20/03
NO. 27,950 Breen v. Carlsbad Schools (COA 22,858/22,859) 4/1/03
NO. 27,966 Montaño v. Allstate (COA 22,614) 4/7/03
NO. 27,969 Hovet v. Allstate (COA 22,276) 4/7/03
NO. 27,945 State v. Munoz (COA 23,094) 4/14/03
NO. 27,939 Patscheck v. Snodgrass (12-501) 4/21/03
NO. 27,995 State v. Flenniken (COA 22,715) 4/21/03
NO. 27,996 State v. Augustin M. (COA 22,900) 4/21/03
NO. 28,002 Chase Manhattan v. Candelaria (COA 22,625) 4/28/03
NO. 28,009 Reynoso v. Allstate (COA 23,131) 5/13/03
NO. 28,016 State v. Lopez (COA 23,424) 5/13/03
NO. 28,025 Martinez v. Friede (COA 22,442) 5/14/03
NO. 28,038 Paule v. Santa Fe County Commissioners (COA 22,988) 5/14/03
NO. 28,046 Apodaca v. AAA Gas Company (COA 21,946) 5/28/03
NO. 28,017 State v. Renfro (COA 23,206) 5/30/03
NO. 28,047 State v. Urban (COA 22,359) 5/30/03
NO. 28,068 State v. Gallegos (COA 22,888) 6/6/03
NO. 28,077 Slack v. Robinson (COA 23,189) 6/11/03
NO. 28,061 State v. Lara (COA 22,936) 6/25/03
NO. 28,076 Celaya v. Hall (COA 22,211) 6/25/03
NO. 28,128 Jicarilla Apache Nation v. Rodarte (COA 22,336) 7/15/03
NO. 28,156 State v. Anita T. (COA 23,652/23,653/23,651) 8/5/03
NO. 28,107 State v. Joanna v. (COA 22,876) 8/8/03
NO. 28,007 State v. Ruiz (on reconsideration) (COA 22,282) 8/11/03
NO. 28,198 Lentz v. Benson (COA 23,762) 9/3/03
NO. 28,178 State v. Daniel G. (COA 22,769/22,772) 9/3/03
NO. 28,119 State v. Dominguez (COA 23,286) 9/3/03
NO. 28,183 State v. Ochoa (COA 23,840) 9/3/03
NO. 28,176 State v. Golden (COA 22,769) 9/3/03
NO. 28,159 State v. Eubanks (COA 23,923) 9/3/03
NO. 28,241 State v. Duran (COA 22,611) 9/3/03
NO. 28,242 Didyoung v. Dow (COA 23,417) 9/15/03
NO. 28,233 Palmer v. St. Joseph Healthcare (COA 22,718) 9/15/03
NO. 28,225 Huntley v. Cibola General Hospital (COA 23,916) 9/15/03
NO. 28,234 State v. Blea (COA 24,032) 9/16/03
NO. 28,228 State v. Sharpe (COA 23,742) 10/10/03
NO. 28,253 Miller v. Brock (COA 24,124) 10/10/03
NO. 28,249 Miller v. Brock (COA 24,125) 10/10/03
NO. 28,237 State v. McDonald (COA 22,689) 10/10/03

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RULES/ORDERS
From the New Mexico Supreme Court

www.supremecourt.nm.org

PROPOSED NEW CRIMINAL FORM

The Supreme Court is considering a proposed new criminal form, Form 9-218 NMRA. If you would like to comment on the proposed new form set forth below, please send your written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received by the Clerk on or before February 6, 2004 to be considered by the Court.

9-218

TARGET NOTICE[1]

You are the target of a grand jury investigation in _____ County. The crimes being investigated are:

_____

(Name of offense and applicable statutory citation):

which are alleged to have occurred on _____ date in _____ County, New Mexico. Other possible charges may arise from the grand jury investigation.

You have the following rights with respect to this investigation:

(1) You have a right to counsel to assist you in this matter. If you cannot afford an attorney, one will be appointed for you.

(2) You have a right to testify before the grand jury if you desire.

(3) You have a right not to testify.

(4) You have a right to submit evidence to the prosecution[2].

This case will be presented to the grand jury on _____ _____ *(date)*[3].

If you decide that you will testify or submit proposed questions or exhibits, please call _____ *(name of person to be notified)* at _____ *(telephone number)* by _____ (a.m.) (p.m.) on _____ *(date).*

Date issued: _____

_____

[Signature of attorney]

_____

[Title]

I certify that a copy of this notice was [mailed] [faxed] [delivered] to _____ *(name of target)* on _____ ___ *(date)* at the following address _____ *(street address)* _____ *(city).*

_____

(Signature of person providing notice)

_____

(Title)

USE NOTES

1. This form may be used for a grand jury target notice. *See* Sections 31-6-4 and 31-6-11 NMSA 1978.

2. Section 31-6-4 NMSA 1978 provides that, at least twenty-four (24) hours before grand jury proceedings begin, a target's attorney may submit proposed questions and exhibits to the district attorney or attorney general.

3. Section 31-6-11 NMSA 1978 provides that unless otherwise ordered by the presiding judge or unless the target agrees to testify earlier, a target has a right to testify no earlier than:

(a) four (4) days after receiving the target notice, if the target is in custody; or

(b) ten (10) days after receiving the target notice, if the target is not in custody.

WRITS OF CERTIORARI

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NO. 28,261 State v. Dedman (COA 23,476) 10/10/03
NO. 28,272 Lester v. City of Hobbs (COA 22,250) 10/10/03
NO. 28,270 State v. Paredez (COA 24,082) 10/27/03
NO. 28,286 State v. Graham (COA 22,913) 11/3/03
NO. 28,210 Cassidy-Baca v. County Comm'r (COA 24,046) 11/3/03
NO. 28,317 Turner v. Bassett (COA 22,877) 11/6/03
NO. 28,321 State v. Heinrich (COA 23,215) 12/2/03
NO. 28,337 Colonias Dev. Council v. Rhino Envtl. Svcs. (COA 22,932) 12/2/03
NO. 28,353 State v. Villa (COA 23,229) 12/2/03
NO. 28,359 State v. Moses M. (COA 23,250) 12/2/03
NO. 28,380 Angel Fire v. Wheeler (COA 24,295) 12/3/03
NO. 28,369 State v. Beltron (COA 24,234) 12/5/03
NO. 28,379 State v. Cooley (COA 23,253) 12/9/03
NO. 28,386 State v. Flores (COA 24,067) 12/16/03
NO. 28,383 Blake v. Public Service Company (COA 23,671) 12/19/03
NO. 28,376 Ryan v. Highway Dept. (COA 22,615) 12/19/03
NO. 28,374 Smith v. Bernalillo County Commissioners (COA 22,766) 12/19/03
NO. 28,402 State v. Stewart (COA 23,137) 1/13/04
NO. 28,408 Federal Express v. Abeyta (COA 23,519) 1/13/04
NO. 28,414 State v. O'Kelley (COA 23,272/23,364) 1/13/04

Petitions For Writ Of Certiorari Denied:

NO. 28,300 Archuleta v. Blair (12-501) 11/10/03
NO. 28,413 Hill v. Williams (12-501) 12/22/03
NO. 28,398 State v. Sosa (COA 23,357) 12/31/03
NO. 28,399 State v. Matta (COA 24,259) 12/31/03
NO. 28,415 Turner v. Tipton (12-501) 1/7/04
NO. 28,411 Doak v. Tipps (COA 23,562) 1/8/04

WRIT OF CERTIORARI QUASHED:

NO. 27,814 State v. Hertel (COA 23,153) 1/13/04

From the New Mexico Supreme Court

Opinion Number: 2003-NMSC-033

JAY COURTNEY FIKES, Ph.D.,
Plaintiff-Respondent,
versus
PETER T. FURST, Ph.D.,
Defendant-Petitioner.
No. 27,824
(filed: November 21, 2003)

ORIGINAL PROCEEDING ON CERTIORARI
EUGENIO S. MATHIS,
District Judge

MICHAEL W. BRENNAN
M. ELIZA STEWART
MADISON, HARBOUR,
MROZ & BRENNAN, P.A.
Albuquerque, New Mexico
for Petitioner

DAVID MATTHEW OVERSTREET
JAMES NATHAN OVERSTREET
OVERSTREET &
ASSOCIATES, P.C.
Alamogordo, New Mexico
for Respondent

OPINION

MINZNER, Justice

{1} Petitioner Peter Furst, Ph.D. petitioned this Court to review an opinion of the Court of Appeals that reinstated some of the claims brought against him by Respondent Jay Fikes, Ph.D., but otherwise affirmed the district court's judgment for Dr. Furst. *See Fikes v. Furst*, 2003-NMCA-006, 133 N.M. 146, 61 P.3d 855. Dr. Fikes had brought this lawsuit against Dr. Furst in the district court for defamation, tortious interference with contract, and various other claims. The district court granted summary judgment in favor of Dr. Furst on all claims in three separate orders. Dr. Fikes appealed to the Court of Appeals regarding the defamation and tortious interference with contract claims only. *Id.* ¶ 5. The Court of Appeals affirmed the district court regarding most of the allegedly defamatory statements, but held that a sufficient question of fact remained regarding four of the statements to make summary judgment improper. The Court of Appeals also reversed the district court's dismissal of Dr. Fikes' tortious interference with contract claim. *Id.* ¶ 48. We hold that the district court properly granted summary judgment in favor of Dr. Furst on these claims; we therefore reverse the Court of Appeals in part, and remand to the district court for further proceedings consistent with entry of summary judgment in favor of Dr. Furst.

I

{2} The parties to this case are two anthropologists involved in a decades-long dispute regarding each others' observations of the Huichol Indian community in Mexico. Dr. Furst, the defendant in the lawsuit and the petitioner to this Court, was the first to observe the religious practices of the Huichol Indians during the 1960s. Then, in the late 1970s and early 1980s, Dr. Fikes, the plaintiff in district court, the appellant in the Court of Appeals, and the respondent in this Court, visited the same Indian community. Dr. Fikes proceeded to dispute some of the findings that Dr. Furst had reported regarding Huichol practices.

{3} Dr. Furst took offense to Dr. Fikes' claims that his reports of Huichol practices were inaccurate, and thus began the bitter feud that resulted in this lawsuit. Each expressed his disagreement with the other in various ways. Dr. Furst allegedly made various disparaging remarks regarding Dr. Fikes to various third persons throughout the past fifteen years. As a representative sample, Dr. Furst made statements that Dr. Fikes was "a lousy anthropologist," "beset by devils," and was "pursuing a half-assed fantasy." Dr. Fikes, for his part, wrote a book that chronicled his disagreement with Dr. Furst's conclusions about the Huichol that was entitled *Carlos Castaneda: Academic Opportunism and the Psychedelic Sixties*. The manuscript contained statements, referring to Dr. Furst's work with the Huichol Indians, such as, "I discovered what may be the most complicated and fascinating anthropological hoax of the 20th century." Originally, Dr. Fikes entered into a contract with Madison Books to publish the manuscript. However, Dr. Furst found out about it, and wrote to the publisher threatening to sue for libel if the book was published. Madison Books then canceled the contract with Dr. Fikes to publish the book. Subsequently, Dr. Fikes' manuscript was modified to, in his words, "libel-proof" its content, and another publisher, Millenia Press, was found for the book.

{4} Despite his claims that he might, Dr. Furst never sued Dr. Fikes for libel as a result of the published book. Dr. Fikes, however, sued Dr. Furst for defamation, tortious interference with contract, and other claims in 1996. The district court granted summary judgment in favor of Dr. Furst in 1998. Dr. Fikes appealed to the Court of Appeals regarding the defamation and tortious interference with contract claims. The Court of Appeals affirmed summary judgment on many of the defamation claims, either because they were barred by the statute of limitations, or because the alleged statements involved opinions rather than facts. *See generally Fikes*, 2003-NMCA-006, 133 N.M. 146, 61 P.3d 855.

{5} The Court of Appeals reversed the district court's order, however, regarding two groups of alleged defamatory statements. The first group of statements were made by Dr. Furst to Dr. Bruce Bernstein, the chief Curator and Assistant Director of the Museum of New Mexico. In a deposition, Dr. Bernstein testified that Dr. Furst, "on more than one occasion went through a litany of reasons why Dr. Fikes was unqualified" to work on a "Huichol Indian Assistance Project" that was envisioned at the University of New Mexico. That project was eventually abandoned. The second group of statements made by Dr. Furst all related to Dr. Fikes' relationship with the University of Michigan. Specifically, Dr. Furst asserted that the university "disowned" Dr. Fikes, "[d]idn't want anything to do with him," and was "sorry they had ever given him or provided him with a doctor's degree." These statements were made by Dr. Furst to Dr. Bernstein. A similar statement was made to Joan O'Donnell of the School of American Research.

{6} The Court of Appeals also reversed the order granting summary judgment in favor of Dr. Furst regarding the tortious interference with contract claim. The Court held that an issue of fact existed: whether Dr. Furst's threat to sue the publisher was made with an improper motive. The Court explained that the record contained evidence that supported an inference that

Dr. Furst did not actually intend to sue the publisher, because he did not sue Millenia Press after the revised manuscript was eventually published.

{7} Dr. Furst petitioned this Court for certiorari. Dr. Fikes did not cross-petition.

II

{8} As a preliminary matter, we must explain the proper scope of our review of the Court of Appeals opinion. Dr. Fikes, in his answer brief, asserts that this Court should take this opportunity to review other allegedly defamatory statements on which the Court of Appeals affirmed summary judgment in favor of Dr. Furst. Dr. Fikes, however, did not file a petition for certiorari regarding the numerous claims that the Court of Appeals held were properly dismissed by the district court. Under the appellate rules, it is improper for this Court to consider any questions except those set forth in the petition for certiorari. *See* Rule 12-502(C)(2) NMRA 2003. Accordingly, Dr. Furst has not responded in his reply brief to the merits of Dr. Fikes' arguments regarding claims outside of the scope of the petition; he emphasizes instead that those issues are not properly before this Court. We agree.

{9} This Court cannot consider any of Dr. Fikes' claims that the Court of Appeals erred. Dr. Fikes could have filed a cross-appeal or petition for certiorari as to those issues. Not having done so, he has waived any right to request their review. *Id.*; *see* 5 C.J.S. *Appeal & Error* § 840 (1993) ("[T]he higher court cannot review rulings of the intermediate court against appellee where appellant alone appealed or applied for a writ of error."). The United States Supreme Court similarly requires a cross-petition for certiorari if the respondent wishes to argue additional issues. *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360 (2002) ("Petitioners challenged only the Court of Appeals' constitutional holding in their petition for certiorari, and respondents did not file a cross-petition. We therefore address only the constitutional question . . . ."). If we were to acquiesce in this request to consider any issue addressed by the Court of Appeals, we would work a substantial change on the certiorari process. This would be unfair to the petitioner and inconsistent with our appellate rules. We thus limit our discussion to those issues raised in the petition for certiorari.

III

{10} Dr. Furst asserts that the Court of Appeals erred by reversing the district court's order and reinstating Dr. Fikes' claims regarding some of the defamatory statements. Dr. Furst argues that two different elements of a defamation case have not been met. First, he claims that the recipients of the allegedly defamatory statements did not attribute defamatory meaning to the statements. Second, he argues that Dr. Fikes has not alleged any specific damages that resulted from the statements. We need not reach the damages issue because we agree with Dr. Furst that the recipients did not attribute a defamatory meaning to the statements.

A

{11} Because the district court granted summary judgment in favor of Dr. Furst, we apply a de novo standard of review. *McGarry v. Scott*, 2003-NMSC-016, ¶ 5, 134 N.M.32, 72 P.3d 608. Summary judgment is the appropriate disposition if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 1-056(C) NMRA 2003. "Summary judgment may be proper even though some disputed issues remain, if there are sufficient undisputed facts to support a judgment and the disputed facts relate to immaterial issues." *Oschwald v. Christie*, 95 N.M. 251, 253, 620 P.2d 1276, 1278 (1980). Once the movant makes a prima facie case that summary judgment should be granted, the burden "shifts to the opponent to show at least a reasonable doubt, rather than a slight doubt, as to the existence of a genuine issue of fact." *Ciup v. Chevron U.S.A., Inc.*, 1996-NMSC-062, ¶ 7, 122 N.M. 537, 928 P.2d 263.

B

{12} "The primary basis of an action for libel or defamation is contained in the damage that results from the destruction of or harm to that most personal and prized acquisition, one's reputation." *Gruschus v. Curtis Publishing Co.*, 342 F.2d 775, 776 (10th Cir. 1965). Thus, no matter how opprobrious a defendant's statement may be, a plaintiff is not entitled to recover damages unless he or she can show that it caused an injury to reputation. Under the framework of our Uniform Jury Instructions, the tort of defamation has nine elements. *See* UJI 13-1002(B) NMRA 2003. Two of the elements that the plaintiff must prove are that the communication at issue is defamatory, and the recipient of the communication understands it to be defamatory. *Id.* These elements raise a common question: What does it mean for a statement to be defamatory? "Generally, a statement is considered defamatory if it has a tendency to render the party about whom it is published contemptible or ridiculous in public estimation, or expose him [or her] to public hatred or contempt, or hinder virtuous [people] from associating with him [or her]." *Bookout v. Griffin*, 97 N.M. 336, 339, 639 P.2d 1190, 1193 (1982).

{13} Dr. Furst does not argue that the statements he made about Dr. Fikes could not be interpreted to have a defamatory meaning. Indeed, the statements that Dr. Fikes was unqualified to work on a Huichol Indian assistance project, and the various statements regarding his relationship with the University of Michigan, might be considered defamatory as a matter of law. *See Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 429, 773 P.2d 1231, 1236 (1989) ("A statement is deemed to be defamatory per se, if, without reference to extrinsic evidence and viewed in its plain and obvious meaning, the statement imputes to plaintiff: . . . unfitness to perform duties of office or employment for profit, or the want of integrity in discharge of the duties of such office or employment[, or] some falsity which prejudices plaintiff in his or her profession or trade . . . ."). Rather, Dr. Furst argues that Dr. Bernstein and Ms. O'Donnell did not attribute a defamatory meaning to the statements, notwithstanding the ordinary meaning of the words Dr. Furst used.

{14} This Court has not considered what it means for the recipient to understand a statement to be defamatory. Our Uniform Jury Instruction is based on the definition found in 3 Restatement (Second) of Torts § 563 (1977). Although the Restatement is not binding, we consider it to be "persuasive authority entitled to great weight." *Gabaldon v. Erisa Mortgage Co.*, 1999-NMSC-039, ¶ 27, 128 N.M. 84, 990 P.2d 197. Thus, we note that the Uniform Jury Instruction states:

> To support a claim for defamation, the defamatory meaning of the communication must be understood by the person to whom it was communicated.
>
> The defamatory meaning of a communication is that which the recipient reasonably understands it was intended to express. It is what the recipient of the communication reasonably understood the meaning to be that controls; not what the defendant may have intended

to convey.
UJI 13-1008 NMRA 2003.

{15} Some statements that may seem plainly defamatory to an outside observer may be understood by the intended recipient in a completely different way. *See* Restatement, *supra*, § 563 cmt. e at 164 ("Words which if isolated from the circumstances under which they were uttered might appear defamatory, may in fact not have been so understood by the person to whom they were published."). "Communications are judged on the basis of the impact that they will probably have on those who are likely to receive them, not necessarily the ordinary `reasonable man.'" Robert D. Sack, *Sack on Defamation* § 2.4.3, at 2-25 (3rd ed. 2003). Dr. Furst is not liable in tort for defamation if the recipients of his words did not understand those words to have a defamatory meaning. "[C]ontext (including tone and type of publication) may show that language is asserting no defamatory fact because context can show that the words should not be understood as literal statements but as whimsy, irony, hyperbole, or meaningless invective." Dan B. Dobbs, *The Law of Torts* § 404, at 1133 (West 2000); *see Morse v. Ripken*, 707 So.2d 921, 922 (Fla. Dist. Ct. App. 1998) (holding that the court must consider all of the circumstances surrounding the statement, including the audience to which it is published, before determining that the statement is indeed defamatory).

{16} The Court of Appeals held that disbelief by the recipients would not defeat the claim. *See Fikes*, 2003-NMCA-006, ¶ 21. We believe Defendant's argument differs subtly from the Court of Appeals' characterization. Dr. Furst does not argue that he should not be liable because the recipients did not believe his statements. Rather, he argues the recipients thought that he was trying to convey something different than the ordinary meaning of his words. In another context, the argument that the recipients did not really think that Dr. Furst meant to say that Dr. Fikes was unqualified, or that the University of Michigan disapproved of him, might not be plausible because it would lack support in the record. In this case, however, the deposition testimony provides confirmation. Dr. Bernstein, the recipient of some of the statements made by Dr. Furst, first stated that the statements did not influence his opinion of Dr. Fikes. Dr. Bernstein explained that Dr. Furst's statements were typical of what he hears in the anthropological community. He went on, however, to state that the statements caused him to have "a much more cautious approach" in his dealings with both Dr. Fikes and Dr. Furst. Ms. O'Donnell, when asked about her reaction to Dr. Furst's statements, stated that "I would say some of [the statements] are extreme but they are not outside the range of what goes on in academic talk."

{17} At oral argument, Dr. Furst's counsel contended that such statements are common within the academic community of which his client and Dr. Fikes are part and because they are common, do not convey, or at least in this case did not convey, a defamatory meaning. If the recipients of the statements had expressly indicated that in the academic community of which Dr. Furst and Dr. Fikes were part such statements would not be taken literally, the issue on appeal would have been easier. Nevertheless, we are persuaded the deposition testimony supports an inference that the statements were not taken literally by the recipients, because similar statements usually are not taken literally in the context in which they were made. Rather, such statements were understood by the recipients to be Dr. Furst's opinions and not actual facts. While Dr. Furst may have intended for the recipients to draw negative inferences of Dr. Fikes from his statements, this intent alone does not give defamatory meaning to the statements. *See Moore v. Sun Publ'g Corp.*, 118 N.M. 375, 381-82, 881 P.2d 735, 741-42 (Ct. App. 1994) (distinguishing statements of opinion that go beyond essential facts and "convey a negative opinion" from statements that "imply a `provably false factual assertion'").

{18} In addition to the immediate context of the statement, we also look to "the broader social context into which the statement fits." *Ollman v. Evans*, 750 F.2d 970, 983 (D.C. Cir. 1984). Criticism of the work of scholars is generally commonplace and acceptable in academic circles. Thus, statements that may appear in isolation to be defamatory may in fact be particularly appropriate or acceptable criticism when made in an academic setting. *See, e.g.*, *Freyd v. Whitfield*, 972 F. Supp. 940, 946 (D. Md. 1997) (holding statements non-defamatory in part because they were made within "the broader social contact of an academic lecture"). *Cf. Ezrailson v. Rohrich*, 65 S.W.3d 373, 382 (Tx. App. 2001) ("[C]riticism of the creative research ideas of other medical scientists should not be restrained by fear of a defamation claim..."). This is so because an academic audience will often be able to recognize the "subjective character" of the statements and "discount them accordingly." *Freyd*, 972 F. Supp. at 946. Not only should this sort of "imaginative expression" not be discouraged by defamation claims, it is often valuable to discourse and at times should be encouraged. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (noting that protecting statements that cannot reasonably be interpreted as stating actual facts "provides assurance that public debate will not suffer for lack of `imaginative expression' or the `rhetorical hyperbole' which has traditionally added much to the discourse of our Nation").

{19} Considering the context of the statements made by Dr. Furst, the evidence produced in support of his motion for summary judgment supports Dr. Furst's argument. He made a prima facie showing that the recipients did not attribute a defamatory meaning to the statements he made. Because proof that a defamatory communication occurred was essential to Dr. Fikes' case, Dr. Furst's showing gave rise to a burden on Dr. Fikes to show that there was an issue of fact concerning a statement of defamatory meaning. Dr. Fikes did not carry that burden. He has not pointed to any evidence that the statements affected the recipients' opinions of him, other than Dr. Bernstein's statement that he now takes "a much more cautious approach" in his professional dealings with Dr. Fikes and Dr. Furst . We construe this statement as evidence that Dr. Bernstein did not want to get in the middle of the feud, not that he no longer respected Dr. Fikes professionally. We conclude the deposition testimony supports an inference, which Dr. Fikes did not rebut, that neither recipient understood the words to have a defamatory meaning. Because neither recipient of the statements attributed a defamatory meaning to them, we must affirm the district court's order granting summary judgment in favor of Dr. Furst as to these claims.

IV

{20} Dr. Furst also argues that the Court of Appeals erred by reversing the district court's order dismissing the tortious interference with contract claim. In order to prevail on a claim of tortious interference with contract, Dr. Fikes must prove that Dr. Furst took action that persuaded Madison Books to break its commitment to publish his manuscript, and that Dr. Furst accomplished this either with an

improper motive or through improper means. *Kelly v. St. Vincent Hosp.*, 102 N.M. 201, 207, 692 P.2d 1350, 1356 (Ct. App. 1984). The Court of Appeals held that an issue of material fact remains regarding whether Dr. Furst had an improper motive or used improper means for threatening Madison Books with litigation. *See Fikes*, 2003-NMCA-006, ¶¶ 45-47.

A

{21} Dr. Furst argues that for an "improper motive" to exist the motive must have been *solely* to harm the plaintiff. This Court, though, has never stated that an improper motive must be the sole motive for interfering with an existing contract. We have only applied the "sole motive" test to prospective contracts, and at-will contracts, which are equivalent to prospective contracts. *See Silverman v. Progressive Broad., Inc.*, 1998-NMCA-107, ¶ 28, 125 N.M. 500, 964 P.2d 61 (stating that a claim for prospective interference with contract requires a showing that the sole motive was to harm the plaintiff); *Kelly*, 102 N.M. at 207, 692 P.2d at 1356 (stating that the Court will apply the means and motive analysis applicable to prospective contracts to an at-will contract); *Clough v. Adventist Health Sys., Inc.*, 108 N.M. 801, 806, 780 P.2d 627, 632 (1989) (applying sole motive analysis to interference with a doctor's relationship with patients). Nevertheless, the Court of Appeals accepted the "sole motive" test as the applicable standard below. *See Fikes*, 2003-NMCA-006, ¶ 45. We believe a different standard was appropriate, but we also believe that on the record Dr. Furst was entitled to summary judgment on this claim as well as the defamation claims.

{22} When the interest at stake is an existing contractual relationship, a different analysis is appropriate than when the interest at stake is a prospective contractual relationship.

> American courts are not as willing to protect interests in prospective contractual relations as they are to protect interests in existing contracts. Where the defendant is accused of interfering with the plaintiff's opportunity to enter into contracts with third persons, a strong showing must be made that the defendant acted not from a profit motive but from some other motive, such as personal vengeance or spite.

Anderson v. Dairyland Ins. Co., 97 N.M. 155, 158, 637 P.2d 837, 840 (1981) (quoting James A. Henderson, Jr. & Richard N. Pearson, *The Torts Process* 1166 (2d ed. 1981)). The Restatement recognizes that "greater protection is given to the interest in an existing contract than to the interest in acquiring prospective contractual relations." 4 Restatement, *supra*, § 767 cmt. j, at 37. Thus, for a claim based on an interference with an existing contract, the plaintiff must still prove that the defendant acted with either an improper motive or improper means, but the improper motive need not be the sole motive. *Id.* cmt. d, at 32 ("The desire to interfere with the other's contractual relations need not, however, be the sole motive."). *See also* 2 Fowler Harper et al., *The Law of Torts* § 6.11, at 341 (2d ed. 1986) ("[T]he law does not extend its protection as far in the case of precontractual interferences as it does when existing contracts have been interfered with.").

{23} In *Speer v. Cimosz*, 97 N.M. 602, 606, 642 P.2d 205, 209 (Ct. App. 1982), the Court of Appeals explained that "`[p]rivilege' [is] defined as a good faith assertion or threat by the one interfering to protect a legally-protected interest of his [or her] own which he [or she] believes might otherwise be impaired or destroyed by performance of the contract." A motive to protect one's own interest does not need to be the exclusive motive for the conduct to be privileged. *See Williams v. Ashcraft*, 72 N.M. 120, 122, 381 P.2d 55, 56-57 (1963) ("`[O]ne acting to protect his [or her] property rights is privileged to interfere even if he does so with malice.' . . . `As a general rule, justification for interfering with the business relations of another exists where the actor's motive for doing so is to benefit himself [or herself], and it does not exist where his [or her] sole motive is to cause harm to such person.'") (quoted authorities omitted). This rule is in keeping with the Restatement formulation that more conduct will be privileged for interference with prospective contracts than will be privileged for interference with existing contracts. A person may be privileged to interfere with a prospective contract unless the sole motive is to harm a third party; in contrast, a person may not be privileged to interfere with an existing contract, even if the person has mixed motives. The inquiry, in the end, should be to determine the party's primary motivation for the interference. If it was primarily improper, then the person has no privilege. If it was primarily proper, then liability should not attach.

{24} In this case, Dr. Fikes and Madison Books had an existing contract to publish his book. Therefore a sole motive analysis is not applicable. Regardless of whether Dr. Furst intended him harm, Dr. Fikes still needed to show that Dr. Furst was not substantially motivated by a desire to protect his own interest. It cannot be questioned that Dr. Furst sought to protect his own legally protected interest by sending his letter to Madison Books. In his letter to the publisher, Dr. Furst claimed that the book would "threaten serious damage to . . . [his] standing in the anthropological community, [his] ongoing career, and, not least, [his] livelihood." This statement clearly demonstrates that Dr. Furst was motivated by more than a desire to harm Dr. Fikes when he sent the letter. He wanted to protect his own reputation. Nowhere in the letter is there any indication that Dr. Furst had an improper motive for making his request. Dr. Fikes does not point to any other evidence in the record that would indicate such an improper motive, but rather he contends that "Dr. Furst's animosity toward [him] is self evident." We are left to conjecture and speculation in that regard. While it would not be surprising to discover that Dr. Furst took pleasure in Dr. Fikes' lost profits, given the history of their contentious relationship, the letter reflects far more than personal animosity; it reflects Dr. Furst's genuine concern for his professional reputation and livelihood. It was Dr. Fikes' burden to present evidence to the contrary in his response to Dr. Furst's motion for summary judgment. Dr. Fikes not having done so, the district court properly entered summary judgment in favor of Dr. Furst on this claim.

B

{25} Dr. Fikes also argues that Dr. Furst utilized "improper means" to interfere with his publishing contract with Madison Books. In *M & M Rental Tools, Inc. v. Milchem, Inc.*, 94 N.M. 449, 454, 612 P.2d 241, 246 (Ct. App. 1980) (quotation marks and quoted authority omitted), the Court of Appeals stated, "[c]ommonly included among improper means are violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." Dr. Fikes claims that Dr. Furst's letter to Madison Books constituted a threat of unfounded litigation. He argues that the fact that Dr. Furst did not sue once a different version was finally published by

another publisher demonstrates that Dr. Furst never intended to sue, but simply to harass. This contention lacks support because the content of Dr. Fikes' book appears to have been changed specifically for the purpose of making it "libel-proof" before it was published by the Millenia Press. Furthermore, the content of the book that was published is not in the record. Therefore, Dr. Furst's decision not to sue for libel as a result of the publication of the second book is completely unprobative of whether he would have sued if the first manuscript had been published. Dr. Fikes points to no evidence in the record that would create a genuine issue of material fact as to whether Dr. Furst acted with improper means.

V

{26} We hold that the Court of Appeals erred to the extent that it reversed the district court's order granting summary judgment in favor of Dr. Furst. On the defamation claims, there was no genuine issue of material fact that the recipients of the statements understood them to be defamatory. On the claim for tortious interference with contract, there was no genuine issue of material fact that Dr. Furst was substantially motivated by a desire to protect his own interests. Thus, the district court correctly held that Dr. Furst was entitled to judgment as a matter of law. We therefore affirm the district court's summary judgment for Dr. Furst.

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

PAMELA B. MINZNER,
Justice

WE CONCUR:
PETRA JIMENEZ MAES,
Chief Justice
PATRICIO M. SERNA, Justice
RICHARD C. BOSSON, Justice
EDWARD L. CHÁVEZ, Justice

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2003-NMCA-143

HAAS ENTERPRISES, INC., a New Mexico corporation,
Plaintiff-Appellant,
versus
BRUCE DAVIS; B.J. DAVIS, D.O., P.C., a New Mexico corporation;
and B.J. DAVIS, individually,
Defendants-Appellees.
No. 22,923 (filed: September 24, 2003)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
TED BACA, District Judge

ROBERT A. JOHNSON
STEPHEN R. NELSON
JOHNSON & NELSON, P.C.
Albuquerque, New Mexico
for Appellant

ROBERT J. MUEHLENWEG
SHARI L. STERUD
MICHAEL J. THOMAS
KELLY, RAMMELKAMP &
MUEHLENWEG, P.A.
Albuquerque, New Mexico
for Appellees

OPINION

RODERICK T. KENNEDY, Judge

{1} The issue we address here is: When did the statute of limitations in this accountant's malpractice case begin to run? Haas Enterprises, Inc. sued Bruce Davis on an unsecured promissory note. Bruce, his father Dr. B.J. Davis, and Dr. Davis's medical practice, Davis P.C., in turn filed a counterclaim and third-party complaint against Haas Enterprises for its failure to file certain tax returns on its behalf for a number of years.[1] Haas Enterprises then defended on the basis that the statute of limitations had run on the claim.

{2} The district court found for the Davises, based on case law that draws a bright-line at the moment the client receives notice of tax deficiency from the IRS to establish when a client discovers the injury as well as the right to a cause of action for accountant malpractice. The district court thus allowed the Davises' claims to proceed. The Davises obtained a judgment. Haas

[1] Mr. Haas is deceased; the initial action was brought in the name of his firm Haas Enterprises. Dr. Davis, Haas's client, assigned 50% of his third-party claims for malpractice to his son Bruce Davis after Bruce was sued by Haas Enterprises on his promissory note. Bruce counterclaimed as per his interest. The distinction between individuals, counterclaimants, and third-party plaintiffs in this case is not material, save for detail; unless distinction is necessary, we refer to Dr. Davis, Bruce Davis, and Davis P.C. as the Davises.

Enterprises filed a timely appeal.

{3} We hold that a notice of deficiency or equivalent IRS document is not the sine qua non of discovering an injury and the existence of a cause of action for accountant malpractice. In this case, the statute of limitations began to run when Dr. Davis acquired knowledge that his tax returns, which he had paid Haas Enterprises to file for a number of years, had not been filed. That date was almost a year earlier than any IRS notice of deficiency was issued; the statute of limitations had run, and we reverse the district court.

FACTS AND BACKGROUND

{4} Ferris Haas ran a bookkeeping and accounting practice for many years as Haas Enterprises. He prepared the books and took care of tax matters for Dr. Davis personally and for Davis P.C. since the late 1970's. The relationship was personally close, as Mr. Haas loaned money to both Dr. Davis and Bruce. One of these loans to Bruce was secured by a promissory note, which is the subject of Haas Enterprises lawsuit.

{5} Dr. Davis had given Mr. Haas authority by power of attorney to deal with taxing authorities firsthand on his behalf. Mr. Haas took care of the month-to-month needs of Dr. Davis's practice, such as gross receipts tax payments and employee withholding taxes. Mr. Haas could sign returns for Dr. Davis, and tax-related correspondence was sent to Haas Enterprises' address. Dr. Davis would provide Haas Enterprises with blank checks to pay taxes owed, and to pay Haas Enterprises for accounting services, all of which would be executed by Mr. Haas.

{6} Mr. Haas died in August 1995. Upon Mr. Haas's death, on October 24, 1995, Dr. Davis retained Jennifer Cantrell, a certified public accountant, on October 24, 1995, to take over his bookkeeping and accounting. Part of their contract stated that it was Dr. Davis's belief at that time that no bookkeeping or tax returns for the medical practice had been prepared or filed since 1984.

{7} Because Dr. Davis tried to run his practice as a "zero corporation," meaning that he attempted every year to have no corporate taxable income, he did not question Mr. Haas's accounting practices during the years he was not paying corporate taxes. Dr. Davis also testified that he usually received a refund on his personal taxes when he did file, so he did not think he owed any personal taxes. The district court found that Dr. Davis "knew that Haas had not prepared and filed [his] individual income [tax] returns for the years 1991, 1992, 1993 and 1994." In July 1996, assessment of liability for penalties and interest for Dr. Davis's personal taxes was issued. During the fall of 1996 and early 1997, Dr. Davis learned that there would be corporate taxes and penalties owed.

{8} Haas Enterprises sued on the promissory note in February 2000; the counterclaim and third-party complaint were filed on March 27, 2000, for Haas Enterprises' malpractice. The district court found that prior to December 2, 1996, when federal tax returns were filed for Davis P.C., Dr. Davis had "no notice of any injury as a result of Haas' failure to file corporate income tax returns" and concluded that the Davises' claims were timely under the four-year statute of limitations.

DISCUSSION

Standard of Review

{9} When facts relevant to a statute of limitations issue are not in dispute, the standard of review is whether the district court correctly applied the law to the undisputed facts. *Inv. Co. of the S.W. v. Reese*, 117 N.M. 655, 657, 875 P.2d 1086, 1088 (1994). We review questions of law de novo. *Sowder v. Sowder*, 1999-NMCA-058, ¶ 7, 127 N.M. 114, 977 P.2d 1034. It is undisputed in this case that the applicable statute of limitations is four years. NMSA 1978, § 37-1-4 (1880).

Two-Prong Test for Accrual of Action for Professional Malpractice

{10} New Mexico has a two-prong test to determine when an accountant malpractice action accrues. The test is based on the formula adopted by our Supreme Court for attorney malpractice. *Sharts v. Natelson*, 118 N.M. 721, 724, 885 P.2d 642, 645 (1994); *LaMure v. Peters*, 1996-NMCA-099, ¶¶ 16-18, 122 N.M. 367, 924 P.2d 1379 (concluding that the two-prong test established to ascertain when an attorney malpractice cause of action accrues applies in cases of accountant malpractice). The limitation period begins to run, and the accountant malpractice cause of action accrues when the client sustains an "actual injury," and when "the client discovers, or through reasonable diligence should discover, the facts essential to the cause of action." *Wiste v. Neff & Co.*, 1998-NMCA-165, ¶ 8, 126 N.M. 232, 967 P.2d 1172 (internal quotation marks and citation omitted). Although the prongs may be met simultaneously, each must be satisfied individually. *Id.*

{11} Here, the Davises argue that without formal action by the IRS establishing a tax deficiency, no event triggering the statute of limitations could have occurred until the IRS rendered its assessment in mid to late 1996. This argument is consistent with New Mexico accountancy malpractice cases from *Chisholm v. Scott*, 86 N.M. 707, 709, 526 P.2d 1300, 1302 (Ct. App. 1974) through *LaMure*, 1996-NMCA-099, ¶ 18, in which we have held that the two-prongs of the test to determine accrual of an accountant malpractice cause of action is satisfied by the issuance of an IRS tax deficiency notice. *LaMure* instructs us that accountancy malpractice actions accrue when there is a notice of deficiency issued by the IRS, thus creating injury "and not before." *Id.* ¶ 14. Receiving the notice of deficiency functions simultaneously as the injury itself and notice to the client of the injury. *Id.* ¶ 18.

{12} This said, we have previously held that knowing the extent of the tax liability is not necessary to determining when the injury has occurred. *See Wiste*, 1998-NMCA-165, ¶ 10. In *Wiste*, this Court held that receipt of a Final Partnership Administrative Adjustment (FPAA) stating that taxes were owed from an interest in a limited partnership was the functional equivalent of a deficiency notice and satisfied the discovery requirement. *Id.* Receipt of such a notice established the fact that the client had suffered "the loss of a right, remedy, or interest, or that liability ha[d] been imposed" sufficient to satisfy the discovery prong. *Id.* (internal quotation marks and citation omitted).

{13} Thus, our courts have selected certain events as bright-line spots at the occurrence of which "people should know that they are injured by accountant malpractice." *LaMure*, 1996-NMCA-099, ¶ 15; *Chisholm*, 86 N.M. at 709, 526 P.2d at 1302. The reason for waiting for injury to "accrue" is simply that injury may not be apparent at the time the negligent act itself is committed. Often, only IRA action against the taxpayer makes the injury apparent. *LaMure*, 1996-NMCA-099, ¶ 17; *see also Chisholm*, 86 N.M. at 709-10, 526 P.2d at 1302-03. To insist on accrual of the cause of action at the time the negligent act was committed could result in the statute of limitations running before the injury was ever discovered, resulting in an injustice. *See Jaramillo v. State*, 111 N.M. 722, 726, 809 P.2d 636, 640 (Ct. App. 1991).

{14} The calculus in these cases assumes that the tax laws and tax accounting may well be beyond the ken of the taxpayer.

La Mure, 1996-NMCA-099, ¶ 17; *Chisholm*, 86 N.M. at 709, 526 P.2d at 1302 ("A person needs special training to know whether his tax return has been erroneously prepared."). In this context, a bright-line is useful, but need not be exclusive.

{15} We have previously stated that we regard the discovery rule as "the underlying basis of the *Chisholm* holding, *despite* its bright-line selection of the deficiency notice as the time that people should know that they are injured by accountant malpractice." *LaMure*, 1996-NMCA-099, ¶ 15 (emphasis added). Thus, the essential question is when people should know that they are injured, irrespective of any single bright-line. As we stated in *LaMure*, "[f]or purposes of determining when the statute of limitations began to run, we are concerned only with the point at which the [plaintiffs] knew or should have known that they were damaged by [defendant's] malpractice." *Id.* ¶ 23. The earlier line of cases deals with returns prepared badly and a resulting tax deficiency. It was reasonable in those cases to wait to ascertain whether an injury has occurred and how bad it was. However, the general rule applied to actions for negligent or improper preparation of tax returns is not applicable here. This case deals with returns that were never prepared at all, and actual injury and its discovery may be determined in other ways.

When no Tax Return is Filed, the Injury and its Discovery may be Determined in Other Ways

{16} In this case, Dr. Davis contracted for the preparation of tax returns, paid for their preparation, and knew for some time that they had not been prepared. Dr. Davis knew that his corporate tax returns had not been filed for eleven years, and that it was Haas Enterprises' obligation to file them. He also knew that corporate returns were to be filed in September 1995, within three months of the end of his business' fiscal year on June 30. Failing to file when one personally knows the deadline has been held not to be a problem attributable to one's accountant. *United States v. Kroll*, 547 F.2d 393, 396 (7th Cir. 1977).

{17} In October 1995, Dr. Davis knew he had not signed personal returns for the last five cycles. His wife even questioned him regarding whether his personal income taxes had been filed. Dr. Davis testified that as of October 21, 1995, his new accountant advised him that no corporate returns had been prepared since 1984. Knowing this, for Dr. Davis to seek to wait for an IRS notice of deficiency based on a return filed in 1996 is struthious. It strains logic to insist on waiting for a notice of tax deficiency before one can tell an accountant has committed malpractice, when one knows for a fact that the accountant has not filed a tax return for as many as eleven years.

{18} The Pennsylvania Supreme Court castigated estate administrators for "supine negligence" in failing to ascertain the date for filing of tax returns despite having counsel, and made the following observations:

> A prudent man may not have the technical knowledge or skill to prepare . . . an income tax return, and so would properly rely on one more knowledgeable. But a prudent man in the conduct of his own affairs would certainly know that there is A [sic] time when a tax return must be made and a time when a tax is due and payable, and, if he did not know what those times were, he would find out. . . . What 'prudent man' is there who does not know that April 15 is the normal date by which individual federal income tax returns must be filed and the tax paid?

In re Estate of Lohm, 269 A.2d 451, 455-56 (Pa. 1970). Dr. Davis presents us with the same situation. The contention that "there was no actual injury to Dr. Davis or Davis, P.C. until at least July 1996" when there was an assessment of liability for penalties and interest for personal taxes has no merit. Although the absence of a tax deficiency notice distinguishes this appeal, *LaMure* instructs us that in an appropriate case an "actual injury" may take the form of consequential or incidental damages, such as attorney fees or costs incurred as a result of the alleged malpractice. *See LaMure*, 1996-NMCA-099, ¶ 16. Dr. Davis retained a new accountant in October 1995 with the explicit understanding that returns had not been prepared for a number of years. Dr. Davis incurred substantial consequential damages in the form of professional service fees paid to his new accountant. Further, the district court found that Dr. Davis knew Haas Enterprises had not prepared and filed his personal returns from 1991 through 1994. The district court concluded that Haas Enterprises breached its contract to prepare tax returns, failed to provide adequate services, and committed fraud against the Davises. The conclusion that the contract was breached and finding that Haas Enterprises had been paid for the work not done constitute the injury. All of this leaves us no doubt that both the actual injury and discovery of Haas Enterprises' failures were known to Dr. Davis as of October 1995. Dr. Davis "knew what he needed to know." *State v. Cumpton*, 2000-NMCA-033, ¶ 15, 129 N.M. 47, 1 P.3d 429.

CONCLUSION

{19} We hold that in October 1995, when Dr. Davis retained his new accountant stating that returns had not been filed since 1988, the statute of limitations began to run. The Davises' claims filed in March 2000 are barred by the running of the statute. The district court's judgment in favor of the Davises is hereby reversed. This case is remanded with instructions for dismissal of the Davises' claims for accountant malpractice as they are barred by the statute of limitations.

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

RODERICK T. KENNEDY, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

MICHAEL D. BUSTAMANTE, Judge

Certiorari Denied, No. 28,367, December 2, 2003

From the New Mexico Court of Appeals

Opinion Number: 2003-NMCA-147

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
RICKY JOE BENNETT,
Defendant-Appellant.
No. 23,177
(filed: October 22, 2003)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
LOURDES A. MARTINEZ,
District Judge

PATRICIA A. MADRID
Attorney General
M. ANNE KELLY
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

JOHN BIGELOW
Chief Public Defender
WILL O'CONNELL
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

OPINION

JAMES J. WECHSLER
Chief Judge

{1} Defendant Ricky Bennett was convicted of aggravated battery with a deadly weapon against a household member contrary to NMSA 1978, § 30-3-16(C) (1995) and battery against a household member contrary to NMSA 1978, § 30-3-15 (1995, prior to 2001 amendment). On appeal, he asserts that error occurred both at trial and at sentencing. With regard to the trial, Defendant argues that the district court erred in granting the State's petition for an extension of time to prosecute his case and that there was insufficient evidence to support his convictions. At sentencing, the district court, after imposing the statutory penalties for Defendant's convictions, also found Defendant to be an habitual offender under NMSA 1978, § 31-18-17 (2003) and deemed the aggravated battery with a deadly weapon to be a serious violent offense under NMSA 1978, § 33-2-34(L)(4) (1999), the Earned Meritorious Deduction Act (EMDA). Defendant argues that the district court imposed an illegal sentence when it applied the EMDA to his conviction for aggravated battery with a deadly weapon on a household member. We affirm Defendant's convictions and reverse with regard to his sentence.

Background

{2} The charges against Defendant arose from events that occurred in May 2000, when Defendant and the victim were living together in a one-room apartment. The victim testified that on May 29, 2000, at approximately 4:00 a.m., she was awakened by Defendant's throwing things around the apartment. After the victim refused to give him money, Defendant ripped the telephone from the wall and struck the victim on the head with the telephone when she said that she was going to call the police. The victim, fearing that Defendant was out of control, began to get dressed so she could leave the apartment. Defendant then broke a glass bottle over her head, leaving an open wound that required twenty-five stitches to close. The victim fled the apartment, wearing jeans but no shirt, and called 911 from a pay phone. The police officers who responded to the call testified that they found her partially clothed, bleeding copiously, and hysterical. When the officers contacted Defendant, he told them that the victim had fallen down the stairs. The officers testified that they saw no blood on the stairs, but did find blood in the apartment.

{3} Following a jury trial, Defendant was convicted of aggravated battery against a household member for striking the victim with the bottle and battery against a household member for hitting her with the telephone. He was acquitted of an additional aggravated battery charge which was based on an incident that had occurred several days earlier. The district court also entered a directed verdict on a charge of tampering with evidence.

Serious Violent Offense Under the EMDA

{4} Defendant contends that the district court erred when it deemed his conviction for aggravated battery with a deadly weapon on a household member to be a serious violent offense under the EMDA because the crime is not specifically enumerated in the EMDA either in Section 33-2-34(L)(4) or in Section 33-2-34(L)(4)(n). The district court's authority to classify Defendant as a serious violent offender derives from Section 33-2-34, and our construction of this statute for the district court's authority in this case is an issue we analyze de novo as a matter of law. *State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

{5} Under the EMDA, prisoners convicted of serious violent offenses may earn a monthly maximum of four days of good time for participation in various programs, while prisoners convicted of nonviolent offenses may earn a maximum of thirty days. Section 33-2-34(A)(1), (2). The EMDA defines thirteen offenses which are serious violent offenses as a matter of law. Section 33-2-34(L)(4)(a)-(m). Among those offenses is third degree aggravated battery under NMSA 1978, § 30-3-5(C) (1969); Section 33-2-34(L)(4)(c). The offense Defendant committed, third degree aggravated battery on a household member under Section 30-3-16, is not specifically listed in Section 33-2-34(L)(4). It is also not listed in the thirteen additional offenses which the district court may adjudge to be serious violent offenses for the purposes of a reduced good time credit under Section 33-2-34(L)(4)(n).

{6} Our principal purpose in construing a statute is to effectuate the intent of the legislature. *State v. Ogden*, 118 N.M. 234, 242, 880 P.2d 845, 853 (1994). We look first to the plain language of the statute. *Id.* at 242, 880 P.2d at 853. If the meaning of the statutory language is clear and without ambiguity, we apply the statute as it is written.

{7} Our Supreme Court has warned that even within a statute that is clear on its face there may be ambiguity that may result in the failure to achieve the legislative intent. *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 351-53, 871 P.2d 1352, 1357-59 (1994). On this basis, the State contends that the EMDA should be read to include third degree aggravated battery on a household member as a serious violent offense. The State argues that its inclusion is necessary in order to achieve the stated purpose of the EMDA that offenders who commit violent intentional felonies be required to serve a greater percentage of the sentence imposed upon them. The State correctly points out that the statutory language prohibiting third degree aggravated battery on a household member is the same as the language prohibiting third degree aggravated battery, the only

difference being the inclusion of the status of the victim.

{8} The EMDA defines "serious violent offense" by reference to specific criminal offenses and the numbered statutory sections which contain the offenses. By way of example, it lists third degree aggravated battery by stating "third degree aggravated battery, as provided in Section 30-3-5 NMSA 1978." Section 33-2-34(L)(4)(c). If the statutory references were not included, we might agree with the State that the reference to third degree aggravated battery could include third degree aggravated battery on a household member. However, the statutory reference to Section 30-3-5 precludes our interpreting the reference to the offense as being ambiguous.

{9} Moreover, the EMDA definition includes as a serious violent offense "aggravated battery upon a peace officer, as provided in Section 30-22-25," also a third degree felony. Section 33-2-34(L)(4)(k). The listing of this offense indicates that the legislature did not intend its inclusion of third degree aggravated battery under Section 30-3-5 to include aggravated battery upon specific victims not expressly listed in the EMDA. *See Worland v. Worland*, 89 N.M. 291, 294, 551 P.2d 981, 984 (1976), (stating that "[t]he legislature was at pains to enumerate certain elements of domestic disputes when it wrote the statute. It therefore stands to reason that it meant to exclude those elements not included").

{10} The State's position can be read to ascribe a mistake to the legislature's enumeration of offenses within the EMDA in the failure to list aggravated battery on a household member. We acknowledge that in construing a statute, we may depart from its plain language if necessary to "correct a mistake or an absurdity that the [l]egislature could not have intended." *State v. McDonald*, 2003-NMCA-123, ¶ 23, ___ N.M. ___, ___ P.3d ___ [No. 22,689, slip op. at 12 (N.M. Ct. App. July 30, 2003)].

{11} We cannot say that Section 33-2-34 contains such a defect. In defining "serious violent offense," the legislature not only listed twenty-six separate offenses, but also specified the sections of the criminal code with regard to each offense. We presume that the legislature knows the law when enacting a statute. *Bybee v. City of Albuquerque*, 120 N.M. 17, 20, 896 P.2d 1164, 1167 (1995).

{12} The legislature created the crime of aggravated battery on a household member in 1995 by enacting the Crimes Against Household Members Act, N.M. Laws 1995, Ch. 221, § 1. Although aggravated battery and aggravated battery on a household member carry the same penalty, *compare* § 30-2-5(B), (C), *with* § 30-3-16(B),(C), the legislature expressly distinguished the crime of aggravated battery on a household member from the crime of aggravated battery. Significantly, this action was not the first time before enacting the EMDA that the legislature created a separate crime of aggravated battery specifying a particular victim. In 1989, the legislature created the crime of aggravated battery upon a school employee with the same elements and penalty as aggravated battery and different from aggravated battery only because of the additional element that the victim be a school employee. NMSA 1978, § 30-3-9(F) (1989). Aggravated battery upon a school employee is also not listed in the EMDA's definition of "serious violent defense." *See* § 33-2-34(L)(4).

{13} As we have recently stated, "the legislature appears to have carefully structured the EMDA." *McDonald*, 2003-NMCA-123, ¶ 23. As a matter of policy, the legislature could have considered the distinction that it created between the crimes of aggravated battery and aggravated battery on a household member and decided that it did not intend to include the latter within the EMDA. *See Bybee*, 120 N.M. at 20, 896 P.2d at 1167 (stating that even though result may seem contradictory, courts presume that the legislature knows the law and acts rationally); *see also* 7 Wm. & Mary J. Women & L. 383, 393 (2001), (discussing financial consequences to victim and children of prosecuting domestic violence crimes). We cannot conclude that the legislature made a mistake in its enactment of the EMDA.

Extension of Time for Trial

{14} Rule 5-604(B) of the Rules of Criminal Procedure provides that the trial of a criminal case shall begin within six months of the occurrence of the last of several events. In this case, the date of arraignment is the applicable event, and trial needed to commence on or before December 19, 2000. *See* Rule 5-604(B)(1) NMRA 2003. On December 8, 2000, the State filed a timely petition for an extension of time to bring Defendant's case to trial under Rule 5-604(E). The district court granted the extension on March 19, 2001, and the Supreme Court granted a second petition extending the time for trial until June 19, 2001. The trial was conducted on May 15, 2001. Our Supreme Court has recently held that a district court has the authority to rule on a timely-filed petition for an extension of time after the date required for the commencement of trial under Rule 5-604. *State v. Sandoval*, 2003-NMSC-927, ¶¶ 12, 17, ___ N.M. ___, ___ P.3d ___ [No. 27,881, slip op. at 6-7, 9-10 (N.M. Supreme Court Oct. 7, 2003)]

{15} Defendant contends that the district court abused its discretion in granting the petition for extension of time because trial did not proceed until almost one year from the date of the alleged incident. He asserts that he was prejudiced by the delay because he was incarcerated and because the victim was unavailable for a period of time.

{16} However, Defendant affirmatively waived his right to a timely trial under Rule 5-604. Trial was originally scheduled for September 21, 2000. The record shows that on September 20, 2000, Defendant apparently made a strategic decision that he needed more time for discovery and filed a stipulated motion for continuance of his trial. The motion for continuance stated that "[t]he defendant, though incarcerated, has no objection to a continuance nor to an extension but only wants to ensure he gets a fair trial[.]" In a later paragraph in the motion, Defendant again declared that "[t]here will be no opposition to an extension, if necessary." On the basis of this motion, the district court granted the continuance. Given the context and language of the motion, we determine that the reference to "an extension" is to an extension of time under Rule 5-604(C) and that Defendant waived the operation of the rule. *See State v. Eskridge*, 1997-NMCA-106, ¶¶ 11-12, 124 N.M. 227, 947 P.2d 502 (holding that defense attorney's oral representation that setting of plea hearing after expiration of time to commence trial was not a problem, constituted waiver of Rule 5-604(C) requirement).

{17} Moreover, Defendant does not challenge that there was good cause shown to grant the extension because the district court was unable to conduct trial before December 19, 2000. Rule 5-604(C). Nor does Defendant state the manner in which the inability to locate the victim for a period of time caused him prejudice. *See In re Ernesto M.*, 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318 ("An assertion of prejudice is not a showing of prejudice."). The district court did not err in granting the State's petition for an extension.

Sufficiency of the Evidence

{18} Defendant challenges the sufficiency of the evidence for his conviction of aggravated battery with a deadly weapon challenging the credibility of the victim by alleging that the victim was intoxicated on the night in question. He asserts that her testimony was insufficient to convict him.

{19} We review the sufficiency of the evidence under a substantial evidence standard. *State v. Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and citation omitted). We must determine whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime established beyond a reasonable doubt. *State v. Sanders*, 117 N.M. 452, 456, 872 P.2d 870, 874 (1994). We view the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all permissible inferences to uphold the conviction, and disregarding all evidence and inferences to the contrary. *State v. Salazar*, 1997-NMSC-044, ¶ 44, 123 N.M. 778, 945 P.2d 996. In making this determination, a reviewing court "does not weigh the evidence and may not substitute its judgment for that of the fact finder so long as there is sufficient evidence to support the verdict." *Sutphin*, 107 N.M. at 131, 753 P.2d at 1319.

{20} Relying upon *State v. Franklin*, 78 N.M. 127, 428 P.2d 982 (1967) and *State v. Boyer*, 103 N.M. 655, 712 P.2d 1 (Ct. App. 1985), Defendant suggests that if this Court were to reweigh the conflicting evidence in this case, we might find that a reasonable doubt existed in this case. However, as discussed, this standard is not the correct one for an appellate court. It is the role of the factfinder, in this case a jury, to resolve conflicts in the evidence. We have reviewed the record and arguments of counsel regarding Defendant's sufficiency of the evidence claim. The victim testified at trial and was subject to cross-examination. The testimony of the responding officers presented evidence that supported the victim's account of the evening's events. Defendant did not present any witnesses at trial. The evidence presented in this case supports Defendant's convictions for aggravated battery with a deadly weapon and battery.

Conclusion

{21} Third degree aggravated battery against a household member is not a serious violent offense under the EMDA. Defendant waived any claims under Rule 5-604, and there was sufficient evidence to support his convictions. We affirm Defendant's convictions. We reverse his sentence to the extent that it classifies Defendant as a serious violent offender under the EMDA. We remand for the district court to enter a proper sentence in accordance with this opinion.

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

JAMES J. WECHSLER, Chief Judge

WE CONCUR:

IRA ROBINSON, Judge

MICHAEL VIGIL, Judge

Certiorari Denied, No. 28,393, December 16, 2003
From the New Mexico Court of Appeals
Opinion Number: 2003-NMCA-151

U.S. BANK NATIONAL ASSOCIATION, as Trustee, Plaintiff,
versus
MARTIN ALFREDO MARTINEZ, et al., Defendants,

RONNIE G. BUSTOS, Petitioner-Appellant,
versus
DARRELL HALDERMAN and JOSEPH J. GARCIA,
Purchasers-Appellees.
No. 24,146 (filed: November 6, 2003)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
WILLIAM F. LANG, District Judge

LARRY M. REECER
LARRY M. REECER ATTORNEY AT LAW, P.C.
Albuquerque, New Mexico

EDWARD RICCO

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Albuquerque, New Mexico
for Appellant

SYLVAIN SEGAL
Albuquerque, New Mexico
for Appellees

OPINION

KENNEDY, Judge

{1} Petitioner Ronnie G. Bustos filed a petition for a certificate of redemption with respect to certain property under NMSA 1978, § 42-6-1 (1987). The trial court dismissed the petition as not timely filed and Petitioner appeals. We proposed to reverse in a calendar notice, and we received in response a memorandum in opposition from Purchasers Daniel Halderman and Joseph J. Garcia, and a memorandum in support from Petitioner. We have considered Purchasers' arguments and we are not persuaded by them. We therefore reverse.

{2} Purchasers bought a tract of land at a foreclosure sale. The trial court entered an order approving the sale; the order was filed on March 5, 2003. The order stated that the sale was "subject only to the equity of redemption, said redemption period being one (1) month." Petitioner filed a petition for certificate of redemption on Monday, April 7, 2003.

Purchasers responded to the petition by arguing that it was not timely filed, and should have been filed on or before April 4, 2003. The trial court agreed and denied the petition.

{3} The redemption period was reduced to one month under NMSA 1978, § 39-5-19 (1965), which allows a redemption period to be shortened "to not less than one month." The redemption statute does not provide guidance on how one month is to be calculated. Where there is no other meaning indicated in the applicable statute, the term "month" is construed to mean a "calendar month." *State v. Bishop*, 108 N.M. 105, 107, 766 P.2d 1339, 1341 (Ct. App. 1988). There is nothing in the applicable statute in this case that suggests that a "month" is anything other than a "calendar month." Unlike *Bishop*, however, the question in this case is not whether "month" means a calendar month or thirty days. The question before us is as follows: Does a "calendar month" run from a given date in one month, such as March 5, to that same given date in the next month, or April 5, or does it run from a given date in one month, such as March 5, to the date before that same date in the next month, or April 4? The question is crucial in this case because if the latter rule applies, April 4 occurred on a Friday and the attempt to redeem, filed on Monday, April 7, came too late. On the other hand, if the former rule applies, April 5 was a Saturday, and the petition to redeem was timely filed. *See* Rule 1-006(A) NMRA 2003 (discussing computation of time and when it is necessary to exclude Saturdays, Sundays, and holidays in the computation).

{4} Unfortunately, the authorities are not uniform on this question. Some courts hold that a "calendar month" runs from a given day in one month to the day with a corresponding number in the subsequent month. *See* 86 C.J.S. *Time* § 6 at 570-71 (1997). Other courts run a "month" from a given day in one month to the day *before* the corresponding day in the following month. *See* 74 Am. Jur. 2d *Time* § 8 at 576 (2001) (stating that a calendar month runs "from the beginning of a certain numbered day up to, but not including, the corresponding numbered day of the next month," but also noting that, under the Uniform Statute and Rule Construction Act, one month "ends on the day of the concluding month which is numbered the same as the day of the month on which an event determinative of the computation occurred"). In New Mexico, no opinion has addressed this question, and our appellate courts have given contrary indications as to how a redemption period should be calculated. *See, e.g.*, *Sun Country Sav. Bank v. McDowell*, 108 N.M. 528, 531, 775 P.2d 730, 733 (1989) (stating that one-month right of redemption expired on April 21, where order confirming foreclosure sale was filed March 22); *Reger v. Sanchez*, 77 N.M. 641, 642, 426 P.2d 786, 787 (1967) (stating that where property was sold at a foreclosure sale on October 22, 1962, the three-month redemption period expired on January 22, 1963).

{5} We believe the preferable rule is that a calendar month should run from the date of the court order triggering the right of redemption to the corresponding date of the subsequent month (or months, if the redemption period granted is more than one month). We reach this conclusion for three reasons. First, the legislature has strongly indicated a preference for this method of calculation, by enacting NMSA 1978, § 12-2A-7(C) (1997). This statute creates a general rule that, where a period of time is expressed in months in a statute, "the period ends on the day of the concluding month that is numbered the same as the day of the month on which an event determinative of the computation occurred." *Id.* Although this provision is not controlling in this case because the redemption statute predates Section 12-2A-7 (*see* NMSA 1978, § 12-2A-1(B)(1997)), we believe it to be good policy to follow the legislature's express intentions in the absence of controlling authority to the contrary.

{6} Second, the rule we adopt today conforms with the requirements of Rule 1-006(A). This provision states that when computing any period of time prescribed by a court order, the day of the order shall not be included. *Id.* In this case, for example, March 5 would not be counted in calculating the one-month redemption period, and one full calendar month would therefore include April 5. The same rule would apply to every redemption period expressed in months; the date of the court order triggering the redemption period would not be counted as part of that period, and the redemption period would expire on the date corresponding to the date of the order, in the subsequent month (or months, if more than one month was granted as a redemption period).

{7} Finally, the rule we adopt today is consistent with the common understanding of when a one-month period, beginning on a certain date, will expire. We believe most people would assume that if they were given one month from March 5 to accomplish a certain task, that month would expire on April 5, not April 4. This is a reasonable interpretation, and given that forfeitures are not favored in the law, our conclusion that this rule should be adopted is strengthened. *See Thomas v. City of Santa Fe*, 112 N.M. 456, 461, 816 P.2d 525, 530 (Ct. App. 1991) (noting that conditions in deed or contract should be construed to avoid forfeiture).

CONCLUSION

{8} Based on the foregoing, we hold that the one-month redemption period in this case, established by the trial court's order of March 5, did not expire until April 5. Since April 5 was a Saturday, the petition for certificate of redemption filed by Petitioner on Monday, April 7, was timely. We therefore reverse and remand to the trial court with directions to consider the petition as timely.

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

RODERICK T. KENNEDY, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
IRA ROBINSON, Judge

Certiorari Denied, No. 28,382, 28,385, December 12, 2003

From the New Mexico Court of Appeals

Opinion Number: 2003-NMCA-150

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
MARK RENDLEMAN and TIFFANY
MIA BARBOSA,
Defendants-Appellants.
and
STATE OF NEW MEXICO,
Plaintiff-Appellant,
versus
MARK RENDLEMAN and TIFFANY
MIA BARBOSA,
Defendants-Appellees.
and
STATE OF NEW MEXICO,
Plaintiff-Appellant,
versus
MARK RENDLEMAN,
Defendant-Appellee.
Nos. 22,129; 22,207 & 22,208 (filed: October 27, 2003)

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA
AND SANTA FE COUNTIES
Michael E. Vigil, District Judge

PATRICIA A. MADRID
Attorney General
M. ANNE KELLY
Assistant Attorney General
Santa Fe, New Mexico
for Appellee in Docket No. 22,229 and
for Appellant in Docket Nos. 22,207 & 22,208

PETER SCHOENBURG
JOHN L. SULLIVAN
ROTHSTEIN, DONATELLI, HUGHES,
DAHLSTROM, SCHOENBURG & ENFIELD, L.L.P.
Santa Fe, New Mexico

DAN CRON
DAN CRON LAW FIRM, P.C.
Santa Fe, New Mexico
for Appellant Mark Rendleman in Docket No.22,129 and
for Appellee Mark Rendleman in Docket Nos. 22,207 & 22,208

DANIEL R. MARLOWE
THE MARLOW LAW FIRM, P.C.
Santa Fe, New Mexico
for Appellant Tiffany Mia Barbosa in Docket No. 22,129 and
for Appellee Tiffany Mia Barbosa in Docket No. 22,207

OPINION

BUSTAMANTE, Judge

{1} The opinion filed in this case on September 18, 2003, is hereby withdrawn and the following submitted therefor. The motion for rehearing is denied in part and granted in part.

{2} These consolidated cases present difficult procedural and substantive issues surrounding the enforcement of New Mexico's Sexual Exploitation of Children Act (the Act). NMSA 1978, §§ 30-6A-1 to -4 (1984, as amended through 2001). Indicted for multiple alleged violations of the Act based on photographs and video taken by them, Defendants filed a pretrial motion to dismiss arguing that the material is protected by the federal and state constitutional guarantees of free speech. The district court dismissed some counts, but refused to dismiss others. Defendants appeal the district court's refusal to dismiss the entire case, while the State cross appeals arguing none of the counts should have been dismissed. Affirming in part and reversing in part, we address (1) the proper role of the trial court when considering a pretrial motion to dismiss an indictment on free speech grounds, (2) the nature of the conduct prohibited by the Act and the elements of proof required by the Act, and (3) the federal and state constitutional limits on prosecutions under the Act. Lastly, we will conduct our own review of the photographs.

{3} We affirm the district court's rulings on the criminal sexual contact and child abuse counts.

FACTS AND PROCEEDINGS

{4} Defendant Mark Rendleman is an artist and former art professor who resides in Embudo, New Mexico located in Rio Arriba County. Adjacent to his house, Rendleman has dug a labyrinth of tunnels and rooms into a hillside made of volcanic ash. Spanning over an acre of land, the "cave" contains carvings of human figures and designs that are sculpted into the walls, as well as freestanding works of sculpture and painting which Rendleman and several other artists have created. The cave has received public recognition in several articles and a film documentary.

{5} Rendleman's daughter, Defendant Tiffany Mia Barbosa, is a documentary and commercial film maker residing in Santa Fe with her husband. Barbosa was born to Rendleman and Elizabeth Stewart in 1975. Stewart is also the mother of two of the alleged victims in this case, a boy and a girl, who were born in 1985 and 1986

respectively. Barbosa is their half-sister. Rendleman had another daughter, with Leslie Drobbin in 1990, and she is the third alleged victim in this case.

{6} In three separate prosecutions by grand jury indictments in Santa Fe and Rio Arriba counties, Defendants Rendleman and Barbosa were charged with multiple counts of sexual exploitation of a child, criminal sexual contact of a minor, and child abuse. The charges were based on Defendants' conduct associated with photographing the three children in various states of undress.

{7} The boy and girl, who lived in California, first visited Rendleman at Embudo with their mother in 1995 when they were nine and eight years old. During this visit, Defendants took a series of photographs which are referred to as the "Cave Shoot Photos." According to the Defendants, the Cave Shoot Photos were taken in an effort to explore artistic themes of primitivism that Rendleman was interested in as an artist. These photos, approximately twenty-nine total, depict the boy and girl, with and without Rendleman, or individually, engaged in what has been described as "a stylized portrayal of primitive cave people." According to Rendleman, the Cave Shoot Photos reflect an effort to create images that have been incorporated into sculptures in the cave, including biomorphic thrones and totem poles, as well as visual repeating elements.

{8} A second group of materials, referred to as the "Family Photos," include various photos of the three children playing in the river, playing with a snake, and playing make believe games, as well as certain unidentified videos described, but not shown, to the Grand Jury. Most of the Family Photos were taken while the children were visiting Rendleman at Embudo between 1995 and 1999, although six (four of which are duplicates) were taken of his daughter at her mother's home in Santa Fe. The girls are essentially naked in the majority of these twenty or so photos, whereas the few shots of the boy depict him fully clothed.

{9} The Santa Fe grand jury indicted Rendleman, charging him with one count of sexual exploitation of his daughter, contrary to Section 30-6A-3(B) ("sexual exploitation") and one count of criminal sexual contact of a minor (the girl), contrary to NMSA 1978, § 30-9-13(A)(2)(a) (2001) ("CSC of a minor"). Rendleman was also charged in an indictment issued by the Rio Arriba grand jury with eighteen counts of sexual exploitation, eleven counts of CSC of a minor, contrary to Section 30-9-13(A)(1), and one count of abandonment or abuse of a child, contrary to NMSA 1978, § 30-6-1(B) (2001) ("child abuse"). The same grand jury also issued an indictment against Barbosa charging her with eight counts of sexual exploitation, eleven counts of CSC of a minor, and one count of child abuse.

{10} Defendants moved to dismiss all charges, arguing the State's prosecution was unconstitutional as applied to them. In particular, Defendants contended that prosecuting them for taking and possessing the photographs violated their rights to free speech under our state and federal constitutions. Defendants urged that their speech was protected under either an obscenity standard or child pornography standard. In their view, the photographs had artistic value and/or simply documented the children's daily activities and development for purely private family purposes and in a way that was not lewd or sexually explicit as proscribed by the Act. Section 30-6A-3. Defendants also argued that the charges should be dismissed because the Act failed to provide adequate notice that photographs taken for artistic purposes or private family purposes would constitute a crime. In a supplemental motion to dismiss, Defendants also asked that the criminal sexual contact of a minor charges be dismissed because any contact was incidental to free expression and, thus, constitutionally protected.

{11} Defendants asserted that the district court had a gate-keeping responsibility to make a threshold determination whether the photos and video were constitutionally protected expressions. The State acknowledged that the district court did have a gate-keeping role to determine whether the conduct fell within the Act as a matter of constitutional law, but argued that the Act narrowly prohibited specific conduct and fell within the parameters of the United States Supreme Court's decision in *New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, the Supreme Court held that sexually explicit material involving children was not entitled to First Amendment protection and that laws criminalizing production and distribution of such materials could constitutionally include visual images which would not be "obscene" under the three-part test of *Miller v. California*, 413 U.S. 15 (1973). *Ferber*, 458 U.S. at 760-61. In the State's view, there was no constitutional question presented here because the materials came within the outer limits of the Act, depicting the children in lewd and sexually explicit poses, frequently with exposed genitalia being the main focus. Thus, the State argued that the question of whether the conduct was criminal was simply a question of fact for the jury.

{12} The district court held a five-day evidentiary hearing on the motion to dismiss. The court took testimony from Defendants Rendleman and Barbosa, Leslie Drobbin, two expert witnesses in the arts, and a forensic psychologist. Rendleman testified about his personal history, education and training in psychology and the arts, as well as his professional experience as an artist, photographer, and former art professor.

{13} Rendleman testified that he was exposed to nudity in his family, at school, and in his artistic life and considered it an asexual or anti-sexual form of expression. His artistic interests included photo realism–the study of how photos affect perceptions. The Cave Shoot Photos were intended as studies for potential sculptures in his cave; they represented primitivism, including digging tools, thrones, and totem poles. These photos were taken with the children's mother's permission. The Family Photos were some of thousands of photos that Rendleman took, documenting the lives of his children. Rendleman and his daughter's mother testified that the photos were not taken for the purpose of sexual stimulation. Rendleman testified that the Family Photos were kept in their original commercial envelopes, in chronological order, in his home.

{14} Two art experts in relevant fields testified on Rendleman's and Barbosa's behalf about the visual artistic process and opined that the Cave Shoot Photos were artistic expression, much like the art work of commercially well-known photographers and were not made for the purpose of sexual stimulation. Another expert, a psychologist, testified for the State that while some of the photos were a mundane documentation of family life or related to artistic projects, some of them were very similar to child pornography collected by pedophiles. He had no opinion as to Defendants' purpose in taking the pictures. This expert also testified that a pedophile might be stimulated from materials ranging from hard core child pornography to commercial publications, or even a clothing catalog.

{15} Defendant Barbosa also testified

about her early childhood with her mother in California, her relationship with her father, her education and training in film making and visual anthropology, as well as her professional experience as a documentary and commercial film maker. She recalled early memories of her father always photographing everything, and from the first time she came to Embudo, nudity was a natural part of daily life.

{16} Following the hearing, the district court issued a decision with detailed findings and conclusions, ultimately dismissing the counts based on the Family Photos, but denying Defendants' request to dismiss counts based on the Cave Shoot Photos. Several of the findings described Defendants' upbringing and family life, which included an open appreciation for nudity and a nudist lifestyle. The district court also outlined Defendants' formal art education and art-related careers. In addition, the district court's findings acknowledged that many of the photographs for which Defendants are being prosecuted are similar to photographs taken by other well-known photographers and published in standard academic texts and books by art photographers.

{17} The district court described many of the photos that formed the basis for the criminal sexual conduct charges against Defendants in specific detail, but appeared to rely on the categorization of the photos as the Cave Shoot Photos and the Family Photos to make its final determination as to the sexual exploitation charges. Ultimately, this categorization determined how the district court resolved Defendants' motion to dismiss.

{18} With regard to the Cave Shoot Photos, the district court found that they presented a factual issue for a jury to resolve concerning whether they were taken for artistic purposes or for other purposes amounting to sexual exploitation of, or criminal sexual contact with, the children. Although the district court acknowledged that these photos were taken in a staged manner, it found that whether the children intelligently and voluntarily participated in the taking of them was also a question for the jury to decide. In light of these findings, the district court concluded that the counts related to the Cave Shoot Photos should not be dismissed because issues of fact existed concerning the purpose or reason why they were created and whether they have serious artistic value, are patently offensive, or appeal to the prurient interest according to prevailing community standards.

{19} With regard to the Family Photos, the district court found that they were clearly spontaneous, unstaged photos taken in an attempt to chronicle the ordinary daily events in the lives of the children, such as playing and bathing. The court further found that the photos do not involve real, simulated, or suggested sexual activity and do not evidence an intent to produce sexual activity. In light of these findings, the district court concluded that the "Family Photos" were not lewd because they simply "capture uninhibited moments of adolescent spontaneity." The district court also concluded the photos were not made for the purpose of sexual stimulation, but were fundamentally private family photos that were a legitimate effort by a parental figure to document the activity and development of his children. Finally, the district court concluded that the State lacked a legitimate interest in prohibiting the types of images reflected in the Family Photos because they represented the mere private possession of innocuous photographs of naked children. As a result, the district court dismissed all charges relating to the Family Photos.

DISCUSSION

I. Pretrial Motion

Preservation

{20} As a preliminary matter, Defendants argue that the State failed to preserve an objection to the district court's decision to hold a pretrial hearing. Defendants point out that the State agreed during the hearing that the district court had a gate-keeping role before the matter was turned over to the jury. The State responds that it did not waive the issue because it repeatedly argued that it was improper for the trial court to decide factual questions that were for the jury to decide. The record reflects that the State suggested the court could not review the sufficiency of the evidence to support the indictment, absent a showing of bad faith on its part, and that it was, therefore, inappropriate for the court to make factual findings as a means to dismissing portions of the indictment. As such, we find the State preserved the issue of whether the district court overstepped the bounds of its authority to dismiss portions of an otherwise valid indictment.

Analysis

{21} Supreme Court Rule 5-601(B) NMRA 2003 provides that "Any defense, objection or request which is capable of determination without a trial on the merits may be raised before trial by motion." The contours of the district court's power to conduct a pretrial hearing on a motion to dismiss charges brought under the Act on constitutional grounds under this Rule is a legal question of first impression in New Mexico. Questions of law are reviewed under a de novo standard. *State v. Roman*, 1998-NMCA-132, ¶ 8, 125 N.M. 688, 964 P.2d 852.

{22} The State generally argues that the district court has no authority to dismiss a valid indictment for insufficient evidence, absent a showing of bad faith. Since there is no claim of bad faith, the State contends that the prosecution has unfettered discretion, under separation of powers principles, to decide whether or not to prosecute and what to charge, so long as there is probable cause to support the charges. The State also asserts that the testimony it presented through its expert was sufficient to raise a factual dispute as to whether the photos were made for the purpose of sexual stimulation. The State concludes that the pretrial dismissal of charges for insufficient evidence was an improper ruling on factual questions that invaded the province of the jury. *See* NMSA 1978, § 31-6-11(A) (1981) ("The sufficiency or competency of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury."). As to the constitutional issues, the State again acknowledges the district court has some gate-keeping role to determine constitutional questions, but argues there was no threshold determination to be made in this case. The State argues, as it did below, that under *Ferber* child pornography, as defined by state law, is not protected speech, and whether Defendants' conduct falls within the Act is purely a question of fact for the jury. The State also argues that, even under an obscenity standard, pretrial review is not appropriate.

{23} Defendants counter that the constitutional protection of speech requires they be given a pretrial opportunity to show that the photographs are lawful and not lewd as a matter of law and constitutional fact. A pretrial opportunity to show the conduct was not sexual in nature, in Defendants' view, is essential to prevent chilling constitutionally protected expression. Defendants conclude a gate-keeping role is particularly appropriate where, as here, the State does not contend that overt sexual conduct is depicted, but rather

that the display involves a "lewd" display of the genitals.

{24} The State points to a number of cases from New Mexico that discuss the very limited extent to which a district court may override the State's decision to prosecute because of governmental misconduct. *See State v. Brule*, 1999-NMSC-026, ¶ 14, 127 N.M. 368, 981 P.2d 782; *Buzbee v. Donnelly*, 96 N.M. 692, 697, 634 P.2d 1244, 1249 (1981); *In re Jade G.*, 2001-NMCA-058, ¶¶ 21-25, 130 N.M. 687, 30 P.3d 376. However, Defendants do not argue that the prosecution here amounts to the type of governmental misconduct addressed in these cases. Accordingly, they are of limited value in trying to determine whether the district court acted properly in this instance.

{25} The State also cites to a number of cases holding that a district court may not dismiss an indictment in advance of trial by making factual determinations concerning the elements of the crime charged. *See State v. Eder*, 103 N.M. 211, 214-15, 704 P.2d 465, 468-69 (Ct. App. 1985); *State v. Masters*, 99 N.M. 58, 60, 653 P.2d 889, 891 (Ct. App. 1982); *State v. Mares*, 92 N.M. 687, 688-90, 594 P.2d 347, 348-50 (Ct. App. 1979). In *Mares*, for example, we reversed the district court's dismissal of an indictment charging the defendant with aggravated battery (firearm enhancement), holding that the lawfulness of the defendant's conduct was not capable of determination without a trial on the merits. *Id.* at 689, 594 P.2d at 349.

{26} These cases place appropriately sharp limits on judicial pretrial fact-finding. However, they are not directly relevant to our inquiry for two reasons. First, none of them involve free speech defenses to prosecution. Free speech defenses raise issues separate and apart from proof of the elements of a particular crime. *Roth v. United States*, 354 U.S. 476, 498 (1957) (Harlan, J., concurring in part and dissenting in part) noted that the "question whether a particular work is [obscene] involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind." Second, as we understand it, Defendants are arguing they are entitled to dismissal as a matter of law with no need to resolve any disputed questions of fact.

{27} New Mexico courts have held that under Rule 5-601(B) a court may rule pretrial on legal questions that involve predicate facts underlying the charges where those facts are undisputed. *See State v. Foulenfont*, 119 N.M. 788, 789, 895 P.2d 1329, 1330 (Ct. App. 1995); *see also State v. Ogden*, 118 N.M. 234, 239, 880 P.2d 845, 850 (1994). In *Foulenfont*, the defendant argued that the predicate facts underlying a burglary charge, entry of a fenced area, did not fit within the statutory definition of burglary. Distinguishing *Mares* where "lawfulness" was a factual issue, the Court noted there was no dispute that the burglary charges were predicated on the act of climbing the fence. *Foulenfont*, 119 N.M. at 789, 895 P.2d at 1330. Thus, the dispute focused on the legal issue of whether a fence came within the definition of "structure" in the burglary statute. We held that because the predicate facts were undisputed, the question of whether a fence was a structure under the burglary statute was purely a legal question. *Id.* at 790, 895 P.2d at 1331 (holding that a motion to dismiss an aggravating circumstance from a death penalty case could be decided pretrial if the issue could be decided as a matter of law).

{28} In cases under the Act, the prosecution relies primarily, if not solely, on documentary evidence, *i.e.,* the photographs. *See People v. Lewis*, 712 N.E.2d 401, 408 (Ill. App. Ct. 1999) (determination of whether photo is lewd can be made by "looking at the photo itself"); *People v. Bimonte*, 726 N.Y.S.2d 830, 836 (N.Y. Crim. Ct. 2001) (whether a photograph is lewd is "based on an analysis of the overall content of the visual depiction"); *accord United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989); *People v. Lamborn*, 708 N.E.2d 350, 355 (Ill. 1999). In some ways, the photos may be viewed as undisputed facts; absent other evidence, they may either meet certain statutory criteria on their face or they may not. *Compare Bimonte*, 726 N.Y.S.2d at 836 (looking only at the photographs), *with United States v. Knox*, 32 F.3d 733, 738, 745-46 (3d Cir. 1994) (looking at the photographs together with their promotional material proclaiming that although the subjects are clothed, the suggestiveness of their clothing and postures is "almost like seeing them naked (some say even better)," in ruling that nudity is not required to satisfy lascivious exhibition of genitals or pubic area portion of the statute).

{29} Section 30-6A-3(C) provides:

> It is unlawful for a person to intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any . . . visual or print medium.

The Act defines "prohibited sexual act" as including a "lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation." Section 30-6A-2(A)(5).

{30} For a photograph to be criminal under the Act, it must meet each of these criteria. If the photo does not meet statutory criteria on its face, it is not legally sufficient to uphold a conviction or support a prosecution. We agree that a determination of "lewdness" and "purpose" are essentially factual questions. However, in some instances the question of whether a photo focuses on the genitals or pubic area is apparent on the face of the photo and therefore can be dealt with as an undisputed fact—the photo either focuses on the area or it does not. If the photo does not focus on these areas, the question of intent is not reached. Thus, unlike *Mares* where the State's proffer of evidence highlighted the issue of lawfulness, the State expert's testimony regarding whether a pedophile might be stimulated by a photograph is irrelevant if the photo does not focus on the genitals or pubic area of the child.

{31} Accordingly, we hold that on a pretrial motion to dismiss charges alleging the sexual exploitation of children, the district court may dismiss the charges where, on the undisputed face of the materials before the court, a jury could not find beyond a reasonable doubt that the material meets the elements of the offense as defined by the Act. Under these limited circumstances, no practical purpose would be served by a trial on the merits, and "[d]ismissal [is] therefore an appropriate and effective means of promoting judicial efficiency . . . in light of the dispositive issue before the district court." *Foulenfont*, 119 N.M. at 790, 895 P.2d at 1331.

{32} As a constitutional matter, our precedent also supports a rule that the district court has a duty to conduct an independent review to ensure unprotected speech falls within the narrow limits of the Act and to ensure that protected speech is not criminalized. Contrary to the State's argument that it has discretion to charge whatever and whomever it desires, the separation of powers doctrine does not justify depriving a person of his or her constitutional rights. *See Brule*, 1999-NMSC-026, ¶¶ 14, 17 (recognizing in dicta

that the separation of powers principle would not "justify depriving a defendant of his or her due process right to be free from vindictive prosecution"). Rather, the court has a duty "to scrutinize charging decisions in limited appropriate cases that seek to circumvent . . . constitutional safeguards." *State v. Isaac M.*, 2001-NMCA-088, ¶ 15, 131 N.M. 235, 34 P.3d 624 (concluding the evidence did warrant dismissal on the basis of prosecutorial vindictiveness underlying prosecutor's decision to file information after grand jury returned no bill); *see State v. Smallwood*, 94 N.M. 225, 228-29, 608 P.2d 537, 540-41 (Ct. App. 1980) (reversing trial court decision to dismiss information on grounds of cruel and unusual punishment but implying that if constitutional defense were viable, dismissal would be proper); *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504-05 (1984) (noting special facts of constitutional significance in categories including child pornography imposes special responsibilities on courts to ensure speech falls within the narrow limits of the unprotected category and to confine the perimeters of the unprotected speech).

{33} The United States Supreme Court has held that while independent appellate review may be adequate to protect free speech values, "*no one* will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive `hard core' sexual conduct." *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974) (quoting *Miller*, 413 U.S. at 27) (emphasis added). Consequently, the Court has held that "[e]ven though questions of appeal to the `prurient interest' or of patent offensiveness are `essentially questions of fact,' . . . juries [do not] have unbridled discretion in determining what is `patently offensive.'" *Id.* Rather, a court has a duty to make a threshold determination of whether material that is alleged to be obscene is the type of hard core pornography that is unprotected speech. *Id.* at 160-61; *Bose Corp.*, 466 U.S. at 505. In doing so, the court evaluates the "special facts that have been deemed to have constitutional significance." *Id.* at 505. In other words, a court has a responsibility to review and determine whether the material cannot, as a matter of constitutional law, be found to be unlawful. *Id.*; *Jenkins*, 418 U.S. at 161; *United States v. Various Articles of Merch.*, 230 F.3d 649, 653 (3d Cir. 2000).

{34} The doctrinal and practical implications of the nature of the free speech defense in these cases is best encapsulated by Frederick F. Schauer, an early and respected commentator on obscenity law:

> Since [under *Jenkins*] there must be an independent legal determination of the issue of obscenity, it is appropriate that the issue may be decided in the context of a motion to dismiss the indictment, or similar motion, on the grounds that the material is not [unprotected speech] as a matter of law. Since this process of independent legal review by the court must occur at some point, there is no logical reason why it cannot occur prior to trial, thus saving the time and expense of a trial if the material is clearly constitutionally protected as a matter of law. . . . If it is clear that the material is not [unprotected] as a matter of law, then the indictment should be dismissed without the necessity of hearing extensive evidence. If the issue is close enough that the judge, in making his independent legal determination, desires the assistance of evidence other than the material itself, this is available during the trial itself. If, at that point, the judge feels that the material is constitutionally protected, he can direct a verdict before the case is actually given to the jury.

Frederick F. Schauer, *The Law of Obscenity* 149 (1976).

{35} We hold that when a defendant raises constitutional free speech defense to charges under the Act, the district court may conduct a limited pretrial review of the materials upon which charges rest to determine whether the materials meet constitutional requirements. *United States v. Pinkus*, 333 F. Supp. 928, 929 (C.D. Cal. 1971) (dismissing indictments because materials were not obscene as a matter of law under existing precedent); *United States v. New Orleans Book Mart, Inc.*, 328 F. Supp. 136, 140 (E.D. La. 1971) (refusing to dismiss indictments for transporting obscene material pretrial but acknowledging trial court responsibility "to make an independent constitutional judgment as to whether the material involved is constitutionally protected"); *People v. Biocic*, 224 N.E.2d 572, 574-75 (Ill. App. Ct. 1967) (upholding dismissal of indictment for sale of nudist magazine because magazines were not obscene as a matter of law).

{36} Our decision is consistent with article VI, § 1 of the New Mexico Constitution which has been interpreted to grant courts an inherent power to exercise authority essential to their judicial function and management of their caseload, even absent express statutory authority or court rule. *State v. Gonzales*, 2002-NMCA-071, ¶¶ 21-22, 132 N.M. 420, 49 P.3d 681; *In re Jade G.*, 2001-NMCA-058, ¶¶ 27-29 ("[A] court's inherent authority extends to all conduct before that court and encompasses orders intended and reasonably designed to regulate the court's docket, promote judicial efficiency, and deter frivolous filings.") (internal quotation marks and citation omitted). As guardians of the constitution, the function of the court is to enforce the rights it guarantees and further the intent of its provisions. *State ex rel. Udall v. Pub. Employees Ret. Bd.*, 120 N.M. 786, 793, 907 P.2d 190, 197 (1995); *see also Subin v. Ulmer*, 2001-NMCA-105, ¶ 13, 131 N.M. 350, 36 P.3d 441 (noting that courts, as guardians of the constitution, may order executive departments to make funding available without violation of separation of powers doctrine). Moreover, "[a]s long as the court's discretion in dismissing [cases] is limited and exercised with great caution, there is no separation of powers violation." *Gonzales*, 2002-NMCA-071, ¶ 22.

{37} Based on the foregoing, we articulate a two-prong inquiry for the district court to conduct on a defendant's motion to dismiss charges under the Act. As an initial matter, the district court should review the material to ensure it meets statutory guidelines. *Schlieter v. Carlos*, 108 N.M. 507, 510, 775 P.2d 709, 712 (1989) ("It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so."). The court then reviews the material to ensure constitutionally protected speech is not prosecuted. We will detail the nature and scope of constitutional pretrial review below.

{38} We emphasize that, as a pretrial matter, the question of whether the material meets *statutory* criteria is a limited inquiry. When considering whether material falls within the Act, as a pretrial matter, the district court may consider only the photos themselves. If the court finds the material depicts conduct proscribed under the Act, and after applying the standards set forth below, it passes constitutional muster,

the jury must decide disputed factual issues, such as whether the photo was taken for a sexual purpose or some other legitimate purpose. On the other hand, if the photograph does not depict the conduct proscribed by the Act, the court must dismiss any related charge of sexual exploitation as a matter of law.

II. Prohibited Conduct Under the Act

{39} Defendants argue that under the Act the photos must contain explicit sexual conduct that focuses on the genitals. Defendants also urge the Court to consider extrinsic evidence of their purpose in taking the photos. In contrast, the State asserts that photos of naked children with bare buttocks or genitals merely visible fall within the Act if a jury could find there was a sexual purpose behind the photo.

{40} We construe the Act to clarify its meaning and application, applying a de novo standard of review. *Morgan Keegan Mortgage Co. v. Candelaria*, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066. We disagree with the State's position that an appellate court may not engage in statutory construction before a trial on the merits. *State v. Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988) (discussing deferential role of appellate court in determining sufficiency of the evidence). Rather, we believe this Court can and must interpret the statute to clarify what conduct is prohibited. *See State v. Barragan*, 2001-NMCA-086, ¶ 24, 131 N.M. 281, 34 P.3d 1157 ("Although framed as a challenge to the sufficiency of evidence, Defendant's argument requires us to engage in statutory interpretation to determine whether the facts of this case, when viewed in the light most favorable to the verdict, are legally sufficient to sustain a conviction.").

{41} To begin our discussion, some historical context is appropriate. New Mexico's first law prohibiting the visual sexual exploitation of children appeared as a category of child abuse in 1978 and simply banned the "lewd exhibition of the genitals or pubic area." 1978 N.M. Laws ch. 103, § 1(A)(3)(e). In 1984, two years after *Ferber* was decided, our legislature made the sexual exploitation of children a separate crime and added the purpose prong, censuring the "lewd exhibition of the genitals or pubic area . . . *for the purpose of sexual stimulation*." 1984 N.M. Laws ch. 92, §§ 1 and 2(A)(5) (emphasis added). The definition was further refined in 1993 to read: "lewd *and sexually explicit* exhibition *with a focus on* the genitals or pubic area . . . for the purpose of sexual stimulation." 1993 N.M. Laws ch. 116, § 1(A)(5) (emphasis added). The 1993 amendment, under which Defendants were charged, was enacted one year after this Court held that the free speech provision of the New Mexico Constitution is broader than the First Amendment and restricts only "intolerable" obscene material. *City of Farmington v. Fawcett*, 114 N.M. 537, 546, 843 P.2d 839, 848 (Ct. App. 1992).

{42} The portion of Section 30-6A-2(A)(5) which defines the "prohibited sexual act" consists of three discreet elements: (1) "lewd and sexually explicit exhibition"; (2) "focus on the genitals or pubic area of any person"; (3) "for the purpose of sexual stimulation." Assuming that the legislature chose this language to comply with the federal and state constitutions and to narrowly limit and define the proscribed conduct, the language should be read together and each of these elements must be present for the conduct to be unlawful and unprotected speech. *State v. Cleve*, 1999-NMSC-017, ¶ 14, 127 N.M. 240, 980 P.2d 23 (stating that legislature is presumed to act with knowledge of relevant case law); *State ex rel. Haragan v. Harris*, 1998-NMSC-043, ¶ 23, 126 N.M. 310, 968 P.2d 1173 (Serna, J. dissenting) (stating that legislature is presumed to enact laws that are constitutional); *see also Ortiz v. Taxation & Revenue Dep't*, 1998-NMCA-027, ¶ 5, 124 N.M. 677, 954 P.2d 109 ("A strong presumption of constitutionality surrounds a statute."). If any one element is missing, a jury could not find, as a matter of law, that the defendant violated the Act. We, therefore, construe each element of the Act.

{43} In an effort to apply an objective standard to an otherwise subjective concept, most courts have adopted the "*Dost* factors" to help determine whether a photograph involving a child is lewd. *See United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Calif. 1986), *aff'd*, *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987). These factors include consideration of whether: (1) the focus is on the genital or pubic area; (2) the setting is sexually suggestive; (3) the child is depicted in an unnatural pose, or in inappropriate attire, considering the child's age; (4) the child is fully or partially clothed; (5) the depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) the depiction is designed to elicit a sexual response in the viewer. *Dost*, 636 F. Supp. at 832. *Dost* helps organize the review of visual material based on its overall content using the factors as objective criteria for the analysis. *Villard*, 885 F.2d at 122. While most courts have held that not all factors need be present, *see, e.g.*, *id.*, the Act expressly requires the first and last factor to be shown for a determination that the material is "lewd." *See* § 30-6A-2(A)(5). We adopt the *Dost* factors as an aid in the determination of whether a depiction is "lewd" under the Act. The *Dost* factors serve only to assist the court or the jury in an evaluation of the statutory elements, including whether it is a sexually explicit exhibition, what is its focus, and what is its intended purpose, which we address next.

{44} First, we clarify the phrase, "sexually explicit exhibition." An "exhibition" requires an objective showing, apart from the child's genitalia being merely visible. *See People v. Pinkoski*, 729 N.Y.S.2d 585, 588 (County Ct. 2001). Webster's defines "exhibition" as "showing, evincing, or showing off." To "exhibit" is to "show or display . . . outwardly esp[ecially] by visible signs or actions; . . . to have as a readily discernible quality or feature; [or] . . . to represent or make clear by a drawing, plan or other visual means." Webster's New Int'l Dictionary 796 (3d ed. 1986). The word "explicit" is "characterized by full clear expression; being without vagueness or ambiguity: leaving nothing implied: unequivocal" *Id.* at 801. In the context of the Act then, a "lewd and sexually explicit exhibition" means a visible display or readily discernible depiction of a child engaged in sexually provocative conduct. In other words, the photograph must be identifiable as hard-core child pornography; that is, it must display visible signs of sexual eroticism, rather than merely depict a naked child. This is consistent with the language of the Act which proscribes "lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation." Section 30-6A-2(A(5).

{45} In addition, the plain language of the Act requires the photograph to "focus on the genitals or pubic area." *State v. Johnson*, 1998-NMCA-019, ¶ 22, 124 N.M. 647, 954 P.2d 79 (rejecting interpretation of statute that would make parts of it mere surplusage or meaningless); *see State v. Javier M.*, 2001-NMSC-030, ¶ 32, 131 N.M. 1, 33 P.3d 1 (construing statute so that no part is surplusage). For the conduct to be unlawful, the depiction must clearly focus on the groin area of a child. Focus can be

determined by photographic elements, such as design, composition, lighting, positioning, attire, and setting.

{46} The most difficult element to articulate is the sexual purpose prong. The definition of the prohibited sexual act incorporates a specific intent element—the photo must be taken for the purpose of sexual stimulation. The question is, what standard do we apply to determine sexual purpose?

> Is this a subjective or objective standard, and should we [evaluate] the response of an average viewer or the specific defendant in [the] case? Moreover, is the intent to elicit a sexual response analyzed from the perspective of the photograph's composition, or from extrinsic evidence (such as where the photograph was obtained, who the photographer was, etc.)?

United States v. Amirault, 173 F.3d 28, 34 (1st Cir. 1999) (questioning standard used to determine whether photo is intended or designed to elicit sexual response in the viewer as the most confusing and contentious of the *Dost* factors).

{47} Under an objective standard, the central question is whether, based on the overall content of the photograph, a reasonable person could find the photograph was intended to elicit a sexual response. *Lewis*, 712 N.E.2d at 410. "Application of [an] objective standard requires [courts] to focus on the photograph itself, and not on the circumstances surrounding the taking of the photograph." *Lamborn*, 708 N.E.2d at 357. In short, "the pictures speak for themselves." *Lewis*, 712 N.E.2d at 410 (internal quotation marks and citation omitted).

{48} The premise behind an objective intent analysis is that child pornography is not created and the Act is not violated simply because a person derives sexual enjoyment from otherwise innocent photographs. *See Amirault*, 173 F.3d at 34 (doubting whether "focusing upon the intent of the deviant photographer is any more objective than focusing upon pedophile-viewer's reaction; in either case, a deviant's subjective response could turn innocuous images into pornography"); *Villard*, 885 F.2d at 125; *Wiegand*, 812 F.2d at 1245. Rather, the focus is on the harm to the child that flows from trespasses against the child's dignity when treated as a sexual object. *Id. United States v. Wolf*, 890 F.2d 241, 246 (10th Cir. 1989); *Villard*, 885 F.2d at 125; *see also Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1403 (2002) (reasoning that the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it" and legislation "cannot [be] constitutionally premise[d] . . . on the desirability of controlling a person's private thoughts.") (citation omitted). In other words, it is not a defendant's private reaction that transforms an innocent photo into a lewd exhibition, but rather the objectively ascertainable intended effect on the viewer. *Lamborn*, 708 N.E.2d at 355-56.

{49} Only if the photo itself raises a question of illegal purpose (if a jury could find it pornographic) should it be submitted to the jury to make a finding on the objective evidence and subjective intent of the photographer. At trial, the subjective motive of the photographer, the circumstances of the photography, and the use of the photo become relevant on the issue of intent. If the trial court believes it is useful and manageable, the *Dost* factors may be considered by the jury as evidence of sexual purpose. *See Villard*, 885 F.2d at 125 (noting that rather than being a separate substantive inquiry, the sixth *Dost* factor is a means to determine if any of the other factors are present); *see also State v. Saulsbury*, 498 N.W.2d 338, 344 (Neb. 1993).

III. Constitutional Limits on Prosecution Under the Act

{50} As a preliminary matter, Defendants argued below that the Act was void for vagueness as applied to them. However, Defendants do not raise a vagueness challenge on appeal. We, therefore, do not consider this issue. *See Fleming v. Silver City*, 1999-NMCA-149, ¶ 3, 128 N.M. 295, 992 P.2d 308 (holding issues raised in docketing statement but not argued in the brief in chief are deemed abandoned).

{51} We perceive three constitutional questions on appeal: first, whether our state constitution requires an obscenity standard be applied to Defendants under the 1993 statute or whether they may be prosecuted under the *Ferber* pornography standard; and second, if the constitution requires an obscenity standard, whether the *Miller* test is to be applied under the Act using the "intolerable" standard we articulated in *Fawcett*, 114 N.M. at 548, 843 P.2d at 850 and third, the nature and scope of the district court's gate-keeping role.

{52} The 1993 version of the Act under which Defendants are being prosecuted is silent on the issue of whether a general obscenity standard or a *Ferber*-derived child pornography standard should be applied to prosecutions under the Act. *See* 1993 N.M. Laws ch. 116, §§ 1, 2. After Defendants were indicted, the legislature amended the Act to incorporate an obscenity standard. *See* 2001 N.M. Laws ch. 2, §§ 1(E). As of 2001, the Act prohibits only obscene depictions of children under eighteen engaged in prohibited sexual acts or their simulation as defined under Section 30-6A-2(A). Section 30-6A-3(C). Adopting the *Miller* criteria for obscenity, the legislature defined "obscene" as "any material, when the content if taken as a whole: (1) appeals to a prurient interest in sex, as determined by the average person applying contemporary community standards; (2) portrays a prohibited sexual act in a patently offensive way; and (3) lacks serious literary, artistic, political or scientific value." Section 30-6A-2(E); *compare Miller*, 413 U.S. at 24.

{53} The State urges this Court to apply a *Ferber* pornography standard to the 1993 Act. Under *Ferber*, visual material depicting children can be criminalized even if it is not obscene. The trier of fact need not consider whether the material appeals to prurient interest or is patently offensive and need not consider the material as a whole. *Ferber*, 458 U.S. at 764. Moreover, any literary, scientific, artistic, or educational value of the work is viewed as de minimis, if not irrelevant, because of the State's overriding interest in protecting children. *Id.* at 762; *see also id.* at 774-75 (O'Connor, J. concurring). The State reasons that pretrial constitutional scrutiny by the district court is unnecessary under this standard so long as the visual material arguably falls within the statutory definition because constitutional free speech provisions are irrelevant.

{54} In contrast, Defendants urge us to apply the *Miller* obscenity standard as modified by *Fawcett*, 114 N.M. at 548 n.7, 843 P.2d at 850 n.7. In *Fawcett*, we held the New Mexico Constitution protects more speech than the First Amendment, and we therefore chose to apply a community "tolerance" standard, rather than the community "acceptance" standard articulated in *Miller*. *Fawcett*, 114 N.M. at 547, 843 P.2d at 849. In the same vein, Defendants assert that the Cave Shoot Photos cannot be deemed obscene on their face. Defendants base their argument largely on the extensive and essentially undisputed evidence they presented regarding artistic value—a prong we have held is particularly well-suited for determination by the courts. *See id* at 549, 843 P.2d at 851(dis-

cussing appellate court's role).

Federal Constitution

{55} *Ferber* was the first United States Supreme Court case to consider child pornography. There, the owner of an adult bookstore appealed his conviction under a New York child pornography statute for selling films that primarily depicted young boys masturbating. *Ferber*, 458 U.S. at 751-52. The defendant challenged the constitutionality of the statute because it did not require proof of obscenity. The Court held that under the First Amendment, photographs of children need not be obscene to be prohibited, so long as the standards used to define the category of banned speech were suitably narrow and an element of scienter was included. *Id.* at 764-65. The Court recognized that some states might find that the *Miller* test properly accommodates their interest in protecting the welfare of children. *Ferber*, 458 U.S. at 760-61.

{56} *Ferber* also recognized that even an otherwise constitutional child pornography statute may reach protected speech, but determined that "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions . . . may not be applied." *Id.* at 773 (internal quotation marks and citation omitted). In this respect, *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Ashcroft*, 122 S. Ct. at 1402 ("`[D]epictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.'") (quoting *Ferber*, 458 U.S. at 764-65)).

{57} We will not conduct a *Ferber* analysis here, however, because we reject the State's position that the Act is a *Ferber* statute. We base our rejection both on the fact that we have interpreted our state constitution to provide broader protection than the First Amendment and on the history of the Act. The history of the Act, as we have recited above, demonstrates that the legislature has consistently used wording derived from the *Miller* formula. Conversely, the legislature has not taken any steps to broaden the Act as *Ferber* would allow under the federal constitution. The progressive refinement of the Act indicates the legislature intended that the Act applied subject to an obscenity standard. The legislature's adoption of an express and defined obscenity standard in the current version of the Act supports our judgment in this regard. Evaluating the Act under the New Mexico constitution, we hold the Act is governed by an obscenity standard. *See State v. Nunez*, 2000-NMSC-013, ¶¶ 14-15, 129 N.M. 63, 2 P.3d 264 (reaffirming interstitial approach used in New Mexico such that only if the right being asserted is not protected by the federal constitution does the court analyze whether the right is protected by the state constitution).

State Constitution

{58} We turn next to consider whether New Mexico's constitution requires application of the *Fawcett* obscenity standard to the Act. Article II, § 17 of the New Mexico Constitution provides: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right . . . ." While "applicable precedents have determined that the protection of the federal and state constitutions are the same, at least with respect to content-neutral restrictions[,]" *State v. Ongley*, 118 N.M. 431, 432, 882 P.2d 22, 23 (Ct. App. 1994), *modified on other grounds by State v. Gomez*, 1997-NMSC-006, ¶ 32, 122 N.M. 777, 932 P.2d 1; *Stuckey's Stores, Inc. v. O'Cheskey*, 93 N.M. 312, 318, 600 P.2d 258, 264 (1979), this Court has interpreted our state constitution more broadly than the federal constitution with respect to content-based restrictions. *Fawcett*, 114 N.M. at 547, 843 P.2d at 849.

{59} Under the second prong of the *Miller* test, patent offensiveness is determined by what is "accepted" by the community as a whole. *Fawcett*, 114 N.M. at 546, 843 P.2d at 848. In *Fawcett*, we observed that "`[a]cceptance' is really the lowest common denominator, and may well limit dialogue on significant public issues beyond obscenity." *Id.* We also opined that the average person would probably find most obscene speech unacceptable, even though it is constitutionally protected. *Id.* We concluded that our state constitution required the community to find the material "intolerable" before it was deemed an abuse of speech. *Id.* In particular, we held that contemporary community standards should be judged by whether the average person or community would be tolerant of the materials in the possession of another, even though most members of the community might themselves be offended. *Id.* We observed that, "the tolerance standard better protects freedom of expression, and is the *only* standard which can truly satisfy article II, Section 17 of the New Mexico Constitution." *Id.* at 547, 843 P.2d at 849 (emphasis added) (internal quotation marks and citation omitted). "In order to be constitutionally sufficient, the definition of `patently offensive' must incorporate a standard which protects all but the most insufferable of sexually explicit material." *Id.* (internal quotation marks and citation omitted). Community tolerance thus determines whether the material is patently offensive. *Id.*

{60} Whether to apply the *Fawcett* intolerable standard to the Act presents a difficult and delicate question. The State correctly points out that the obscenity standard adopted in *Fawcett* is an adult pornography standard. The State's interest in protecting innocent children from sexual exploitation is far more compelling than its interest in protecting consenting adults. As noted above, the legislature has now incorporated the *Miller* test for obscenity in the Act. Section 30-6A-3(E). The legislature, however, did not define the appropriate "community standard."

{61} As *Ferber* held, the decision of how to regulate child pornography is a policy decision that is left to the states and limited only by the requirements of adequate notice. All right-thinking persons would agree that the "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Ashcroft*, 122 S. Ct. at 1399. With this in mind, we are confident that the community tolerance aspect of *Fawcett* will self-adjust to take the interests of children into appropriate account. What the community finds tolerable for adults will be a far cry from what it will tolerate when visual materials include children. Thus, we believe that *Fawcett*'s intolerance standard provides a workable model for patent offensiveness under the Act. The *Fawcett* obscenity standard appropriately ensures the state's interest in protecting children from abuse is satisfied while at the same time remaining sensitive to our free expression values. Rather than isolate the 1993 version of the Act, we hold that the 1993 Act under which Defendants were prosecuted must be applied subject to a *Fawcett* obscenity standard.

Constitutional Gate-Keeping Role

{62} Having found the *Miller/Fawcett* obscenity standard applies to the Act, we must next address the nature and scope of the district court's role as a constitutional gate-keeper to determine whether the court's ultimate decision was proper in this

case. In addressing the appellate standard of review to be applied in obscenity cases, the *Fawcett* Court recognized that "the first two prongs of the three-prong test are primarily factual issues to be judged by contemporary community standards," applying an intolerable standard. *Fawcett*, 114 N.M. at 548, 843 P.2d at 850. What is patently offensive is measured by what conduct is specifically defined under the statute. *Id.* at 548 n.7, 843 P.2d 850 n.7. However, we also noted that courts have "at least equal expertise and authority" to determine whether material has serious value under the third prong. *Id.* at 549, 843 P.2d at 851. Thus, *Fawcett* holds that appellate courts must conduct an independent review, giving some deference to the jury's findings on the prurient interest and patently offensive prongs, but not on the "value" prong. The ultimate question to "be asked is not whether the materials are obscene, but whether the materials create a jury issue as to obscenity." *Id.* (internal quotation marks and citation omitted).

{63} The *Fawcett* formulation provides guidance as to the district court's standard of review as gate-keeper. The district court may entertain a pretrial motion—or a motion for directed verdict—addressing all three prongs, but it must keep in mind the inherently factual nature of the inquiry involved in the questions. As to both inquiries, the district court must satisfy itself that no reasonable juror could find beyond a reasonable doubt that the material, taken as a whole, appeals to prurient interests or is patently offensive. The *Dost* factors may be employed in making the determination.

{64} To withdraw the third *Miller* prong from the jury, the trial court must be able to say that no rational juror could conclude beyond a reasonable doubt that the material, taken as a whole, lacks serious artistic, scientific, political, or other social value. *See* Schauer, *supra* at 150. The value of a work of art is based on a national standard and does not vary between communities. *Fawcett*, 114 N.M. at 549, 843 P.2d at 851. For a work to have artistic value, "there must be the presence of an `idea' as a predominant part of the work, not necessarily in terms of underlying purpose." Schauer, *supra* at 145. Given the inherent difficulties of such an evaluation, and to assist the trial court in determining a national standard of artistic, scientific, political, or other social value, expert testimony is admissible in support of or in opposition to a motion to dismiss. However, if it appears that this issue will lead to a "battle of experts," the district court should reserve the issue for determination at trial.

{65} We find one federal case particularly helpful in illustrating how an obscenity standard would be applied to photographs of naked children. In *Various Articles of Merchandise*, the owner of a bookstore was charged under federal obscenity law for importing adult nudist magazines which contained numerous photographs of nude children. 230 F.3d at 651. Applying a *Miller* obscenity standard, the court found the photographs of "[c]hildren . . . swimming, boating, exercising, playing with beach balls, having picnics, swinging on jungle gyms, building sand castles, riding bicycles, playing guitar, riding horses, and playing such sports," primarily focused on children's activities, not on the children's bodies. *Various Articles of Merch.*, 230 F.3d at 655. Although the court held that the first two prongs are primarily factual, the appellate court conducted an independent review of the photographs on their face, finding they lacked any indicia of prurient appeal or patent offensiveness. The circuit court found that photographs of nudist children engaged in typical childhood activities did not satisfy the prurient interest prong of *Miller*. *Various Articles of Merch.*, 230 F.3d at 655. The circuit court then looked at the photographs to determine whether they depicted a "lewd exhibition of the genitals" which was prohibited by law. The court found that many of the photos did not depict genitalia at all and those that did, did not "exhibit" or "show off" the genitals, the exposure of genitalia was only incidental to the children being naked. *Id.* at 656-57. Rather than the hard core sexual conduct required for photographs to be patently offensive, the court found none could be deemed lewd by any standard—the children were smiling, happy, playful, and not posed in a way suggestive of moral looseness. *Id.* at 657. The only unusual aspect was that the children were nude and "nudity alone is not enough to make material legally obscene under . . . *Miller*." *Id.* (quoting *Jenkins*, 418 U.S. at 161).

IV. Propriety of District Court Ruling[1]

Standard of Review

{66} In *Fawcett* we held that an independent review of the record for substantial evidence was appropriate in obscenity cases on appeal after trial. 114 N.M. at 549, 843 P.2d at 851. However, in pretrial rulings such as we have here, the question is whether the material depicts conduct that cannot be considered obscene as a matter of statutory or constitutional law. We, therefore, review the photographs de novo under the guidelines articulated above.

Family Photos

{67} The district court issued the following conclusions of law:

> C. The "family photos" shown to the Santa Fe and Rio Arriba Grand Juries are fundamentally private family photos. The "family photos" are not lewd in that they merely capture uninhibited moments of adolescent spontaneity. The family photos were not made for the purpose of sexual stimulation.
>
> D. The "family photos" represent protected expression under the New Mexico Constitution. N.M. Const. Art II, Section 17.
>
> E. The State lacks a legitimate interest in [proscribing] Defendant Rendleman's conduct in creating the images reflected in the "family photos" in that the photographs represent the mere private possession of innocuous photographs of naked children.
>
> F. The "family photos" were a legitimate effort by a parental figure, someone who was also an artist, to document the activity and development of his children.

The court based its conclusions, in part, on the photos themselves noting:

> The "family photos" are all clearly spontaneous with the children many times laughing and smiling and apparently under no direction to pose for the photos. The photos also appear to be an attempt to chronicle the different events such as the children playing in the river, playing with a snake, bathing, and playing make believe games, e.g. pretending to

[1]A matrix relating grand jury exhibits to charged counts, plus the district court's ruling is attached as Addendum A.

> be dogs. . . . The "family photos" do not involve real, simulated, or suggested sexual activity or evidence of intent to produce sexual activity.

{68} The Rio Arriba County Grand Jury charged Rendleman with three counts of sexual exploitation of the children in 1996 (counts 18-20), three counts of sexual exploitation of the children in 1997 (counts 21-23), two counts of sexual exploitation of the girl in 1998 (counts 24 and 25), and two counts of sexual exploitation of the girl in 1999 (counts 29 and 30). Counts 24 and 25 are based on grand jury exhibits 33-46, and counts 29 and 30 are based on grand jury exhibits 47-50. The grand jury also charged Barbosa with two counts of sexual exploitation of the girl in 1998 (counts 18 and 19) based on grand jury exhibits 33-46.

{69} The district court found that counts 18-23 were based on testimony presented to the Rio Arriba Grand Jury that Rendleman had videotaped the children nude during the summers of 1996 and 1997. Counts 18-23 were ultimately dismissed because of the trial court's categorizing the videos as "family photos." On appeal, the parties do not discuss the videotapes that form the basis of counts 18-23 in their briefs, nor do they cite to anywhere in the record where such evidence has been identified, let alone considered by the district court at the hearing on the motion to dismiss. Because of the limited record before us, we cannot determine whether the material that forms the basis of counts 18-23 meets statutory and constitutional standards. Consistent with our decision that each count must be analyzed in terms of the content of the depiction charged, we conclude that the district court erred dismissing counts 18-23 on the ground that they involved "family photos." Accordingly, we reverse the dismissal of counts 18-23 and remand this matter to the district court for reconsideration of these charges in accordance with the standards outlined in this opinion.

{70} Grand jury exhibits 33-46 consist of fourteen "family" photos which form the basis of six counts of sexual exploitation of the girl against Rendleman and six counts of sexual exploitation against Barbosa, although there is no break down as to which photos correlate to the specific counts. Exhibits 33-36 are four pictures of the girl, fully clothed, playing with a snake as it crawls out of her pants. In one photo, the girl is touching the snake with her index finger as if she is guiding it out; in another, the boy, who is laughing, grabs it. Although there is sexual innuendo with the snake crawling out of the girl's fly, there is no suggestion of "simulated" sexual behavior, the photos were taken in a nonsexual setting—the livingroom, and the children do not appear posed but are instead playing. Having failed to meet statutory requirements, we find these photos must be dismissed as a matter of law and affirm the court's decision to dismiss any related counts of sexual exploitation.

{71} The remaining ten exhibits, 37-46, depict the girl playing with Rendleman's daughter and the boy. Exhibit 38 is a side shot of the girl crawling on the livingroom floor and contains absolutely no visible display of her genitalia or pubic area. Similarly, exhibit 43 is a side shot of the girl crawling over Rendleman's daughter to get a bean bag chair. Both girls are naked in the living room, but no genitalia or pubic area is visible. In seven other photos, the girl and Rendleman's daughter are playing naked on the kitchen counter. The girl's groin area is not visible in exhibits 37, 40, 44, and 45. Rather, she is playing with Rendleman's daughter, holding a dollar bill over her mouth, or kneeling beside his daughter and the boy who has a hat on his head and is fully clothed. In exhibit 42, the girl is kneeling on the counter, her genitalia are just barely visible, and she turns her head to the camera with an open mouthed laugh. Rendleman's daughter is beside her, naked except for a hat pulled over her face, and the boy is in the foreground, fully clothed and smiling. The girl is not even in photo 41.

{72} The only two photos where the girls' genitalia are arguably the focus of the camera are exhibits 39 and 46. Exhibit 39 depicts Rendleman's daughter and the girl on their hands and knees on the kitchen counter. The shot is from behind; the girl is looking ahead, while the daughter turns laughing at the camera. In exhibit 46, the girl and Rendleman's daughter are standing on the kitchen counter naked, bent over with their faces full of laughter between their knees facing the camera. Their genitalia are fully exposed and appears to be the central focus of both photos.

{73} Under a statutory analysis, we find exhibits 37-38 and 40-45 do not raise a jury question on the issue of sexual exploitation in that they fail to meet minimal statutory standards. We find exhibits 39 and 46 fall within the statute. Under a constitutional analysis, when viewed as a whole, the dominant theme of the Family Photos is the documentation of adolescent spontaneity. Even in this context, however, given the unusual focus on the girls' genitalia in exhibits 39 and 46, a reasonable juror could find these two photos were intended to appeal to prurient interests or that they are patently offensive.

{74} The State's evidence that five of the fourteen photos could be sexually stimulating to a pedophile fails to raise a disputed issue of fact. Under an objective standard, the subjective response of a pedophile is not relevant to a determination of sexual purpose. Moreover, the standard is measured by the reasonable person, not the reasonable pedophile. Accordingly, we affirm the district court's ruling that any charges of sexual exploitation that are based on exhibits 37-38 and 40-45 must be dismissed. We reverse that decision with respect to any charges of sexual exploitation that are based on exhibits 39 and 46.

{75} Grand jury exhibits 47-50 consist of three pictures of the girl playing at the river and one picture of her standing at a coffee table with her underpants pulled down, partially exposing her buttocks to the camera. In the river shots the girl is covered in mud, either sitting in a raft, which is also covered in mud, or standing next to the river playing with the mud. Her genitalia and pubic area are not visible in any of these photos, and in one, it appears she is wearing underpants, although the mud distorts the photo substantially. As such, we find these photos fail to meet statutory criteria and must be dismissed as a matter of law. Accordingly, the dismissal of counts 29 and 30 as to Rendleman are affirmed.

{76} The Santa Fe County grand jury charged Rendleman with one count of sexual exploitation of his daughter in 1996 based on grand jury exhibits 1-6. In exhibits 3 and 5, she is shown standing in a bubble bath, wearing nothing but a giant pair of green, plastic sunglasses. Her pubic area, while visible, is clearly not the focus of this photo. Exhibits 3 and 5, therefore, fail to raise a jury question on the issue of sexual exploitation and must be dismissed as a matter of law.

{77} The remaining four photos are, in fact, two sets of duplicates. Exhibits 1 and 6 are duplicate pictures of Rendleman's daughter crawling on her bedroom floor. The shot is taken from behind, her legs are spread and genitalia are visible, if not the focus of the picture. Exhibits 2 and 4 are duplicate pictures of his daughter, leaning back on her bed, grabbing her feet. She is

wearing only socks and her genitalia are visible if not the focus of the photo. Both sets of pictures raise an issue as to purpose and the predominant theme is not readily apparent on the face of these photos, perhaps because they are taken out of context. Accordingly, we reverse the district court's decision dismissing these photos. Of course, Rendleman can introduce any and all photos that were taken in this series to establish his defense.

Cave Shoot Photos

{78} The district court refused to dismiss counts 1-3 and 12-14, as to Rendleman, and counts 1-6, as to Barbosa. Both indictments alleged three counts of the sexual exploitation of the girl and three counts of the sexual exploitation of the boy based on grand jury exhibits 12-32. In refusing to dismiss the Cave Shoot Photos, the district court issued the following conclusions of law:

> G. The material contained in the "cave shoot photos" presents a factual issue as to whether these photographs have serious artistic value or not, and/or whether or not they are patently offensive or of prurient interest according to prevailing community standards.
>
> H. Where serious questions of fact exist, they cannot be decided on constitutional grounds alone. The "cave shoot photographs" raise fact issues concerning the purpose or reasons why these photos were created and will turn on the issue of credibility and, therefore, should be decided by a jury. *City of Cincinnati v. Contemporary Arts Center*, 57 Ohio Misc.2d 9,15, 566 N.E.2d 207 (1990).
>
> I. The "cave shoot photographs" may meet the statutory requirement of NMSA 30-6A-2
>
> ....

{79} Initially, we note that exhibits 30-32 were taken outside the cave, and bear no resemblance to the Cave Shoot Photos, in general. Exhibits 31 and 32 are photos of Barbosa (we assume) with the girl and boy. Both children are naked and covered in mud, while Barbosa is partially clothed in a skirt and her breasts are covered in mud. One shot is taken from the front and the second is taken from behind. The third photo, exhibit 30, we assume is a depiction of the two children, although only their naked buttocks are shown, covered in mud. None of these photos focus on the genitalia or pubic area; in fact, the area is barely visible, if at all. Having failed to meet the "focus" element, any related charges upon which these photos are based must be dismissed as a matter of law.

{80} The remaining photos, exhibits 12-29, present particularly difficult questions. The first problem we perceive is that there are twenty-nine Cave Shoot Photos before us. Eleven of these, exhibits 1-11, were charged as criminal sexual contact, whereas the other eighteen, exhibits 12-29 were charged as sexual exploitation. Thus, the photos that are charged as sexual exploitation are isolated from the work as a whole. The second problem is that at least eleven of the eighteen photos (exhibits 12-18, 20, and 27-29) do not depict or focus on the groin area. In this respect, the district court erred in concluding that these photos "may meet statutory requirements." These photos cannot form the basis of any charges, and accordingly, any counts that rely solely on these exhibits to support a charge of sexual exploitation should be dismissed. To the extent genitalia or pubic area are displayed in the remaining seven photos, the judge should have considered all of the Cave Shoot Photos as a complete "work," including the photos that constitute the criminal sexual contact charges, as well as the twelve photos we reject above.

{81} Defendants argue that the photos were consistent with their overall theme of primitivism that were part of the artistic process used to create sculptures for the cave. One of their experts testified on the use of the human form in photography, the artistic process, and the similarity of the Cave Shoot Photos to widely disseminated commercial publications. She opined that the themes in Rendleman's artwork reflected an interest in natural forms and the connection between organic and inorganic forms. The photos reflected this theme and, in particular, the totem and throne images appeared to be a model or study for ongoing works of art in the cave. Defendants' other witness, an expert in contemporary art history, studio practice, and artistic expression, further opined that the photos were related to the sculptural elements of the cave. The State's evidence was limited to the photos themselves and its expert's testimony that a pedophile might be stimulated by six of these twenty-nine photographs. As we noted above, his testimony is of limited, if any, value in this context in that he was unable to testify regarding Defendants' purpose in creating any of these images.

{82} We find that the predominant theme of primitivism and connection between organic and inorganic form is reflected in the Cave Shoot Photos, and that many of these photos appear to be models or studies for ongoing works of art in the cave. Others appear to be spontaneous shots of the children playing like cave people, digging in the dirt, climbing the cave walls, playing dead, and playing with a bear, each of which is related to the overall theme of primitivism. Only one picture of the girl (Exhibit 8), covered in oil, lying back on a metallic sheet of sorts, is clearly posed. This photo was charged as a criminal sexual contact. Despite their context, however, we cannot say that the seven photos that remain before us must be dismissed as a matter of constitutional law. Six of these photos, exhibits 19 and 22-26, depict the children playing but in each of these photos their genitalia is fully exposed, if not "exhibited." The seventh photo, exhibit 21, is a "throne" photo showing the girl as part of the "seat" with her legs spread and facing the camera. Given the questionable focus of these photos, a rational juror might find they were designed to appeal to prurient interests or that they are patently offensive and that the other photos were merely a pretext or cover for obscene material. We, therefore, reverse the district court judgment refusing to dismiss the Cave Shoot Photos to the extent that exhibits 12-18, 20, and 27-32 were relied on to sustain charges of sexual exploitation. We affirm the decision to prosecute charges of sexual exploitation with respect to exhibits 19 and 21-26.

{83} To summarize, we affirm the ruling of the district court dismissing the Rio Arriba indictment with respect to sexual exploitation counts 24, 25, 29, 30 against Rendleman and sexual exploitation counts 18 and 19 against Barbosa, except as to any counts that rely on exhibits 39 and 46. As to counts 18-23, we reverse the dismissal of all counts charging sexual exploitation by videotaping the children and remand to the district court for reconsideration..

{84} As a final note, we assume that counts 26-27 were otherwise disposed of since the amended decision of the district court did not discuss these counts. In the event that these counts were overlooked, the district court may review these counts consistent with this opinion.

{85} We reverse in part the district court's decision to deny the motion to dismiss the Rio Arriba indictment with respect to

counts 1-3 and 12-14 against Rendleman and counts 1-6 against Barbosa and hereby dismiss those counts to the extent that they rely on exhibits 12-18 and 27-32. We affirm the court's decision as to any remaining counts that rely on exhibits 19 and 21-26. We also reverse the dismissal of Santa Fe County indictment, count 1 against Rendleman, but affirm the court's decision to reject grand jury exhibits 3 and 5 as a matter of law. As noted above, Rendleman can introduce any and all photos taken during this "session" in aid of his defense so that the court or jury may consider the material as a whole.

V. Criminal Sexual Contact of a Minor and Child Abuse

{86} The district court dismissed both counts of child abuse of the boy against Rendleman (count 28) and Barbosa (count 20). According to the court, these counts were based on Family Photos, exhibits 37-46, in which the fully clothed boy was present with the girl and Rendleman's daughter who were naked. The court found that Barbosa was responsible for the children at this time, gave Rendleman permission to take these photos, and was present in one photo in which the girl and his daughter were being photographed nude.

{87} The district court refused to dismiss eight counts of criminal sexual contact of the girl and three counts of criminal sexual contact of the boy. These counts were based on the Cave Shoot Photos, exhibits 1-11, in which Rendleman is shown in various poses with the children, primarily the totem pole and throne poses, in which their genitalia touches Rendleman. According to the district court, there was testimony that the oil used to cover the girl in the remaining two photos was applied by Rendleman.

{88} Neither party has argued or briefed these issues on appeal. We, therefore, deem them to be abandoned. *See Fleming*, 1999-NMCA-149, ¶ 3. To the extent Rendleman asserts, without reference to any authority, that the touching was merely incidental to protected First Amendment expression, that is not our understanding of the law. States have greater leeway to regulate physical conduct than to suppress depictions or descriptions of the same behavior. *Miller*, 413 U.S. at 26 n.8. The regulation of conduct which embodies both speech and nonspeech elements is justified, so long as they are unrelated to the suppression of free speech and the least restrictive means available. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). Accordingly we affirm the district court decision with respect to Rendleman, counts 4-11, 15-17, and 28 and with respect to Barbosa, counts 7-17 and 20.

CONCLUSION

{89} This matter is remanded to the district court for further proceedings not inconsistent herewith.

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

MICHAEL D.
BUSTAMANTE, Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
LYNN PICKARD, Judge

Certiorari Denied, December 16, 2003

From the New Mexico Court of Appeals

Opinion Number: 2003-NMCA-152

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
KURT DEWAYNE FAIRRES,
Defendant-Appellant.
No. 22,652
(filed: November 13, 2003)

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
William P. Lynch, District Judge

PATRICIA A. MADRID
Attorney General
MARGARET MCLEAN
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

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

OPINION

WECHSLER, Chief Judge

{1} Defendant Kurt Dewayne Fairres pleaded no contest to possession of methamphetamine, reserving his right to appeal the district court's denial of his motion to suppress. On appeal, Defendant challenges the denial of the motion to suppress as well as his enhanced sentence as a habitual offender. We uphold the district court's denial of the motion to suppress, but reverse Defendant's sentence because the district court applied the habitual offender statute, NMSA 1978, § 31-18-17(B) (1993), to a conditional discharge granted under NMSA 1978, § 30-31-28(A) (1972) of the Controlled Substances Act.

Motion to Suppress

{2} On November 25, 2000, Detective Rodney Morris of the Roswell Police Department responded to a call that shots had been fired at a residence where Defendant was a visitor. After Detective Morris entered the residence and while he was waiting for the homeowner in the living room, he observed a plate on the living room floor with marijuana and drug paraphernalia on it. He arrested the homeowner for possession of the marijuana and searched him, finding a substance later identified as methamphetamine. He informed those present in the house that he was investigating both the "shots fired" call and the possession of the illegal drugs. Additionally, he informed them that he was going to apply for a search warrant and that they were not free to leave the house. Officer Brad MacFadden arrived at the residence and also observed the marijuana on a plate in the living room. Defendant then asked if he could be searched and allowed to leave. Officer MacFadden searched Defendant and found a white, powdery substance he suspected to be illegal drugs in Defendant's wallet. Defendant was arrested and gave a statement at the police station, admitting that the substance was methamphetamine and explaining that the loud noise at the house that was the subject of the "shots fired" call was caused by his igniting a large firecracker and blowing up a cordless drill.

{3} On appeal, Defendant contends that the district court erred in not granting the motion to suppress by ruling that: Defendant does not have standing to contest the police entry; the police officers had a reasonable basis to believe that Defendant had a connection to the premises or to criminal activity; Defendant voluntarily consented to the search; and the scope of the search did not exceed Defendant's consent. Defendant's arguments raise mixed questions of law and fact, which we review de novo, weighing the facts in the manner most favorable to the State as the prevailing party. *State v. Attaway*, 117 N.M. 141, 145-46, 870 P.2d 103, 107-08 (1994); *State v. Chapman*, 1999-NMCA-106, ¶ 12, 127 N.M. 721, 986 P.2d 1122.

{4} Defendant argued to the district court that he was subject to an illegal search and seizure because the police officers did not have a right to enter the residence without a warrant and no exigent circumstances existed to permit the entry. The district court's conclusion that Defendant did not have standing to object to the officers' entry depends upon whether Defendant had a reasonable expectation of privacy within the residence. *State v. Wright*, 119 N.M. 559, 562-63, 893 P.2d 455, 458-59 (Ct. App. 1995). A reasonable expectation of privacy is constitutionally protected. *Id.* at 563, 893 P.2d at 459. To establish his standing, Defendant must show subjectively, by his conduct, that he had an expectation of privacy, and objectively that his expectation was reasonable. *Id.*

{5} Detective Morris testified that when he arrived at the residence, the front door was open, but the accompanying screen door was closed. One person walked to the doorway, saw him, and returned to the back of the house. A second person came to the door and held the screen door open. As this person called for people from the back of the house, including the homeowner, Detective Morris stepped inside. The homeowner and four other persons, including Defendant, returned to the living room.

{6} In *Wright*, this Court held that a person has a reasonable expectation of privacy in another's house, in a bedroom, with the door closed. *Id.* at 563-64, 893 P.2d at 459-60. In this case, Defendant was among the group of people in the living room in the presence of marijuana. He did not make any specific showing concerning his expectation of privacy. The record supports the district court's determination that Defendant did not have a reasonable expectation of privacy and therefore did not have standing to contest Detective Morris's entry.

{7} Defendant further maintains that the police did not have a reasonable basis to connect Defendant to the residence or the criminal activity and thus could not detain him. In *State v. Graves*, 119 N.M. 89, 888 P.2d 971 (Ct. App. 1994), relied on by Defendant, this Court addressed the rights of visitors during the execution of a search warrant. We held that visitors cannot be detained unless there is a reasonable basis to believe that the visitor is connected to the premises or to criminal activity based on the totality of the circumstances. *Id.* at 92, 94, 888 P.2d at 974, 976. The same principle applies when a police officer has a valid basis to be on private property by consent without a warrant. *State v. Cassola*, 2001-NMCA-072, ¶ 14, 130 N.M. 791, 32 P.3d 800. Although Defendant argued in district court that *Graves* does not apply because Detective Morris was not lawfully present in the living room, he does not make this argument on appeal. We therefore assume, without deciding, that Detective Morris had a valid basis to be present. *See English v. English*, 118 N.M. 170, 175, 879 P.2d 802, 807 (Ct. App. 1994) (stating that issues not argued on appeal are deemed abandoned).

{8} "[A] police officer may detain a person in order to investigate possible criminal

activity, even if there is no probable cause to make an arrest," based on reasonable suspicion that a crime is being or has been committed. *State v. Cobbs*, 103 N.M. 623, 626, 711 P.2d 900, 903 (Ct. App. 1985). Such reasonable suspicion is subject to an objective test based upon specific articulable facts and reasonable inferences from those facts. *Id.*

{9} Detective Morris observed Defendant in the living room in the presence of illegal drugs and drug paraphernalia. Although the investigation did not originally involve drugs, the officers could reasonably expand the scope of the investigation based on the reasonable suspicion of criminal activity. *State v. Taylor*, 1999-NMCA-022, ¶ 20, 126 N.M. 569, 973 P.2d 246. Detective Morris's observation of the marijuana and drug paraphernalia and the homeowner's possession of alleged drugs on his person provided this reasonable suspicion. Defendant's proximity to the marijuana and drug paraphernalia in the living room gave the officers a reasonable basis to believe that Defendant had a connection to the presence of the marijuana and drug paraphernalia so as to reasonably detain him as part of the investigation. *See Graves*, 119 N.M. at 93, 888 P.2d at 975 (citing *United States v. Holder*, 990 F.2d 1327, 1329 (D.C. Cir. 1993), to illustrate that detention would be justified in a case in which a person was found inside an apartment being searched "five feet from a drug-laden table").

{10} Defendant additionally raises two issues concerning the search: that his consent to the search was not voluntary; and that the scope of the search exceeded his consent. We review the district court's factual determinations that Defendant's consent was voluntary and based on substantial evidence considering the totality of circumstances. *Chapman*, 1999-NMCA-106, ¶ 19; *State v. Garcia*, 1999-NMCA-097, ¶ 8, 127 N.M. 695, 986 P.2d 491.

{11} Even in the absence of probable cause or a search warrant, a search will generally be lawful, if the person searched has given a voluntary consent. *State v. Duffy*, 1998-NMSC-014, ¶ 72, 126 N.M. 132, 967 P.2d 807. Defendant argues that his consent was not voluntary because it was the product of duress caused by the officers. *See State v. Paul T.*, 1999-NMSC-037, ¶ 28, 128 N.M. 360, 993 P.2d 74 (stating that a voluntary consent may not be a product of duress). This Court has described duress or coercion in this context as involving "police overreaching that overcomes the will of the defendant." *Chapman*, 1999-NMCA-106, ¶ 21.

{12} *State v. Shaulis-Powell*, 1999-NMCA-090, 127 N.M. 667, 986 P.2d 463, is also instructive to our analysis. In *Shaulis-Powell*, one of the defendants argued that his consent to a search was the result of duress or coercion because "the officers told him that they had enough evidence to obtain a search warrant," and "his refusal would have been futile." *Id.* ¶ 10. We held that the statement of one of the officers that he felt or believed that he had enough evidence to obtain a search warrant was "simply the officer's assessment of the situation," which was not coercion or duress. *Id.* ¶ 11. We stated that a suspect's consent to search would be valid, even if an officer informed the suspect that the officer would get a warrant, if there was probable cause to support the warrant. *Id.* ¶ 12. Without force or threat, Detective Morris stated his assessment of the situation that he intended to seek a search warrant. According to Officer MacFadden's testimony, Detective Morris may have offered the opportunity to consent to a search before the warrant was obtained. Defendant approached and advised the officers that he wished to be searched so that he could leave the premises. The warrant was ultimately issued. The district court had substantial evidence to conclude that Defendant's consent was not derived by duress or coercion.

{13} Substantial evidence also supports the district court's finding that the search did not exceed Defendant's consent. *See Garcia*, 1999-NMCA-097, ¶ 9 (stating that the scope of a search is limited to the consent given as measured by an objective reasonableness standard). Defendant affirmatively volunteered to be searched. He did not express any restriction to the search or protest the search of his pockets or his wallet.

Habitual Offender Enhancement

{14} The State filed a supplemental information seeking to enhance Defendant's sentence by one year under the habitual offender statute based in part on a prior conviction for possession of a controlled substance in 1999. In that case, the Bernalillo County District Court granted Defendant a conditional discharge for a first offense of possession of a controlled substance under Section 30-31-28(A), deferred sentence, and placed Defendant on supervised probation for eighteen months. At the conclusion of the probation, the Bernalillo County District Court entered an order of dismissal on conditional discharge (unsatisfactory) dismissing Defendant's case while noting that Defendant did not satisfactorily complete his probationary period.

{15} The district court in this case concluded that the conditional discharge could be used for enhancement under the habitual offender statute and ordered a one-year enhancement of Defendant's sentence. We review this ruling de novo as a matter of statutory construction. *State v. Smith*, 2000-NMCA-101, ¶ 4, 129 N.M. 738, 13 P.3d 470.

{16} As originally enacted, the habitual offender statute did not include sentence enhancement for a felony conviction under the Controlled Substances Act. In 1983, the legislature amended the habitual offender statute to add such convictions. The habitual offender statute also did not originally include conditional discharge as a form of conviction eligible for enhancement. The legislature effected that amendment in 1993 by including a conditional discharge as equivalent to a felony conviction for habitual sentencing enhancement purposes.

{17} Although subsequently amended in 2002 and 2003, the habitual offender statute, as amended in 1993, and as applicable to this case, provided:

> B. Any person convicted of a noncapital felony in this state whether within the Criminal Code or the Controlled Substances Act or not who has incurred one prior felony conviction which was part of a separate transaction or occurrence or conditional discharge under Section 31-20-7 NMSA 1978 [31-20-13 NMSA 1978] is a habitual offender and his basic sentence shall be increased by one year, and the sentence imposed by this subsection shall not be suspended or deferred.

Section 31-18-17(B).

{18} The Controlled Substances Act, under which Defendant received his conditional discharge, reads:

> A. If any person who has not previously been convicted of violating the laws of any state or any laws of the United States relating to narcotic drugs, marijuana, hallucinogenic or depressant or stimulant substances, is found guilty of a violation of Section

> 23 [30-31-23 NMSA 1978], after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place him on probation upon reasonable conditions and for a period, not to exceed one year, as the court may prescribe.
>
> B. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against the person and discharge him from probation before the expiration of the maximum period prescribed from the person's probation.
>
> C. If during the period of his probation the person does not violate any of the conditions of the probation, then upon expiration of the period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt, but a nonpublic record shall be retained by the attorney general solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, the person qualifies under this section. A discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the penalties prescribed under this section for second or subsequent convictions or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

Section 30-31-28(A)-(C).

{19} Is there a conflict between the habitual offender statute provisions that allow enhancement for felony convictions under the Controlled Substances Act as well as for conditional discharges and the Controlled Substances Act provision that precludes the consideration of a conditional discharge under that Act as a conviction? We think not.

{20} Although it is clear that the 1983 amendment to the habitual offender statute addresses the possession of controlled substances, and it is clear that the 1993 amendment addresses conditional discharges, it is not clear that the two amendments are related. The assumption that they both relate to controlled substances derives from the role of a conditional discharge in the Controlled Substances Act. However, upon close reading, the inclusion of a conditional discharge as a felony conviction in the habitual offender statute does not relate to the Controlled Substances Act.

{21} The legislature so stated. The express language of the 1993 amendment added "conditional discharge under Section 31-20-7 NMSA 1978 [31-20-13 NMSA 1978]." Section 31-18-17(B). NMSA 1978, § 31-20-7 (1977), which addressed the period of a deferred or suspended sentence, was repealed in 1985. NMSA 1978, § 31-20-13(A) (1994), enacted in 1993, allows a conditional discharge for a first felony offense when a deferred or suspended sentence is also authorized. The legislature did not, in its 1993 amendment of the habitual offender statute, include a conditional discharge under the Controlled Substances Act. Instead, it referenced only the contemporaneously enacted general conditional discharge statute. The conditional discharge provision of the Controlled Substances Act is different in material ways: it addresses consequences of a specific crime rather than a general range of crimes and it specifically states that a conditional discharge under the Controlled Substances Act cannot be deemed a conviction. Section 30-31-28(C). Without reference to the Controlled Substances Act in the habitual offender statute amendment when the general conditional discharge statute is specifically referenced, we infer that the legislature intended that a conditional discharge under the Controlled Substances Act continues to be distinct from the newly enacted general conditional discharge and that a conditional discharge under the Controlled Substances Act continues to not be a conviction as provided in Section 30-31-28(C). *See Kahrs v. Sanchez*, 1998-NMCA-037, ¶ 24, 125 N.M. 1, 956 P.2d 132 (stating that court presumes that the legislature is aware of existing law, that it enacts new statutes consistent with existing law, and that repeal by implications is disfavored).

{22} As a result, although the habitual offender statute applies to a prior felony conviction under the Controlled Substances Act, it does not apply if there is a conditional discharge under the Controlled Substances Act. The State does not argue that the Bernalillo County District Court sentenced Defendant under the general conditional discharge statute. Therefore, if the Controlled Substances Act was properly followed, Defendant's conditional discharge did not subject him to sentence enhancement.

{23} The State argues that the Controlled Substances Act was not properly followed and does not preclude sentence enhancement because Section 30-31-28 requires a defendant to complete probation without violation prior to dismissal, and Defendant did not satisfactorily complete his probation. However, the Controlled Substances Act does not make this requirement. The satisfactory performance of the conditions of probation is required for the court to effect a discharge and dismiss proceedings. Section 30-31-28(C). The Bernalillo County District Court exercised its discretion and dismissed the proceedings against Defendant despite Defendant's violation of his probation. The issue of Defendant's performance during his probation was not before the district court in this case.

Conclusion

{24} We affirm Defendant's conviction of possession of methamphetamine and reverse the enhancement of Defendant's sentence under the habitual offender statute.

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

JAMES J. WECHSLER, Chief Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

IRA ROBINSON, Judge