

BAR BULLETIN

OFFICIAL PUBLICATION OF THE STATE BAR OF NEW MEXICO

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Kelley S. Hestir

Colfax County Courthouse, Raton, NM

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Skeptics say she will never start her own company.

A lawyer says she will.

The bank denies her loan.

A lawyer says they can't.

The real estate agent won't give her a lease.

A lawyer sees to it that they do.

The agency requires a business plan.

A lawyer writes it up.

Skeptics said she would never start her own company.

A lawyer proved them wrong.



State Bar of New Mexico

It's Not Too Late to Get Involved!



By joining a State Bar committee you will:

- Help Strengthen the Legal Profession
 - Work on Legal Causes of Interest
 - Improve Public Understanding
- Increase Access to the Legal System

Each year the State Bar president appoints members to committees that accomplish these goals. The following committees are currently accepting new members. Review the descriptions and complete the form below to request an appointment.

Please check the committee(s) you wish to join.

- | | |
|---|---|
| <ul style="list-style-type: none"> <input type="checkbox"/> Alternative Methods of Dispute Resolution (ADR) – Promotes and provides legal education and training in the use of alternative dispute resolution processes. <input type="checkbox"/> Bench and Bar Relations – Plans the statewide Bench and Bar Conference. <input type="checkbox"/> Committee for the Delivery of Legal Services to People with Disabilities – Provides information and assistance to ensure access to counsel for persons who have a disability. <input type="checkbox"/> Committee on Diversity in the Legal Profession – Promotes opportunities for minorities in the legal profession and encourages participation by minorities in bar programs and activities. <input type="checkbox"/> Ethics Advisory – Assists attorneys with interpretation and application of the Code of Professional Conduct. <input type="checkbox"/> Historical – Acquires, maintains and submits for publication historical information relating to the bar. <input type="checkbox"/> Law Office Management – Develops and provides resources for attorneys, especially solo and small firm practitioners and young lawyers, to more effectively manage law practices. <input type="checkbox"/> Lawyers' Assistance – Provides confidential peer assistance to State Bar members in need of help because of substance abuse, mental illness or emotional distress. <input type="checkbox"/> Lawyers' Professional Liability – Advises the State Bar regarding risk management activities. <input type="checkbox"/> Legal Services and Programs: Planning Subcommittee – Recommends to the State Bar and other appropriate legal service organizations systemic approaches to the effective and efficient delivery of legal services to the poor. | <ul style="list-style-type: none"> <input type="checkbox"/> Legal Services and Programs: Pro Bono Subcommittee – Facilitates cooperation and coordination of pro bono opportunities available to the State Bar and the UNM School of Law. <input type="checkbox"/> Membership Services Advisory – Evaluates and makes recommendations regarding in-house programs. Advises the State Bar on alliance partner agreements with vendors of products and services. <input type="checkbox"/> Public Legal Education – Provides information and education about the legal profession, the law and services available through the State Bar and other law-related entities. <input type="checkbox"/> Quality of Life – Examines issues such as depression, dissatisfaction and balance in order to provide recommendations that will help to alleviate the stress of modern law practice. <input type="checkbox"/> Technology Utilization – Assists with the development and promotion of electronic technology applications for the legal profession. |
|---|---|

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State Bar of New Mexico Staff Listing

Need something from the State Bar staff and not sure whom to call? Here's a listing of departments and staff. We're here to serve you.

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BAR BULLETIN

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Contributions and announcements to the *Bar Bulletin* are welcome, but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy available upon request.

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MEETINGS

FEBRUARY

17
Solo and Small Firm Practitioners
Section noon, Albuquerque Petroleum Club

18
Health Law Section Board of Directors,
11:30 a.m., State Bar Center

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

19
Bankruptcy Law Section Board
of Directors, noon, U.S. Bankruptcy Court,
10th floor conference room

Children's Law Section Board of
Directors, noon, Juvenile Justice Center

20
Family Law Section Board of
Directors, 9 a.m., via teleconference

Appellate Practice Section Board
of Directors, 3 p.m., State Bar Center

21
Young Lawyers Division Board
of Directors, 10 a.m., State Bar Center

STATE BAR WORKSHOPS

FEBRUARY

19
Family Law Workshop
6 - 8 p.m., Raton Convention Center
901 S. 3rd St., Raton, NM

25
Consumer Debt/Bankruptcy Workshop
6 - 8 p.m., State Bar Center
Albuquerque, NM

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

26
Consumer Debt/Bankruptcy Workshop
5:30 - 7:30 p.m., Branigan Library
(2nd Fl.-Pearl Higgins Room), Las Cruces, NM

Lawyer Referral for the Elderly Program
Workshop & Clinic (Topic: Probate in NM)
1:15 p.m. - 4:30 p.m., Meadowlark Senior
Center, Rio Rancho, NM

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

NOTICES

COURT NEWS

N.M. Supreme Court

Notice of Vacancy – Code of Professional Conduct Committee

One attorney vacancy exists on the Code of Professional Conduct Committee due to the recent resignation of one member. Attorneys interested in volunteering their time on this committee may send a letter of interest and/or resume by Feb. 27 to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

Notice of Vacancy – Children’s Court Rules Committee

One attorney vacancy exists on the Children’s Court Rules Committee due to the recent resignation of one member. Attorneys interested in volunteering their time on this committee may send a letter of interest and/or resume by Feb. 27 to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

Proposed Amendments to the Magistrate, Metropolitan and Municipal Court Rules

The Supreme Court is considering the amendment of the Magistrate Court and Metropolitan civil and criminal rules, the Municipal Court rules and civil and criminal forms. Attorneys and/or judges who would like to comment on the proposed revisions should send written comments by Feb. 20 to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For your reference: The proposed amendments were published in the Jan. 29 (Vol. 43, No. 4) Bar Bulletin.

Proposed Revisions to the Code of Judicial Conduct

The Supreme Court is considering proposed amendments to the Code of Judicial Conduct. Attorneys and/or judges who would like to comment on the proposed amendments should send written comments by Feb. 20 to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848,

Santa Fe, NM 87504-0848.

For your reference: The proposed amendments were published in the Jan. 29 (Vol. 43, No. 4) Bar Bulletin.

Judicial Performance Evaluation Commission Upcoming Meeting

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 next meeting will be from 8 a.m. to 5 p.m., Feb. 27 at the State Bar Center, 5121 Masthead NE, Albuquerque. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

New Mexico Board of Legal Specialization Legal Specialists Announced

The New Mexico Supreme Court Board of Legal Specialization has announced the following attorneys as certified specialists in the area of law indicated:

Bankruptcy Law – Business

George M. Moore

Employment & Labor Law

Carol L. Dominguez

George R. McFall

Natural Resources – Water Law

James C. Brockmann

Jay F. Stein

Workers’ Compensation

Richard J. Crollett

To receive information on any of the certified specialty areas, call the Legal Specialization Administrative Office, (505) 797-6057.

First Judicial District Court Mastering Settlement Facilitation

The First Judicial District Court, through the Alternative Dispute Resolution Program, is sponsoring a com-

plimentary 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 approved by 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.

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, March 2, 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.

Destruction of Exhibits, Domestic Cases, 1986-91

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the court in the domestic cases for years 1986 to 1991 (excluding cases

State Bar News

Board of Bar Commissioners Considers Challenges to Non-budgeted Expenditures in 2002 Related to the Petition to Unionize

Dear Members:

Six members have challenged the State Bar's expenditure of funds in 2002 for staff education on union issues. Under *Popejoy et al v. New Mexico Board of Bar Commissioners*, No. Civ. 92-1462 JB, should these challenges be sustained, these members will be entitled to a refund of that portion of their bar dues, \$0.90, that was spent on union education.

As is outlined in the 2004 Budget Disclosure document, the direct expense relating to union education was \$3,000. The cost of staff time associated with this activity has been calculated to be \$2,663.32. Therefore, a total of \$5,663.32 was expended to educate the staff on issues related to the petition to unionize. This amount represents \$0.90 of the bar dues each member paid in 2002. This amount is determined by dividing the total challenged expenses (\$5,663.32) by the total amount of dues paid for 2002 (audited figure of \$1,357,859) and multiplying that figure (.004) by the total amount of dues paid by each active member (\$215).

Only once, in 1993, has the State Bar contested member challenges to non-budgeted expenditures. That year, an arbitrator appointed by the New Mexico Supreme Court decided the challenges. Because of the substantial expense associated with that proceeding, the State Bar did not contest challenges in subsequent years, all of which involved relatively small dollar amounts. Instead, a fraction of each challenging member's bar dues was refunded.

The Board of Bar Commissioners, at its January 24, 2004 meeting, unanimously voted to refund \$0.90 to the six members who challenged the union-related, non-budgeted expenditure. Although the reasons for this vote varied,

all board members agreed that the expense involved in arbitrating the challenges could not be justified given the amount of the expenditures being challenged. Many board members believe that, in theory, union education was appropriate under the circumstances and not substantially different from other employee-related services that require the expenditure of bar dues. However, the board is mindful that many believe that the union education effort in 2002 was flawed or entirely unnecessary. Rather than debate that issue now and run the risk of further member discontent, the board will make refunds to the challenging members.

One member, in his challenge, has asked that *all* members be refunded that portion of their dues used for the union education effort. In effect, this member is proposing a class action on behalf of all members. However, the board voted against this proposal. Reasons discussed included the fact that every member had the right and opportunity to challenge the union-related expenditures. It is questionable then whether one member has standing to challenge a particular expenditure on behalf of the entire membership. Even if a class challenge is appropriate and successful, the expense and labor involved in writing 6,300 \$0.90 checks and mailing them to each member would be an inefficient use of bar dues and too much to pay for the vindication of a principle that the board believes has already been established.

The board sincerely hopes that the union issue, and the divisiveness it created, will come to an end this year.

Sincerely,
Daniel J. O'Brien, President

on appeal). Counsel for parties are advised that exhibits may be retrieved through April 12. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 841-7596/8767 from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s). All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

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 March 1. Contact Mary Lovato, (505) 841-6778, for more information or to have something placed on the agenda.

Judicial District Nominating Commission

Nine applications were received in the Judicial Selection Office for the judicial vacancy in the Second Judicial District Court, due to the retirement of Judge Frank H. Allen, Jr.

The District Judges Nominating Commission will meet on Feb. 20 at the Bernalillo County Courthouse (SW corner of Fourth and Lomas) in Albuquerque to evaluate the applicants for the judicial position. The commission meeting is open to the public. For meeting time, call (505) 277-4700.

NOTICES



Bar Bulletin: Call for Cover Images

The State Bar of New Mexico is seeking additional courthouse images to be featured on the cover of the weekly *Bar Bulletin*. A different image of a New Mexico courthouse — either still in use

or historical — will be featured each week. Please send photograph images by mail or e-mail to the attention of Diana Sandoval, editor, PO Box 92860, Albuquerque, NM 87199-2860; or dsandoval@nmbar.org. Images will be used as a reference for original drawings by State Bar artist, Kelley S. Hestir.

The names of the applicants in alphabetical order are:

Adrian, Dawn T. (Penni)
Collins, Robert B.
Flynn-O'Brien, Timothy V.
Harada, Stanley D.
Hernandez, David N.
Kavanaugh, J. Michael
Roberts, Donovan A.
Stone, Jennifer L.
Vanzi, Linda M.

Thirteenth Judicial District Court Destruction of Exhibits, 1983 to 2003

Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the Thirteenth Judicial District Court will destroy exhibits filed with the court in civil cases, criminal cases, domestic cases, probate cases and children's cases for the years 1983 to 2003 (excluding cases on appeal.) Counsel for parties are advised that exhibits may be retrieved through April 19. Attorneys who may have cases with exhibits may verify exhibit information with the Sandoval County District Court (505) 867-2376, ext. 29, Monday through Friday from 8 a.m. to noon and from 1 to 5 p.m. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s). All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

U.S. Court of Appeals - 10th Circuit 2004 10th Circuit Judicial Conference

The U.S. Court of Appeals for the 10th Circuit will host the 2004 10th Circuit Judicial Conference July 21-23 in Park City, Utah. This year marks the 75th anniversary of the 10th Circuit. Information regarding events and lodging are available at www.ca10.uscourts.gov. Online registration will begin April 1. For more information, contact Chris Lighthall, (303) 335-2823, or Julie Baehr, (303) 335-2826.

STATE BAR NEWS

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 March 3. (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.

Lawyers Assistance Committee Monthly Meeting

The Lawyers Assistance Committee will meet at 5:30 p.m., March 1, 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 Paralegal Compensation Survey

The State Bar Paralegal Division is conducting a Paralegal Compensation, Utilization and Benefits Survey during the month of January. The division is urging every paralegal practicing in New Mexico to complete the survey. The complete survey was published as a special insert in the Jan. 15 (Vol. 43, No. 2) *Bar Bulletin*. A link to the online survey can be found on the State Bar Web site, www.nmbar.org, and the survey can also be downloaded, completed and e-mailed to PD@nmbar.org (type "survey" in subject line) or printed and mailed to Paralegal Division Survey, PO Box 1923, Albuquerque, NM 87103. Deadline for submission of the survey is March 1. Confidentiality of all personally identifiable information will be strictly maintained at all times.

Prosecutors' Section Annual Awards

The State Bar Prosecutor's Section will be presenting awards to five prosecutors at the District Attorney's spring conference. The five categories are as follows:

- Prosecutor of the Year – must have five or more years of full-time prosecution experience. The nomination should address the individual's outstanding characteristics, prosecution history, work with the public and contributions to the quality of prosecution, and the image of prosecutors.

- Law Enforcement Prosecutor - this nomination should address the support and assistance the prosecutor has provided to law enforcement agencies, as well as the prosecutor's commitment of time in assisting law enforcement.

- Community Service Prosecutor – this nomination should address the service this prosecutor has provided to the community and the results of those efforts (for example volunteering at rape crisis centers, nursing homes, youth mentorship organizations, etc.).

- Legal Impact Prosecutor – this nomi-

nation should address the significant impact that resulted from the prosecutor's efforts in a criminal prosecution(s) and the significant and positive impact or effect on the law, along with the prosecutor's outstanding character.

- **Rookie Prosecutor of the Year** – must have been prosecuting for no more than two years. The nomination should address the prosecutor's dedication to criminal prosecution and commitment to making prosecution a career.

Nominations should be submitted by March 19 to Julie Ann Meade, section chair, PO Box 1508, Santa Fe, NM 87504-1508; or jmeade@ago.state.nm.us. The nominees will be presented to a committee for selection.

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.

For a complete list of award criteria, see the Jan. 22 (Vol. 43, No. 3) *Bar Bulletin*.

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.

Feb. 17, noon: "Overview of the Americans with Disabilities Act and its Application in Albuquerque," Richard Benison, ADA coordinator, city of Albuquerque.

Upcoming luncheon dates are: March 16, April 20 and May 18.

Toastmasters to Form Albuquerque Group for Lawyers

Toastmasters International, a non-profit organization devoted to helping members learn the arts of speaking, listening and thinking, is inviting interest in forming a club for lawyers in the Albuquerque area.

At Toastmasters, members learn by speaking to groups and working with others in a supportive environment. A typical Toastmasters club is made up of 20 to 30 people who meet regularly for about an hour. Annual dues are minimal and the club leadership is elected from within its own membership. Each meeting gives participants an opportunity to practice:

- conducting meetings;
- giving impromptu speeches;
- presenting prepared speeches; and
- offering constructive evaluation.

Members interested in learning more about a Toastmasters Club for attorneys are invited to attend an informational meeting at 5:30 p.m., March 3 at the State Bar Center, 5121 Masthead NE, Albuquerque. For more information and to reserve a space, contact Bay Stevens, Toastmasters Area 23 governor, (505) 480-1999; or bay.stevens@att.net.

Young Lawyers Division Region 4 Brownbag Luncheon

The State Bar Young Lawyers Division, Region 4, will host a brownbag luncheon with Third Judicial District Court Judge Silvia Cano-Garcia. The luncheon will be held from noon to 1 p.m., Feb. 19 in the Multi-Purpose Room at the Doña Ana County District Court. Pizza and beverages will be provided. Those who plan to attend should R.S.V.P. by Feb. 17 to Roxanna M. Chacon, (505) 523-8270; or by e-mail to lglrnc@zianet.com or lcrdrnc@nmcourts.com.

OTHER BARS

American Bar Association Nominations Sought for 2004 Pro Bono Publico Awards

The American Bar Association Standing Committee on Pro Bono and Public Service is seeking nominations for the Pro Bono Publico Awards, which will be presented in August 2004 during the ABA Annual Meeting in Atlanta.

The Pro Bono Committee established the Pro Bono Publico Awards in 1984 to recognize lawyers and law firms for extraordinary noteworthy contributions to extending legal services to those who cannot afford legal representation.

Nominees may be individual lawyers, law firms, government attorney offices, corporate law departments and other institutions in the legal profession that have demonstrated outstanding commitment to volunteer legal services for the poor and the disadvantaged. Nominees may not earn their income delivering legal services to the poor.

Award winners will have accomplished one or more of the following:

- Demonstrated dedication to the development and delivery of legal services to the poor through a pro bono program;

- Contributed significant work toward developing innovative approaches to delivery of volunteer legal services;

- Participated in an activity that re-

sulted in satisfying previously unmet needs or in extending services to underserved segments of the population;

- Successfully litigated pro bono cases that favorably affected the provision of other services to the poor; and/or
- Successfully achieved legislation that contributed substantially to legal services for the poor.

Nominations must be received no later than March 10. For additional information contact Dorothy Jackson, ABA Pro Bono Publico Awards, (312) 988-5766; or by e-mail at jacksond@staff.abanet.org. A full description of the award and the nomination process can be found in downloadable form on the committee's Web site, www.abaprobono.org.

Tax Section Pro Bono Committee

This year, the Pro Bono Committee of the American Bar Association's Tax Section is raising the level of participation in the IRS's Volunteer Income Tax Assistance ("VITA") program.

The VITA Program is available for taxpayers who are in need of assistance in preparing and filing their returns. The complexities of the tax laws can frustrate many low-income, elderly, disabled and limited English proficient taxpayers' effort to complete their own return.

Because commercial tax preparers may not be a viable option for low-income taxpayers, the VITA Program provides a location where these taxpayers can come for assistance. Members of the community – including professionals, students and other volunteers – donate their time to help taxpayers complete their returns. Local legal and tax professionals are asked to check www.abanet.org/tax/vita for VITA location information, including when and how to volunteer at those locations.

For more information on this and other tax pro bono projects, visit www.abanet.org/tax/groups/probono.

OTHER NEWS

National Board of Trial Advocacy National Trial Certification Exam Scheduled for April 17

The National Board of Trial Advocacy (NBTA), a nonprofit organization accredited by the American Bar Association to certify attorneys as specialists in the areas of civil, criminal and family law trial advocacy, will conduct the spring administration of the national trial certification examination on April 17, in various locations throughout the United States, including Albuquerque, Denver and San Antonio. The day-long written examination, on part of NBTA's certification application, tests an applicant's comprehensive practical knowledge of trial practice, ethics and evidence relevant to their chosen specialty. Applicants will be tested on their knowledge of the substantive law and their ability to evaluate, handle and resolve model controversies prior to the institution of suit and through post judgement proceedings. Attorneys interested in achieving national trial certification in the specialties of civil, criminal or family law trial advocacy should submit an NBTA application prior to March 1 to be eligible to sit for the April 17 examination.

Contact the NBTA staff office for information on how to apply for certification, or visit the NBTA Web site, www.nbtanet.org.

Workers' Compensation Administration Uninsured Employers' Fund

The newly enacted Uninsured Employers' Fund (UEF), Section 52-9-1.1 (NMSA 2003) became effective June 22, 2003. The purpose of the UEF is for the protection of a worker whose employer was required, but failed, to maintain workers' compensation insurance at the time of the workers' job accident/illness. The UEF will pay workers' compensable disability and medical benefits, and thereafter seek reimburse-

ment from the employer. Only those job accidents/illnesses occurring on or after June 22, 2003, are eligible for UEF benefits.

For more information, call Richard Crollett, UEF fund administrator, (505) 841-6823, or visit the WCA Web site at <http://wca.state.nm.us>.

YWCA of the Middle Rio Grande 2004 Women on the Move Awards

The YWCA of the Middle Rio Grande is accepting nominations for the 2004 Women on the Move Award, which was established to recognize outstanding New Mexico women who have positively affected others through their leadership. This year marks the 20th anniversary of the program. The YWCA encourages nomination of any woman or girl (14 or older) whose leadership has made a positive difference to her profession and/or community. All honorees will be recognized during a celebration dinner at 6 p.m., April 1 at the Albuquerque Hyatt Regency.

The following criteria will be considered in the selection: demonstration of both leadership and commitment to a healthy balance in their lives; outstanding professional achievements and/or volunteer contributions; display of values of diversity, peace and social justice promoted by the YWCA.

A \$50 nomination fee is due along with the honoree information form (see the State Bar Web site, www.nmbar.org, for pdf file) and any additional information by Feb. 23. The nomination fee includes a banquet dinner for the nominee, a Women on the Move plaque and a sterling silver miniature of the Betty Sabo bronze Women on the Move award. Nominations should be sent to YWCA of the Middle Rio Grande, Women on the Move Selection Council, 210 Truman NE, Albuquerque, NM 87108. For more information, contact Mary Torres, 500 Fourth St. NW; Ste. 1000, PO Box 2168, Albuquerque, NM 87103; (505) 848-1800; fax, (505) 848-9710; or mtorres@modrall.com.

Before the Disciplinary Board of the Supreme Court of the State of New Mexico

In the Matter of
Gregory Gahan
Disciplinary No. **12-2001-420**
An Attorney Licensed to Practice
Law Before the Court of the
State of New Mexico
FORMAL REPRIMAND

You are before the Disciplinary Board due to your second violation of the terms of your probation. Though you had the opportunity to successfully complete a period of probation and receive an Informal Admonition in lieu of this Formal Reprimand, you failed to abide by the terms of that probation on two separate occasions, which led the issuance of this Formal Reprimand.

The misconduct which gave rise to this matter involved your representation of two different clients. You represented defendant Karl Duran in *State v. Duran*. Despite receiving notice at the address listed on the entry of appearance filed with the Court, you missed three separate trial settings for this case. The first trial date was scheduled for June 4, 2001 at 8:30 a.m. Although you failed to appear, your client, opposing counsel and its witnesses all appeared. You telephoned the Judge's chambers at 9:10 in the morning, and left a message that you were out sick. The next day the Judge sent you a letter requesting an explanation for your failure to appear. You responded that you were experiencing some anxiety problems, but assured the judge that you were addressing those problems and would not again fail to appear.

The trial date was rescheduled for September 17, 2001. Again your client, opposing counsel, and its witnesses all appeared, but you did not. You did not notify your client or the Court of the reason for your absence. In response to inquiries from disciplinary counsel regarding this absence, you alleged that you injured your hand the day before. You did not offer an adequate explanation for your failure to notify either your client or the Court of your inability to attend the scheduled trial.

The trial was reset a third time for October 1, 2001. Again you did not appear at the scheduled time. In response to disciplinary counsel's inquiries regarding this failure to appear, you stated that you had calendered these events, but forgot to check your calender. You further stated that you realized your mistake at approximately 9:00 a.m. and attempted to contact the Court.

Your conduct in this instance was found to have violated Rule 16-101, by failing to provide competent representation to your client, Rule 16-103, by failing to act with

reasonable promptness and diligence in representing your client, Rule 16-804(D), by engaging in conduct which is prejudicial to the administration of justice, and Rule 16-804(H), by engaging in conduct which adversely reflects on your fitness to practice law.

The second matter arose from your representation of your client Lisa VanOstrand to represent her in a custody and child support matter. According to Ms. VanOstrand, she started a new job on July 10, 2000. On July 11, 2000 at 6:30 in the evening, you telephoned her to advise her that a hearing was scheduled on a child support issue for the next day at 9:00 a.m. Ms. VanOstrand advised you that she could not attend the hearing due to the new job, and you attended the hearing without her. You did not contact Ms. VanOstrand regarding the results of the hearing until 10 days afterwards, at which time you advised her that her child support payment had been reduced. You neglected to advise her, however, of the Court's decision with regard to a nearly \$6,000 alleged arrearage. According to Ms. VanOstrand, you did not advise her until January of 2001 that at the July hearing the Court had given you ninety days to provide the correct figure of the arrearage, even though Ms. VanOstrand had provided you with the correct figure prior to the July hearing.

A second hearing was scheduled to determine physical custody of Ms. VanOstrand's child. You failed to inform your client of the hearing and did not appear yourself. As a result, physical custody was awarded to Ms. VanOstrand's former husband. Your client had no knowledge of this result until she received a reduced check for child support. It was only after Ms. VanOstrand contacted her former spouse that she learned that she had been ordered to pay her former husband's court costs for that hearing.

Sometime after these events, the issue of physical custody of Ms. VanOstrand's child was to be reviewed by the court clinic. You told your client that you would prepare the necessary documents and leave them at the front desk for her to sign. Two days later Ms. VanOstrand appeared to sign the papers, however, none were left. She had to wait while the receptionist telephoned you to bring the papers to the office. The papers were finally signed on August 21, 2001.

Two weeks later, Ms. VanOstrand learned that you still had not filed the papers. When questioned about this, you stated that you had not filed the papers because she had not signed them in all of the correct places. You did not, however, contact Ms. VanOstrand to advise her of this alleged oversight.

During this conversation, you told Ms. VanOstrand that you would sign for her so that the papers could be filed the next morning. Ms. VanOstrand consented to this arrangement, however, the papers were not filed the next morning. At the time Ms. VanOstrand mailed her disciplinary complaint, on or about October 5, 2001, the necessary papers still had not been filed. Several days later, on or about October 9, 2001, you finally filed those papers.

Your conduct in this instance was found to have violated Rule 16-101, by failing to provide competent representation to your client, Rule 16-103, by failing to act with reasonable promptness and diligence in representing your client, Rule 16-104, by failing to keep your client informed about the status of a matter and failing to respond to reasonable requests for information, Rule 16-804(D), by engaging in conduct which adversely reflects on your fitness to practice law, and Rule 16-804(H), by engaging in conduct which is prejudicial to the administration of justice.

In response to inquiries from disciplinary counsel regarding these complaints, you admitted that you are struggling with an alcohol addiction, and alleged that your misconduct was due at least in part to your addiction. You entered into a consent agreement admitting the charges, and consenting to discipline. You were to receive a Formal Reprimand, deferred in favor of one year of probation. Following a successful conclusion of the probationary period you were to receive an Informal Admonition in lieu of the Formal Reprimand.

The period of probation was subject to various conditions. One such condition was that you completely abstain from the use of alcohol. A second condition was that you obtain an attorney monitor and submit to random alcohol tests through the Lawyer's Assistance Program.

Just two months into the period of probation you tested positive for the use of alcohol. Despite the fact that this was a clear violation of the terms of your probation, disciplinary counsel did not seek revocation of

your probation at that time. Instead, you agreed to an extension of the period of probation, and you and disciplinary counsel filed a joint motion to extend the period of probation with the Board Panel, which approved the motion.

You tested positive for the use of alcohol for the second time approximately nine months later, and this Formal Reprimand is issued as a result. While the Disciplinary Board is not without sympathy for your struggle to overcome your addiction, you previously received lenient treatment based on your assurances that you were committed to remaining alcohol free. In addition, addiction cannot provide a defense to unethical conduct, and can only be considered as a factor in mitigation if the respondent has demonstrated a prolonged period of successful rehabilitation. *See e.g., In re Kelly*, 119 N.M. 807, 896 P.2d 487 (1995).

It is hoped that this Formal Reprimand, together with the continued supervision and monitoring you are receiving through the Lawyer's Assistance Program will satisfy the primary concern of the disciplinary process, the protection of the public. It is further hoped that by extending the period of your probation for a second time you will continue to work to overcome your addiction and avoid a duplication of the violations of the Rules of Professional Conduct which brought you before this Board.

This Formal Reprimand will be filed with the Supreme Court in accordance with Rule 17-206(D), and will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. In addition, in accordance with Rule 17-206(D), the entire text of this formal reprimand will be published in the State Bar of New Mexico *Bar Bulletin*.

DATE: January 23, 2004

The Disciplinary Board,

BY: Richard J. Parmley, Jr., Chairman

February

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|---|---|--|
| <p>16 Is a New Rule Needed Regarding Class Action Litigation? Teleconference TRT, Inc. 2.4 E (800) 672-6253 www.trtcle.com</p> | <p>18 Judgment Enforcement Albuquerque Lorman Education Services 6.6 G / 0.6 E (715) 833-3940 www.lorman.com</p> | <p>19 Labor and Employment Law Update Albuquerque Sterling Education Services 7.8 G (715) 855-0495 www.sterlingeducation.com</p> |
| <p>16 Federal Rules of Evidence VR - State Bar Center - Albuquerque Center for Legal Education of SBNM 3.9 G / 1.2 E / 2.0 P (505) 797-6020 www.nmbar.org</p> | <p>18 Back to the Future: Lawyering and Problem Solving VR - State Bar Center - Albuquerque Center for Legal Education of SBNM 2.0 P (505) 797-6020 www.nmbar.org</p> | <p>19 Mastering Settlement Facilitation Plaza Resolana - Santa Fe First Judicial District Court 6.9 G (505) 827-5072</p> |
| <p>16-17 Workers' Compensation Top Ten Medical and Legal Issues Las Vegas, NV Professional Education Systems, Inc. 15.6 G / 1.2 E (800) 826-7155 www.pesi.com</p> | <p>18 Ethics: Put a CAAP on Complaints VR - State Bar Center - Albuquerque Center for Legal Education of SBNM 1.0 E (505) 797-6020 www.nmbar.org</p> | <p>19 Supreme Court Term 2004 - Notable Cases Pending Before Our Nation's Highest Court Roswell SBNM Paralegal Division 1.0 G (505) 627-5251</p> |
| <p>17 Keys to Successful Pre-Trial Preparation in New Mexico Albuquerque National Business Institute 6.7 G / 0.5 E (800) 930-6182 www.nbi-sems.com</p> | <p>18 Should My Client Litigate or Mediate Teleconference TRT, Inc. 2.4 G (800) 672-6253 www.trtcle.com</p> | <p>20 Child Custody and Shared Parenting Albuquerque National Business Institute 6.7 G / 0.5 E (800) 930-6182 www.nbi-sems.com</p> |
| <p>17 Recent Developments for Estate Planners Teleconference Cannon Financial Institute 1.8 G (706) 353-3346</p> | <p>19 Choice of Entity After the 2003 Tax Act ALN Satellite Broadcast State Bar Center-Albuquerque ALN 4.4 G (215) 243-1649</p> | <p>20 Shareholder Activism - The Legal Context Teleconference TRT, Inc. 2.4 G (800) 672-6253 www.trtcle.com</p> |
| <p>17 When Counsel's Duties Conflict Teleconference TRT, Inc. 2.4 P (800) 672-6253 www.trtcle.com</p> | <p>19 How to Make a Private Company Acquisition Teleconference TRT, Inc. 2.4 G (800) 672-6253 www.trtcle.com</p> | <p>23 Is the Attorney-Client Privilege on the Ropes? Teleconference TRT, Inc. 2.4 E (800) 672-6253 www.trtcle.com</p> |

February

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| <p>24 2003 Professionalism - Still in the Dark: Disappointing Images of Professionalism
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www.nmbar.org</p> | <p>25 Workplace Harassment - Provide Your Clients with the Essentials for Eliminating Claims
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27 Dallas, TX
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| <p>24 Beginning Westlaw
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| <p>25 2004 NM Legislative Update on Healthcare
State Bar Center - Albuquerque
Health Law Section and Center for Legal Education of SBNM
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(505) 797-6020
www.nmbar.org</p> | | |

G = General

P = Professionalism

E = Ethics

VR = Video Replay

Programs have various sponsors; contact appropriate sponsor for more information.

Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective February 10, 2004

Petitions for Writ of Certiorari Filed and Pending:

- NO. 28,488 State v. Siegert (COA 23,237) 2/5/04
NO. 28,487 State v. Gomez (COA 23,033) 2/5/04
NO. 28,482 Jouett v. Growney (COA 23,669) 2/5/04
NO. 28,486 Jouett v. Growney (COA 23,669) 2/3/04
NO. 28,485 State v. Eubanks (COA 23,006) 2/3/04
NO. 28,481 Jouett v. Growney (COA 23,669) 2/3/04
NO. 28,480 Maso v. Stte (COA 23,218) 2/3/04
NO. 28,477 State v. Smith (COA 24,253/24,254/24,258) 2/2/04
NO. 28,390 Ballejos v. Ulibarri (12-501) 2/2/04
NO. 28,479 State v. Juan V. (COA 22,930) 1/30/04
NO. 28,478 Weiss v. SW Counseling (COA 24,289) 1/30/04
NO. 28,426 Sam v. Sam (COA 23,288) 1/30/04
NO. 28,475 City of Sunland Park v. PRC (COA 23,238) 1/29/04
NO. 28,473 Deaton v. Gutierrez (COA 22,409) 1/29/04
NO. 28,472 Equicredit v. Salazar (COA 24,091) 1/28/04
NO. 28,471 State v. Brown (COA 23,610) 1/27/04
NO. 28,470 Escamilla v. Ulibarri (12-501) 1/27/04
NO. 28,469 Robertson v. Carmel (COA 22,176) 1/27/04
NO. 28,468 Bruhn v. The Hartford (COA 23,501) 1/27/04
NO. 28,466 State v. Duran (COA 23,412) 1/26/04
NO. 28,465 Manuel v. Snedeker (12-501) 1/23/04
NO. 28,464 Hoffman v. Snedeker (12-501) 1/21/04
NO. 28,463 State v. Shafer (COA 24,209) 1/21/04
NO. 28,462 State v. Ryon (COA 23,318) 1/21/04
NO. 28,459 State v. Montano (COA 24,111) 1/13/04
NO. 28,458 Parson v. Snedeker (12-501) 1/12/04
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. 28,443 McIntire v. Snedeker (12-501) 1/6/04
NO. 28,444 Armjo v. Williams (12-501) 12/31/03 time to consider petition extended to 2/27/04
NO. 28,424 Cowan v. Velasquez (COA 22,819) 12/31/03
NO. 28,439 Gonzales v. LeMaster (12-501) 12/30/03 time to consider petition extended to 2/27/04
NO. 28,436 Corliss v. Snedeker (12-501) 12/29/03 time to consider petition extended to 2/27/04
NO. 28,435 Gallup LLC v. City of Gallup (COA 22,308) 12/24/03
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. 28,341 Lucero v. State (12-501) 11/18/03 time to consider petition extended to 2/27/04
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 2/27/04

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. 27,823 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. 27,912 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 Montano 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. 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. 28,068 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. 28,128 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
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. Paredes (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

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Certiorari Denied, January 22, 2004
From the New Mexico
Supreme Court
Opinion Number: 2004-NMSC-002

TOPIC INDEX:

Administrative Law: Legislative Intent

Civil Procedure: Arbitration

Commercial Law: Uniform Arbitration Act

Contracts: Contracts Against Public Policy; and Public Policy

Insurance: Insurance Code; Insurance Contract; Regulation of Insurance; and Uninsured or Underinsured Motorist

Remedies: Arbitration

Statutes: Interpretation; and Legislative Intent

DEBBIE MCMILLAN,
Plaintiff,
versus

ALLSTATE INDEMNITY COMPANY,
Defendant.
No. 27,897

(filed: November 20, 2003)

CERTIFICATION FROM THE UNITED
STATES DISTRICT COURT

Martha Vázquez, United States District
Judge

Consolidated with:
No. 28,055

YVONNE GALLEGOS, as guardian
and next friend of JERRICA
A., a minor child,
Petitioner-Appellee,
versus

ALLSTATE INDEMNITY COMPANY,
Respondent-Appellant.
CERTIFICATION FROM THE NEW
MEXICO COURT OF APPEALS
Art Encinias, District Judge

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OPINION

CHÁVEZ, JUSTICE

{1} In this consolidated case against Allstate, two automobile insurance policyholders (Insureds) challenge the validity of a clause in Allstate's standard uninsured motorist (UM) insurance endorsement, approved by the Superintendent of Insurance, that provides for arbitration of UM claims only upon the consent of both Allstate and the insured. After Allstate disputed the extent of their respective claims, Insureds each demanded arbitration. Allstate declined, choosing instead to litigate the underlying disputes in court. Insureds then each brought separate actions in state district court to compel arbitration, arguing that the Department of Insurance regulations governing UM insurance coverage, consistent with New Mexico law and public policy, mandate binding arbitration of UM claims. Allstate countered that New Mexico statutory and common law has never mandated binding arbitration in UM disputes, that the Superintendent of Insurance lawfully approved the consensual arbitration provision, and that the provision is therefore valid. Finally, Allstate contended that to compel arbitration would violate its right to a jury trial, protected under Article II, Section 12 of the New Mexico Constitution.

{2} In Petitioner Gallegos' case, the state district court granted her petition to compel arbitration, declaring invalid the consensual arbitration provision in the insurance contract on the ground that it conflicts with the Superintendent of Insurance's mandatory form of UM endorsement. Allstate appealed, and the Court of Appeals certified the case to this Court. In Plaintiff McMillan's case, Allstate removed the state case to federal court. The federal court judge, in accordance with Rule 12-607 NMRA 2003, certified the following question to this Court, the answer to which will resolve both cases on appeal:

Whether New Mexico law requires arbitration of an uninsured motorist claim upon the unilateral demand of either the insurer or the insured where

the insurance policy states that disputes regarding whether the insured is entitled to receive payment under the policy, or the amount of payment due, will be submitted to arbitration only if both the insurer and insured consent.

{3} We consolidated the cases on appeal and now answer the certified question in the negative. This Court recently reaffirmed New Mexico's announced policy of encouraging binding arbitration of UM claims, stressing the significance of a voluntary agreement to arbitrate. See *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶¶ 13, 19, 133 N.M. 661, 68 P.3d 901. Nevertheless, neither this Court nor the Legislature has ever expressly mandated arbitration as the sole method for the adjudication of UM claims. Furthermore, the regulations promulgated by the Department of Insurance do not require binding arbitration where the Superintendent of Insurance has approved a substitute UM endorsement that is not less favorable to the insured. We cannot conclude that preserving a potentially important constitutional right to a jury trial, absent a voluntary agreement to binding arbitration, is less favorable to the insured. For these reasons, we hold that the Allstate contract's consensual arbitration provision does not violate New Mexico law or public policy and is therefore enforceable.

I. The Legislature Does Not Require Arbitration in the Resolution of UM Disputes

{4} Insureds argue that arbitration is mandated by the UM statute. They rely upon the current NMSA 1978, § 66-5-303 (2003), conceding that before Section 66-5-303 was repealed and reenacted in 2003, the Legislature did not mandate arbitration as the sole means of resolving UM claims. The original Section 66-5-303 — enacted in 1969, superceded by the Uniform Arbitration Act (UAA), see *Dairyland Ins. Co. v. Rose*, 92 N.M. 527, 591 P.2d 281 (1979), and repealed by the Legislature in 2003 — states that “[a]ny party aggrieved by an arbitration award” concerning a UM claim dispute has a de novo right of appeal in state district court. Section 66-5-303 (repealed 2003). If the Legislature had intended

to compel binding arbitration of all UM disputes, it would be incongruous for the Legislature to have incorporated such a right of de novo appeal. This right of de novo appeal following an arbitration award bolsters Insureds' concession that prior to the 2003 repeal and reenactment of Section 66-5-303, the Legislature did not mandate arbitration as the sole means of resolving UM disputes.

{5} Because the 2003 reenactment would not directly affect the status of Insureds' claims, which were filed before the new statute took effect, we understand Insureds' argument to be that as a result of the new statute, there is now a discernible public-policy preference for mandatory arbitration, and that this public policy should inform our resolution of the issues on appeal. Insureds, however, point to no specific language in the current UM statute that may be construed to require binding arbitration as the exclusive means of resolving UM coverage disputes. The UM statute does regulate when and to whom the costs of arbitration may be allotted, § 66-5-302, and the procedure by which a district court must confirm or vacate an arbitration award, § 66-5-303. While these provisions may suggest a public-policy preference for the voluntary arbitration of UM disputes, they fall short of mandating arbitration in such cases.

{6} The reenacted Section 66-5-303 states:

After a party to an arbitration proceeding involving an uninsured motorist receives notice of an award, the party may make a motion to the district court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 44-7A-21 or 44-7A-25 NMSA 1978 or is vacated pursuant to Section 44-7A-24 NMSA 1978.

This new language did indeed repeal the right of an aggrieved party to a de novo appeal. Nevertheless, the most that can be inferred concerning the legislative intent underlying the current Section 66-5-303 is that arbitra-

tion ought to be binding in a UM dispute where the parties had agreed to arbitrate. *See Padilla*, 2003-NMSC-011, ¶¶ 13, 18 (enforcing the parties' mutual contractual agreement to binding arbitration following the severance of a contractual provision that violated the UM statute and public policy). The current Section 66-5-303 fails to evince a desire by the Legislature to make binding arbitration the exclusive means of resolving UM disputes.

{7} On the contrary, one of the UAA provisions to which the statute refers, NMSA 1978, § 44-7A-24(A)(5) (2001), provides that the district court "shall vacate" the award where "there was no agreement to arbitrate." By incorporating Section 44-7A-24, the current Section 66-5-303 expressly contemplates a district court vacating an arbitration award where the parties did not consent to arbitration. It would be untenable, therefore, to hold that the Legislature, in drafting the current UM statute, intended to compel arbitration where the parties had not agreed to arbitrate. *See Quintana v. N.M. Dep't of Corr.*, 100 N.M. 224, 225, 668 P.2d 1101, 1102 (1983) ("[P]rovisions of a statute, together with other statutes *in pari materia*, must be read together to ascertain the legislative intent.").

{8} Beyond the UM statute itself, Insureds allege that Allstate's consensual arbitration provision is "a direct affront to the provisions of the current [Uniform] Arbitration Act." As noted, however, the UAA provides no basis for concluding that the Legislature intended to compel arbitration where there was no agreement to arbitrate. While the UAA does evidence a legislative intent to encourage voluntary agreements to arbitrate, it invalidates arbitration awards where there existed no prior agreement to arbitrate. Under procedural provisions of the UAA, a district court is given authority to "order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." NMSA 1978, § 44-7A-8(A)(2) (2001).¹ "If the court finds that there is no enforceable agreement [to arbitrate], it may not . . . order the parties to arbitrate." Section 44-7A-8(C) (emphasis added). Further, where "there was no agreement to arbitrate," the district court "shall vacate"

the award. Section 44-7A-24(A)(5). Given the UAA's prohibition against compelling arbitration where there was no agreement to arbitrate, it would be inconsistent to hold that the public policy underlying the UAA requires binding arbitration of all UM claims. Where, as here, there was no agreement to arbitrate, the UAA neither compels parties to arbitrate, nor does it permit a court to grant a motion to compel arbitration.

{9} Despite our conclusion that the Legislature has not expressly mandated arbitration as the exclusive means of resolving UM disputes, we recognize that in New Mexico there is a strong public-policy preference in favor of resolving disputes through arbitration. *See Lisanti v. Alamo Title Ins.*, 2002-NMSC-032, ¶ 17, 132 N.M. 750, 55 P.3d 962. Although we acknowledge some evidence that the virtues of mandatory arbitration may be overstated, *see, e.g.*, William P. Lynch, *Problems With Court-Annexed Mandatory Arbitration: Illustrations from the New Mexico Experience*, 32 N.M. L. Rev. 181 (2002), arbitration is encouraged as a means of relieving congestion in the court system, speeding up resolution of disputes, and making the resolution of cases more economical to all parties. *See Stinbrink v. Farmers Ins. Co.*, 111 N.M. 179, 182, 803 P.2d 664, 667 (1990). The New Mexico Legislature has concluded, and this Court has repeatedly held, that where the parties have agreed to arbitrate a dispute, courts are generally bound to enforce the outcome of arbitration. NMSA 1978, § 44-7A-7(A) (2001); *see Lisanti*, 2002-NMSC-032, ¶ 17 ("When a party agrees to a non-judicial forum for dispute resolution, the party should be held to that agreement."); *Fernandez v. Farmers Ins. Co.*, 115 N.M. 622, 625, 857 P.2d 22, 25 (1993); *State ex rel. Hooten Constr. Co. v. Borsberry Constr. Co.*, 108 N.M. 192, 193, 769 P.2d 726, 727 (1989); *Rose*, 92 N.M. at 530, 591 P.2d at 284.

{10} Here, however, the issue is not whether our courts should enforce a lawful agreement to arbitrate, but instead whether New Mexico law compels arbitration where one of the parties has not consented. This Court has noted that "a motion to compel arbitration is

¹ We note that we are only analyzing the current Uniform Arbitration Act as an aid to understanding current New Mexico public policy. Application of the UAA in effect when Insureds' claims arose would not result in a different outcome, as it too enforced arbitration agreements only where there was a prior agreement to arbitrate. *See* NMSA 1978, §§ 44-7-2(A), -2(B), and -12(A)(5) (repealed 2001).

essentially a suit for specific performance of an agreement to arbitrate.” *Shaw v. Kuhnel & Assocs.*, 102 N.M. 607, 608, 698 P.2d 880, 881 (1985), *superseded by statute as stated in Aguilera v. Palm Harbor Homes, Inc.*, 2002-NMSC-029, 132 N.M. 715, 54 P.3d 993; *accord Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, ¶ 52, 131 N.M. 772, 42 P.3d 1221, *cert. denied*, No. 27,324, and *cert. denied*, No. 27,285 (2002) (“[A]rbitration clauses are governed by contract law.”). Courts must interpret the provisions of an arbitration agreement according to the rules of contract law and apply the plain meaning of the contract language in order to give effect to the parties’ agreement. *See Christmas v. Cimarron Realty Co.*, 98 N.M. 330, 332, 648 P.2d 788, 790 (1982). New Mexico public policy favors freedom to contract and enforces contracts that do not violate law or public policy. *See Reagan v. McGee Drilling Corp.*, 1997-NMCA-014, ¶ 15, 123 N.M. 68, 933 P.2d 867. As this Court held in *K. L. House Construction Co. v. City of Albuquerque*, 91 N.M. 492, 494, 576 P.2d 752, 754 (1978):

When the parties agree to arbitrate any potential claims or disputes arising out of their relationships by contract or otherwise, the arbitration agreement will be given broad interpretation unless the parties themselves limit arbitration to specific areas or matters. Barring such limiting language, the courts only decide the threshold question of whether there is an agreement to arbitrate. If so, the court should order arbitration. If not, arbitration should be refused.

Where, as here, the parties plainly contracted to arbitrate only upon the consent of both parties, such a contract must be enforced unless it violates New Mexico law or public policy. We find no statutory or public-policy grounds to compel arbitration in this case.

II. The Regulations Governing Uninsured and Unknown Motorists Coverage (UUMC) Do Not Require Binding Arbitration

{11} Insureds next argue that the consensual arbitration provision is invalid because Department of Insurance regulations require binding arbitration in the resolution of

UM disputes. They point out that UM coverage must be provided “according to the rules and regulations promulgated by, and under provisions filed with and approved by, the [S]uperintendent of [I]nsurance.” Section 66-5-301(A) (1983). The UUMC regulations in relevant part state that “[a]ll forms of endorsement for uninsured and unknown motorists coverage shall contain the provisions in 13.12.3.11 through 13.12.3.17 NMAC.” 13.12.3.10 NMAC. These standardized UM provisions, intended to be inserted into UM endorsements, contain two clauses pertaining to dispute resolution. The first provision, titled “mandatory arbitration,” mandates binding arbitration as the sole mode of dispute resolution between claimant and insurer. 13.12.3.17(H)(1) NMAC. The second, titled “optional arbitration,” empowers the insured to demand that arbitration be carried out according to the rules and regulations of the American Arbitration Association. 13.12.3.17(H)(2) NMAC. Neither of these provisions appears in Allstate’s UM endorsement. Insureds argue, therefore, that the Allstate endorsement violates the UUMC regulations, despite the Superintendent’s approval of the endorsement. They contend the Allstate endorsement must be reformed to include the “mandatory arbitration” provision prescribed in the UMCC regulations, supplanting the consensual arbitration provision approved by the Superintendent.

{12} We agree with Insureds’ statement that the Superintendent’s mere approval of an insurance contract does not validate a contract that is otherwise in violation of the UM statute or its underlying public policy. *See Cont’l Ins. Co. v. Fahey*, 106 N.M. 603, 605, 747 P.2d 249, 251 (1987) (striking an exclusionary clause that violated the intent of the UM statute notwithstanding the Superintendent’s approval), *superseded by statute on other grounds as stated in Mountain States Mut. Cas. Co. v. Vigil*, 121 N.M. 812, 815, 918 P.2d 728, 731 (Ct. App. 1996); *Padilla*, 2003-NMSC-011, ¶ 13 (striking an arbitration provision that violated the public policy underlying the UM statute). Nevertheless, although a reviewing court is obliged to correct a misapplication of the law, it “generally may not substitute its judgment for that of the administrative agency.” *Mutz v. Mun. Boundary Comm’n*, 101 N.M. 694, 697, 688 P.2d 12, 15 (1984).

{13} Insureds argue the Superintendent acted outside his statutory authority when he approved Allstate’s UM endorsement containing the consensual arbitration provision. We disagree. The Superintendent possesses authority under both the Insurance Code and the UUMC regulations to approve a substitute UM endorsement that does not precisely conform to the endorsement prescribed in the UUMC regulations. Section 59A-18-17(B) of the Insurance Code states:

No policy shall contain any provision inconsistent with or contradictory to any standard or uniform provision used or required to be used, *but the [S]uperintendent may approve any substitute provision* which is, in his [or her] opinion, not less favorable in any particular to the insured . . . than the provision otherwise required

NMSA 1978, § 59A-18-17(B) (1993) (emphasis added). Contrary to Insureds’ assertion, it is not the case that every insurance policy issued in New Mexico is required to incorporate unconditionally the provisions prescribed by the Department of Insurance. Although every policy is required to conform to “any standard or uniform provision,” including in this case the standard provisions prescribed in the UUMC regulations, the Superintendent clearly has discretion to approve a “substitute provision” that is “not less favorable” to the insured.

{14} The UUMC regulations themselves adopt and incorporate this statutory authority to approve a “substitute” UM endorsement: “Nothing contained in this rule shall prohibit any insurance company from filing an endorsement providing benefits for uninsured and unknown motorists that, in the opinion of the [S]uperintendent of [I]nsurance, is more favorable to the policyholder than the provisions permitted by the endorsement prescribed in this rule.” 13.12.3.8 NMAC. This authority to approve a substitute endorsement is substantially similar to, and such authority is properly conveyed by, the “not less favorable” standard articulated in Section 59A-18-17(B). Construing the Insurance Code and the UUMC regulations together with the delegation of authority to the Superintendent under Section 66-5-301(A), we conclude that the Legislature has delegated to the Superintendent the authority

to approve a UM endorsement that the Superintendent deems to be more favorable to the insured.

{15} In this case we believe Allstate's consensual arbitration provision generally does provide a more favorable benefit to the insured than the mandatory arbitration provision prescribed in the UUMC regulations. First, the consensual arbitration provision approved by the Superintendent provides a mechanism for binding arbitration that is consistent with the public-policy preference in New Mexico for voluntary binding arbitration agreements. Second, the approved provision permits either party to forego arbitration in favor of a trial by jury. We have held elsewhere that a mandatory binding arbitration clause in an insurance contract, imposed on the parties by a Department of Insurance regulation, violates the parties' right to a trial by jury, guaranteed under Article II, Section 12 of the New Mexico Constitution. *See, e.g., Lisanti*, 2002-NMSC-032, ¶¶ 15, 25 (applying Article II, Section 12 in striking down a Department of Insurance regulation that required all property title insurance claims under \$1,000,000 to be resolved through arbitration). Given the constitutional concerns that would be raised by compelling two private entities to arbitrate a private contract claim, it would be truly anomalous for us to find that it was an abuse of discretion for the Superintendent to approve a contract provision that preserved both parties' right to a trial by jury.

III. Other Public-Policy Concerns

{16} Insureds further argue that it would violate the remedial intent of the UM statute to allow Allstate to impose additional expense and delay on them by litigating issues of coverage or damages, rather than submitting these issues to arbitration. Quoting from the Court of Appeals decision in *Padilla*, Insureds argue that "to the extent the insured incurs litigation costs in order to obtain the benefits of uninsured motorist coverage, the value of such coverage is diluted." *See Padilla v. State Farm Mut. Auto. Ins. Co.*, 2002-NMCA-001, ¶ 17, 131 N.M. 419, 38 P.3d 187, *modified in part*, 2003-NMSC-011. Here, Insureds argue, not to compel arbitration would "dilute" their coverage by depriving them of a more speedy, cost-effective method of resolving UM disputes.

{17} We agree with Insureds that the UM

statute is designed to protect individuals against the hazard of culpable but uninsured motorists, *see Romero v. Dairyland Ins. Co.*, 111 N.M. 154, 156, 803 P.2d 243, 245 (1990), and to place the insured in the same position as he or she would have been had the tortfeasor had liability insurance, *see Padilla*, 2003-NMSC-011, ¶ 9. We do not see, however, how Allstate's consensual arbitration provision violates this legislative intent. If the alleged tortfeasor had owned liability insurance, and the alleged tortfeasor's insurer had disputed liability or the extent of the damages, McMillan and Gallegos necessarily would have litigated their claims. Just as in any tort action, the injured party would have the burden of proving duty, breach of duty, proximate cause and damages to a jury, and the alleged tortfeasor would have a fair opportunity to rebut the plaintiff's evidence and to plead affirmative defenses, including comparative negligence. Here, Allstate has disputed the extent of the damages claimed by Insureds and has requested that their respective claims be tried in a court of law. This is nothing more than Insureds could expect had the alleged tortfeasors owned liability insurance.

{18} Furthermore, the consensual arbitration provision at issue here does not confer upon the insurer, as State Farm's "escape hatch" provision did in *Padilla*, a greater leverage over the insureds in demanding litigation. Unlike *Padilla*, the insureds under this contract have an equal right of refusal of arbitration, and therefore an equal right of access to the courtroom. The provision operates symmetrically to allow either party to avoid compulsory arbitration. We cannot say that Allstate's consensual arbitration provision, merely by raising the prospect of litigation, puts the insured in a worse position than he or she would have been had the tortfeasor had liability insurance.

{19} Insureds argue that we should invalidate the consensual arbitration provision because its hidden purpose is "to impose additional expense and delay on the insured" through oppressive litigation costs and delay tactics by the insurer. Insureds, however, have advanced no evidence either that Allstate has employed such tactics in this case, or that insurers generally are more likely to employ such tactics in UM cases than in other types of insurance claim

disputes. Moreover, effective mechanisms already exist to discourage such behavior. First, a prevailing insured is entitled to recover from the insurer certain costs of litigation pursuant to Rule 1-054(D)(2) NMRA 2003. Second, the trial court has the discretion to award prejudgment interest, an award that "ensures that just compensation to the tort victim is not eroded by the dilatory tactics of the tortfeasor." *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 55, 127 N.M. 47, 976 P.2d 999 (quoted authorities and quotation marks omitted); *see NMSA 1978, § 56-8-4(B)* (1993). In addition, in a recent amendment to the New Mexico Rules of Civil Procedure, if the insurer rejects an offer of settlement made by a claimant prior to litigation, and the claimant obtains a judgment at trial that is more favorable than the offer of settlement, the claimant is entitled to "double the amount of costs incurred after the making of the offer." Rule 1-068(A) NMRA 2003. Insureds have not persuaded us that such procedural rules, designed to discourage precisely the conduct they fear, are inadequate in the context of UM litigation.

IV. Conclusion

{20} We conclude that Allstate's consensual arbitration provision in its standard UM endorsement does not violate New Mexico law or public policy. While in no way discounting New Mexico's public-policy preference favoring arbitration, we hold that the Legislature has not expressly required binding arbitration in the adjudication of UM disputes, and the rules and regulations promulgated by the Department of Insurance do not require binding arbitration where the Superintendent of Insurance has approved a substitute UM endorsement that is more favorable to the insured. We hold that, in the context of UM disputes between insurer and insured, where the UM endorsement provides for arbitration only upon the consent of both parties, and where the Superintendent of Insurance has approved such an endorsement, New Mexico law does not compel binding arbitration. Because we hold Allstate's consensual arbitration provision to be valid, we do not reach the constitutional issue raised by Allstate, that arbitration of UM disputes, mandated by statute or regulation, would violate Article II, Section 12 of the New Mexico Constitution. Because we answer the certified question in the negative, we

reverse the district court in Petitioner Gallegos' case and remand for further proceedings consistent with this opinion.

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

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES,

Chief Justice

PAMELA B. MINZNER, Justice

PATRICIO M. SERNA, Justice

RICHARD C. BOSSON, Justice

From the New Mexico
Supreme Court

Opinion Number: 2004-NMSC-003

TOPIC INDEX:

Constitutional Law: Due Process; Equal Protection; and New Mexico Constitution, General

Government: Elections; Public Office; and State Agencies

Statutes: Constitutionality; Interpretation; and Rules of Construction

JEROME D. BLOCK, individually,
as a registered voter, and in his
capacity as member of the Public
Regulation Commission,
Plaintiff-Appellant,
versus

REBECCA VIGIL-GIRON, in her
capacity as the New Mexico
Secretary of State,
Defendant-Appellee.
No. 28,345
(filed: January 7, 2004)

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY
James A. Hall, District Judge

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OPINION

CHÁVEZ, JUSTICE

{1} Appellant Jerome Block, a current member of the Public Regulatory Commission (PRC), seeks a declaration that he is entitled to be put on the upcoming 2004 ballot for another term as Commissioner of the PRC. He was first elected to the PRC in 1998, won re-election in 2000, and now at the expiration of this four-year term seeks to run for a second four-year term. The New Mexico Constitution provides that “after serving two terms” a PRC member is ineligible to hold office “until one full term has intervened.” N.M. Const. art. XI, § 1. Thus, the central question of this case is whether Appellant has served “two terms” as that phrase is understood by the Constitution. Appellant argues: (1) “term,” as used in Article XI, Section 1, should only mean a full, four-year term and his initial two-year period of service should not count toward the two-term limit; and (2) a contrary reading would violate his right to equal protection and substantive due process. We hold: (1) the word “term,” as used in Article XI, Section 1, includes both a full four-year term and the shortened two-year term Appellant served following the 1998 general election; and (2) the Secretary of State would act constitutionally in denying him a place on the upcoming ballot.

I.

{2} Appellant was originally elected to his position in the 1998 general election, the first following the creation of the PRC by Article XI, Section 1. In accordance with that section, the five members of the PRC decided by lot which two would initially serve for two years, and Appellant was one of the two so selected. He was subsequently re-elected in 2000 for a four-year term and now desires to run for a second four-year term. The Secretary of State, following an opinion of the Attorney General, indicated that she would not certify him as a candidate. *See* N.M. Att’y Gen. Op. 03-05 (2003). Appellant thus filed a “Complaint for Declaratory Judgment and Petition for Writ of Mandamus” in the First Judicial

District on September 4, 2003, seeking to compel the Secretary of State to place his name on the ballot. On October 17, 2003, Judge Hall entered an order denying the request for a preliminary injunction and granting the State’s motion for a judgment on the pleadings. We subsequently granted Appellant’s motion for an expedited appeal.

II.

{3} This case involves the interpretation of both a constitutional provision and implementing legislation. In relevant part, Article XI, Section 1, adopted November 5, 1996, provides:

The “public regulation commission” is created. The commission shall consist of five members elected from districts provided by law for staggered four-year terms beginning on January 1 of the year following their election; provided that those chosen at the first general election after the adoption of this section shall immediately classify themselves by lot, so that two of them shall hold office for two years and three of them for four years; and further provided that, after serving two terms, members shall be ineligible to hold office as a commission member until one full term has intervened.

The Legislature passed implementing legislation, which was approved on April 11, 1997. It is largely similar to the constitutional provision, but differs in one significant way:

Members of the public regulation commission shall be elected for staggered four-year terms provided that commission members elected at the 1998 general election shall classify themselves by lot so that two commission members shall initially serve *terms of two years* and three commission members shall serve *terms of four years*. Thereafter, all commission

members shall serve four-year terms. After serving two terms, a commission member shall be ineligible to hold office as a commission member until one full term has intervened.

NMSA 1978, § 8-7-4(A) (1997, prior to 2001 amendment) (emphasis added).

{4} The Constitutional provision states that “after serving two terms” a PRC member is ineligible to hold office “until one full term has intervened.” As noted, the central question of this case is whether Appellant has served “two terms” as that phrase is understood by the Constitution. In interpreting this provision, our primary goal is to give effect to the intent of the Legislature which proposed it and the voters of New Mexico who approved it. See *Hannett v. Jones*, 104 N.M. 392, 393-94, 722 P.2d 643, 644-45 (1986); see also *Todd v. Tierney*, 38 N.M. 15, 26, 27 P.2d 991, 998 (1933) (noting that by “framers of the Constitution” we contemplate also the people who adopted it). For the following reasons, we hold the word “term,” as it is used in this constitutional provision, includes both a full four-year term and a shortened two-year term. Appellant has thus served “two terms” and is ineligible to be placed on the upcoming ballot until four years have intervened.

{5} First, the normal understanding of the word “term” does not support Appellant’s argument. In general, “[i]t must be presumed that the people know the meaning of the words they use in constitutional provision, and that they use them according to their plain, natural and usual signification and import” *Flaska v. State*, 51 N.M. 13, 22, 177 P.2d 174, 179 (1946). Black’s Law Dictionary, for example, defines “term” as “[a] fixed and definite period of time; implying a period of time with some definite termination.” *Black’s Law Dictionary* 1482 (7th ed. 1999). It further provides that a “term of office” is “[t]he period during which an elected officer or appointee may hold office, perform its functions, and enjoy its privileges and emoluments.” *Id.* at 1483. Under this definition, both the two-year period and the four-year period Appellant served as a member of the PRC would be considered terms.

{6} In a slightly different context, this Court indicated that it understands the word “term” in a similar manner to Black’s Law Dictionary. In *Denish v. Johnson*, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914, this Court described the Governor’s authority to fill vacancies of appointments.

In the course of that discussion, we had to distinguish between a term and a tenure of office:

The “term” is the fixed period of time the appointee is authorized to serve in office. It is a period that is established by law and specified by the executive in his or her letters of appointment. The “tenure” is the time the appointee actually serves in office. Depending upon the circumstances the tenure can be shorter or longer than the term.

Id. ¶ 18. Under this definition of the word “term,” Appellant’s initial two-year period of office is just as much a “fixed period of time [he] is authorized to serve in office” as his second, four-year period. *Id.* We also note that in *Denish* the word “term” was not limited in its application to a particular “fixed period of time.” *Id.* ¶ 41. (“The amendment [Article XII, Section 13] inaugurates the system by staggering the terms of the first five appointees—with shortened two-and four-year terms, and one full six-year term.” (Emphasis added.)). Appellant has thus served “two terms.” For that reason, allowing him to serve a second four-year term would enable him to serve three consecutive terms, violating the plain language of Article XI, Section 1: “[A]fter serving *two terms*, members shall be ineligible to hold office as a commission member until one full term has intervened.” (Emphasis added.)

{7} Second, Appellant would have us read into the provision words that are not there. In effect, Appellant is asking us to interpret “after serving two terms” as though it were written “after serving two [four-year] terms.” Had the framers intended to restrict “two terms” in such a way, “that meaning could have been made clear by the use of language incapable of any other interpretation.” *Flaska*, 51 N.M. at 20, 177 P.2d at 178. In this case, rather than use the generic phrase “two terms,” the framers could have explicitly used “two four-year terms.”

{8} Furthermore, the Constitution has, in other contexts, used the phrase “two consecutive four-year terms.” Article X, Section 2 of the New Mexico Constitution, as amended in 1998, provides for the terms of county officers. Subsection A mandates that the ordinary term for a county official is four years. Subsections B and C establish staggered terms for the county officials by creating an initial four-year term for some and an initial two-year term for others. Subsection D, however,

provides that “[a]ll county officers, after having served *two consecutive four-year terms*, shall be ineligible to hold any county office for two years thereafter.” (Emphasis added.) Thus, Article X, Section 2 does not count the initial two-year term of some county officials provided for in Subsection B toward the two-term limit provided for in Subsection D. That Article XI, Section 1 uses “two terms” instead of “two consecutive four-year terms,” is therefore a strong indication that it, unlike Article X, Section 2, does count the initial two-year term towards the two-term limit.

{9} Third, other language in Article XI, Section 1 indicates that the word “term” includes both the initial two-year period and any subsequent four-year period. As noted, the provision renders those that have served two terms ineligible “until one *full term* has intervened” (emphasis added). If Appellant were correct that “term” only means a four-year term, then the adjective “full” would be unnecessary—“term” alone would suffice. In general, we interpret constitutional provisions as a harmonious whole, see *State ex rel. N.M. Judicial Standards Comm’n v. Espinosa*, 2003-NMSC-017, ¶ 23, 134 N.M. 59, 73 P.3d 197, and we avoid interpretations that would render language in the provision surplusage. *Hannett*, 104 N.M. at 395, 722 P.2d at 646.

{10} Finally, any uncertainty as to the legislative intent behind the constitutional provision is removed by the implementing legislation, enacted in 1997, immediately following the adoption of the constitutional provision. That legislation provides that, as the result of the random drawing, “two commission members shall initially serve *terms of two years* and three commission members shall serve *terms of four years*.” Section 8-7-4(A). Under Section 8-7-4(A), it is even more clear that the initial two-year period Appellant served is a “term” that counts toward his two-term limit.

{11} At oral argument, the parties were uncertain when Section 8-7-4(A) was initially enacted and whether it could be used as a gauge of the Legislature’s intent in drafting Article XI, Section 1. Section 8-7-4(A) was initially enacted by 1997 N.M. Laws, ch. 262, § 4, which was approved on April 11, 1997. This approval took place five months after the voters of New Mexico ratified Article XI, Section 1, and over one year before the first election of the PRC Commissioners. Appellant argues that we should not rely on Section 8-7-4 to determine the legislative intent behind Article XI, Section 1. Instead, he argues, we should declare the statute

unconstitutional as contrary to that constitutional provision to the extent that the statute clearly specifies that his initial two years of service constitutes a “term.” We disagree. “A contemporaneous construction by the legislature of a constitutional provision is a ‘safe guide to its proper interpretation,’ and creates ‘a strong presumption’ that the interpretation was proper.” *State ex rel Udall v. Colonial Penn. Ins. Co.*, 112 N.M. 123, 128, 812 P.2d 777, 782 (1991) (quotation marks and quoted authority omitted). Given this presumption, we conclude that Section 8-7-4(A) is constitutional and a safe guide to the legislative intent behind Article XI, Section 1.

III.

{12} Appellant also argues that our interpretation of Article XI, Section 1 would violate his constitutional rights to equal protection of the laws and substantive due process. Appellant “readily concede[s] that the Constitution may provide for term limits and for staggered terms,” but still claims that the discriminatory classification upheld by the district court in this case was unconstitutional. We conclude that Appellant’s concession precludes him from attacking the constitutionality of Article XI, Section 1.

{13} In general, “[d]ue process . . . focuses on the validity of legislation as it equally burdens all persons in the exercise of a specific right. Equal protection, on the other hand, focuses on the validity of legislation that permits some individuals to exercise a specific right while denying it to others.” *Marrujo v. N.M. State Highway Transp. Dep’t*, 118 N.M. 753, 757, 887 P.2d 747, 751 (1994). In his initial brief to this court, Appellant argued that Article XI, Section 1 and NMSA 1978, § 8-7-4 (2001) should be subjected to a strict scrutiny analysis. In his subsequent brief, and again at oral argument, Appellant agreed instead that we should review it under a rational basis analysis. We need not engage in a lengthy discussion of the various standards of review under these constitutional provisions, because any discrimination against Appellant or burden on his rights are inherent in the creation of a new body with term limits and staggered terms, both of which he concedes are constitutional. That is, there is no other way to create staggered terms for a fully constituted board without providing for initial terms of varying lengths. That

fact, combined with the establishment of term limits, necessarily means that in the early days of the newly created body, some members are going to face term limits sooner than others. Having conceded that the Constitution may both create staggered terms and provide for term limits, Appellant cannot be heard to complain of the effect those provisions have on him.

{14} Appellant also argues that the New Mexico Constitution directly confers on him the right to seek office, a right he contends would be violated if the Secretary of State refuses to place him on the ballot. The very provision Appellant identifies, however, does not support his claim. Article VII, Section 2(A) of the New Mexico Constitution provides, “Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any elective public office *except as otherwise provided in this constitution.*” (Emphasis added.) Although Appellant is correct that Article XI, Section 1 generally provides that PRC members serve “staggered four-year terms,” that general rule is modified by the language which follows it: “provided that those chosen at the first general election after the adoption of this section shall immediately classify themselves by lot, so that two of them shall hold office for two years and three of them for four years.” In ordinary usage, the words “provided that” indicate a limitation on, an exception to, or a requirement in addition to those words previously used. *Carr v. Burke*, 130 N.E.2d 687, 688 (Mass. 1955). Accordingly, we read the language following “provided that” as an exception to the general rule that precedes it. We find no right under the New Mexico Constitution to serve two four-year terms before being subjected to term limits.

{15} Finally, determining by lot which PRC members get the initial shortened term, far from representing any invidious discrimination, is instead a fair method of making that determination. Under Article XI, Section 1, members of the PRC are elected from and serve districts. Deciding prior to the initial election which such districts would be served by a member for two or four years prior to re-election would invite discrimination against certain geographic entities. On the other hand, deciding that question after the election and by lot seems a fair way to resolve the

question. We note that Arkansas chose a similar method to provide for staggered terms of its state senators. *See Ark. Const. art. V, § 3.*

IV.

{16} Not being persuaded by Appellant’s arguments to the contrary, we hold: (1) the phrase “two terms” under Article XI, Section 1 includes both his initial two-year and subsequent four-year term; and (2) the Secretary of State would act constitutionally in denying him a place on the upcoming ballot. We therefore affirm the district court.

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

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
RICHARD C. BOSSON, Justice

Certiorari Not Applied For

*From the New Mexico
Court of Appeals*

**Opinion Number:
2004-NMCA-007**

FELONIZ N. MARTINEZ,
Plaintiff-Appellant,
versus
FELIX G. MARTINEZ,
Defendant-Appellee.
No. 21,223
(file: November 7, 2003)

**APPEAL FROM THE DISTRICT
COURT OF TAOS COUNTY**
PEGGY J. NELSON, District Judge

RACHEL E. HIGGINS
JOHN WAYNE HIGGINS
& ASSOCIATES
Albuquerque, New Mexico
for Appellant

J. RONALD BOYD
Santa Fe, New Mexico
for Appellee

OPINION

FRY, JUDGE

{1} This case arises from the 1983 divorce of Plaintiff Feloniz Martinez (Wife) and Defendant Felix Martinez (Husband). Wife's complaint averred that she is a tenant in common in certain real property purchased by Husband during their marriage but not distributed in their divorce decree. Based on this theory, she sought an accounting with respect to a business operated on the property, partition, and damages for Husband's allegedly fraudulent actions in concealing Wife's interest in the property at the time of the divorce. The trial court granted summary judgment in favor of Husband. Wife appeals. We consider (1) whether issues of fact precluded summary judgment on Wife's claim of fraud, (2) whether the statute of limitations barred the fraud claim, (3) whether Wife's partition action is subject to a statute of limitations defense consistent with *Plaatje v. Plaatje*, 95 N.M. 789, 626 P.2d 1286 (1981), and (4) whether laches barred the partition claim. For the reasons that follow, we reverse and remand for further proceedings consistent

with this opinion.

BACKGROUND

{2} The parties appear to agree on many of the basic facts. Wife and Husband married in 1955. In 1978, Husband purchased a one-half interest in a piece of commercial real property in Taos County, New Mexico. Although he was married to Wife at the time, Husband represented himself as a single person on documents related to the purchase. Located on the property was an ongoing business, the Old Martinez Hall and El Cortez Tavern (tavern), which Husband and the co-owners operated together. Early in 1983, prior to his divorce from Wife, Husband purchased an interest in an adjacent piece of property. According to Wife, he again represented himself as a single person; Husband denied this allegation. While Husband in his affidavit denied using community funds to purchase either piece of property, his attorney admitted at the hearing on the motion for summary judgment that the property was community property for purposes of the motion. {3} Wife acknowledges that during the marriage she knew about the existence of the two lots and the tavern (Taos property) and Husband's ownership interest in the property. The couple divorced in April 1983, at which time Wife asked Husband whether she had an ownership interest in the Taos property.

{4} The parties agree that they discussed the Taos property at the time of the divorce, but their versions of history diverge with respect to the content of that conversation. According to Wife, Husband told her that she had no rights in the property and that it belonged to Husband separately. In his affidavit, Husband suggested that at the time of the divorce Wife did not want an interest out of concern that she might be responsible for related debt. On appeal, Husband argues that even if his words were false or misleading as to the legal status of the Taos property, he made no factual misrepresentations.

{5} The parties further agree that their divorce decree did not specifically mention the Taos property. However, the parties dispute whether the decree nevertheless included the property. Husband argues that the decree may have intended to divide the Taos property, even though it was not mentioned in court documents. Wife contends that the divorce decree "did not divide or distribute any interest in the property." The decree is not part of the record on appeal.

{6} In 1996, approximately thirteen years after the divorce decree, Wife filed the action underlying this appeal. She claimed

an interest in the Taos property as a tenant in common on the ground that during the marriage she acquired a community property interest, which automatically became a tenancy in common upon divorce. See *In re Miller's Estate*, 44 N.M. 214, 220, 100 P.2d 908, 912 (1940). In keeping with this theory, Wife's complaint sought an accounting of profits from the tavern and partition. In addition, she alleged damages resulting from Husband's alleged fraudulent misrepresentation in telling her that she had no interest in the property.

{7} Husband moved for summary judgment on the basis that the statute of limitations barred Wife's claim. Alternatively, Husband argued the doctrine of laches barred recovery by Wife. The trial court granted summary judgment, and Wife's appeal followed.

STANDARD OF REVIEW

{8} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." See *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. We review this legal question de novo, viewing the pleadings, affidavits, and depositions in the light most favorable to the nonmoving party. *Id.*; see also *Gardner-Zemke Co. v. State*, 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990).

DISCUSSION

{9} The parties' arguments invoke legal theories including fraud, various statutes of limitations, and the doctrine of laches. Underlying the dispute, however, are basic tenets of community property. Specifically, this litigation is premised on the rule that property acquired during marriage is presumptively community property, NMSA 1978, § 40-3-12(A) (1973), and the corresponding principle that upon dissolution of marriage, community property not otherwise disposed of becomes owned in the form of a tenancy in common. *In re Miller's Estate*, 44 N.M. at 220, 100 P.2d at 912; see also NMSA 1978, § 40-4-20(A) (1993) (stating that failure to divide property at divorce does not affect property rights). With these fundamental legal principles in mind, we turn to the parties' arguments.

Wife's Allegations of Fraud

{10} Wife's complaint sought damages as a result of Husband's fraudulent misrepresentation and breach of fiduciary duties. Husband contended below and the trial court agreed that his statement to Wife—that the land in question was not community property—was a statement of his opinion as to the legal status of the property, not a

statement of fact. Consequently, he argued, as a matter of law the statement could not be deemed fraudulent because fraud requires proof of a misrepresentation of fact. See UJI 13-1633 NMRA 2003 (stating that the elements of fraud include “a representation of fact . . . which was not true”).

{11} We do not agree. “[T]here is a recognized exception to the general rule that misrepresentations of law are not actionable, which exception makes such misrepresentations actionable when the parties occupy a fiduciary relationship or where one party has a superior means of information.” *Rogers v. Stacy*, 63 N.M. 317, 320, 318 P.2d 1116, 1118 (1957). Here, the parties were married when Husband acquired the property, and they were married when Husband told Wife that the property was his sole and separate property. Thus, they were in a fiduciary relationship and Husband owed Wife a fiduciary duty in his management of community property. See *Roselli v. Rio Cmty. Serv. Station, Inc.*, 109 N.M. 509, 514, 787 P.2d 428, 433 (1990) (determining that a spouse’s “power to manage and dispose of the community’s personal property is subject to a fiduciary duty to the other spouse”); *Fernandez v. Fernandez*, 111 N.M. 442, 444, 806 P.2d 582, 584 (Ct. App. 1991) (explaining that “[e]ach spouse owes the other a fiduciary duty when managing community property”). Therefore, Husband’s alleged misrepresentation of law is actionable, and the trial court’s determination to the contrary was error. Of course, to succeed Wife must establish the other elements of her fraud claim, such as Husband’s knowledge or reckless disregard of the falsity of his statement, his intent to deceive, and Wife’s reliance on the statement. See UJI 13-1633 (listing the elements of fraud).

{12} The only other basis Husband offered in support of summary judgment on the fraud claim was that the four-year statute of limitations applicable to fraud barred Wife’s claim. See NMSA 1978, § 37-1-4 (1953). He argued that Wife’s delay of thirteen years from the date of Husband’s alleged misrepresentation to the date when Wife sought legal advice and filed her complaint precludes her action. However, we agree with the trial court’s finding that there are issues of fact regarding when Wife discovered the fraud and the statute of limitations began to run. See *Ambassador E. Apts., Investors v. Ambassador E. Invs.*, 106 N.M. 534, 536, 746 P.2d 163, 165 (Ct. App. 1987) (explaining that statute of limitations applicable to fraud actions “does

not begin to accrue . . . until the fraud is discovered by the aggrieved party”). While Husband attested that Wife knew about his ownership interest in the contested property before the divorce, Wife attested that she had no reason to disbelieve Husband’s representation that the property was his sole and separate property until she consulted an attorney many years after the divorce. This is a classic fact dispute best resolved by the fact finder.

{13} We also conclude there are issues of fact as to whether Husband’s conduct served to toll the running of the statute of limitations. In the context of a fiduciary relationship, a party with superior knowledge has a duty to disclose material information, and failure to disclose such information constitutes fraudulent concealment that tolls the statute of limitations. *Garcia v. Presbyterian Hosp. Ctr.*, 92 N.M. 652, 654-55, 593 P.2d 487, 489-90 (Ct. App. 1979). The parties’ conflicting affidavits and the reasonable inferences drawn from them convince us that this issue should also be resolved by the fact finder.

Wife’s Claims for Accounting and Partition

{14} Wife’s claims for accounting and partition both flow from the legal presumption that she acquired a community property interest in the Taos property because Husband purchased it during the marriage. The parties do not dispute the legal proposition that to the extent Wife had a community property interest in the Taos property, her interest took the form of a tenancy in common upon divorce. See *In re Miller’s Estate*, 44 N.M. at 220, 100 P.2d at 912.

Whether the Claims Are Barred by a Statute of Limitations

{15} Wife brings her claims for accounting and partition pursuant to Section 40-4-20(A), which provides as follows:

The failure to divide or distribute property on the entry of a decree of dissolution of marriage or of separation shall not affect the property rights of either the husband or wife, and either may subsequently institute and prosecute a suit for division and distribution or with reference to any other matter pertaining thereto that could have been litigated in the original proceeding for dissolution of marriage or separation.

The statute refers simply to “property,” without specifying real or personal. Wife contends that this statute permits her to

bring an action to divide real property subject to no time limitation. Husband counters by pointing to *Plaatje*, in which the Supreme Court analyzed a post-divorce claim for future military retirement benefits not distributed at the dissolution of marriage. In *Plaatje*, the Supreme Court applied the four-year “catch-all” statute of limitations in Section 37-1-4 to bar the plaintiff’s action for personal property. *Plaatje*, 95 N.M. at 790, 626 P.2d at 1287. In this case, Husband successfully argued that because the four-year statute of limitations applied to personal property in *Plaatje*, it must be applied to this action for accounting and partition of real property. For the reasons that follow, we disagree with the application of a four-year statute of limitations to this action pertaining to real property.

{16} Under Section 40-4-20(A), failure to divide property upon divorce “shall not affect the property rights.” In addition, the statute explicitly permits actions to divide omitted community property, and it contains no language limiting such actions. Thus, without looking beyond the statutory language, it would appear that a party may bring an action under Section 40-4-20(A) at any time. See *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (stating that plain language of statute is primary indicator of legislative intent); see also 2 Valuation & Distribution of Marital Prop. (MB) § 41.06[1][b][i] (March 2002) (“[A] community property asset that has never been distributed by a court or the parties’ agreement remains in the co-ownership of the spouses. . . . The property sits patiently awaiting division.”).

{17} Nevertheless, *Plaatje* imposed a statute of limitations in a case involving personal property on the basis that the legislature must not have intended the potential injustice that might occur if, for example, a wife could “bring an action against her former husband or against his estate 20 or 30 years after the divorce.” 95 N.M. at 790, 626 P.2d at 1287. The Supreme Court therefore applied a four-year statute of limitations. *Id.* Contrary to Husband’s arguments, however, this case is distinguishable from *Plaatje*.

{18} *Plaatje* specifically refers to “suits to divide personal property.” *Id.* The distinction between personal and real property is crucial because tenants in common in real property enjoy special protections under the law. See *In re Estate of Duran*, 2003-NMSC-008, ¶ 31, 133 N.M. 553,

66 P.3d 326 (noting that the law imposes on a cotenant a heightened standard for establishing adverse possession against another cotenant). In addition, “[s]ince a cause of action for partition is a continuing one while the cotenancy exists, there generally is no limitations period for bringing a petition for partition.” 59A Am. Jur. 2d *Partition* § 80 (2003). Moreover, “[t]he right to partition is an inherent element of the tenancy in common. . . . To deny it is to effectively expand the property rights of one cotenant at the expense of other cotenants.” 7 Richard R. Powell & Michael Allan Wolf, *Powell on Real Property* § 50.07[3][a] (2000).

{19} These authorities teach us that the status of the tenancy in common held by Wife upon divorce described her existing title to the property at issue, which is title she continues to enjoy to the present time. There is nothing about the bare holding of title that should equate to the accrual of a cause of action that triggers a time limitation on the right to seek partition. Indeed, she would be subject to a limitations period only if her cotenant did “something which amounts to an ouster.” *In re Estate of Duran*, 2003-NMSC-008, ¶ 18 (internal quotation marks and citation omitted). We find persuasive the logic expressed by our sister state, Arizona, that the application of a four-year statute of limitations effectively requires tenants in common “to file an action for partition within four years of the initiation of the joint ownership or lose the opportunity to ever obtain partition,” a situation the Arizona court viewed as untenable. *See Occhino v. Occhino*, 793 P.2d 1149, 1151 (Ariz. Ct. App. 1990). We therefore hold that the four-year statute of limitations in Section 37-1-4 does not apply to an action for accounting and partition of real property. Rather, the trial court must analyze a post-divorce action to partition real property in the same fashion as any partition action by a tenant in common. *See Mendoza v. Mendoza*, 103 N.M. 327, 333, 706 P.2d 869, 875 (Ct. App. 1985) (“In addition to the authority invested in the district court under Section 40-4-20, specific statutory authorization may be invoked by a party seeking partition of real estate held as tenants in common[.]”). The resolution of such actions remains guided by the principle that cotenants generally have a right to partition, *Martinez v. Martinez*, 98 N.M. 535, 539-40, 650 P.2d 819, 823-24 (1982),

and yet at the same time the trial court has the right to determine “the equities as between the parties.” *Mendoza*, 103 N.M. at 333, 706 P.2d at 875; *see also* NMSA 1978, § 42-5-1 (1907) (permitting a complaint for partition by interested parties “if it shall appear that partition cannot be made without great prejudice to the owners”).

{20} While we reverse summary judgment in favor of Husband, our holding does not go very far toward resolving matters between the parties. The parties dispute whether the property at issue was in fact community property. Husband admitted that it was community property for purposes of his motion for summary judgment, but this remains a potential issue subject to proof on remand. In addition, the parties dispute whether the property was divided in the divorce, and this may be a bone of contention on remand. If the fact finder concludes that the divorce decree (which is not part of the record on appeal) divided the property, our discussion regarding partition — and the absence of a statute of limitations governing partition — does not apply.

Whether the Claims Are Barred by the Doctrine of Laches

{21} Husband argues that if Wife’s action is not barred by a statute of limitations, then it is barred by the doctrine of laches. The doctrine of laches contains the following elements:

- (1) Conduct on the part of the defendant, giving rise to the situation of which complaint is made and for which the complainant seeks a remedy;
- (2) delay in asserting the complainant’s rights, the complainant having had knowledge or notice of the defendant’s conduct and having been afforded an opportunity to institute a suit;
- (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which [she] bases [her] suit; and
- (4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is not held to be barred.

Garcia v. Garcia, 111 N.M. 581, 588, 808 P.2d 31, 38 (1991). Whether this doctrine

applies cannot be determined at this stage in the proceedings because the undisputed facts do not support the second element. Wife argues, and we agree, that her acknowledgment of a possible interest in the property does not fully resolve the factual issue of whether she had knowledge or notice of Husband’s conduct. In particular, it is unclear whether Wife had knowledge that Husband used community funds to purchase the Taos property, which is a factual question that remains disputed on appeal. If he did not, then Husband may be able to rebut the presumption that the Taos property was community property. In any event, whether laches properly applies depends on the trial court’s resolution of disputed facts.

CONCLUSION

{22} For the foregoing reasons, we reverse the trial court’s grant of summary judgment and remand for further proceedings consistent with this opinion.

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

CYNTHIA A. FRY, Judge

WE CONCUR:

JAMES J. WECHSLER, Chief Judge

LYNN PICKARD, Judge

Certiorari Denied, SC28,435,
January 9, 2004

From the New Mexico
Court of Appeals

Opinion Number: 2004-NMCA-010

GALLUP WESTSIDE DEVELOPMENT,
L.L.C., and HADDEN
CONSTRUCTION COMPANY, INC.,
Appellants-Respondents,
versus

CITY OF GALLUP, a municipal corpora-
tion, ROSEMARIE "SHORTY" SANDO-
VAL, LOUIS BONAGUIDI, PAT BUTLER,
CHARLIE CHAVEZ, and JOHN PENA,
CITY COUNCIL AND MAYOR OF CITY
OF GALLUP, PHILIP GARCIA, CHARLES
HIGH, LIDIO RAINALDI, JR., PHILLIP
GUTIERREZ, PRAKASH SUNDARAM,
JOHN M.
FUHS, and PAUL GRAVES, PLANNING
AND ZONING COMMISSION OF THE
CITY OF GALLUP,
Appellees-Petitioners.
No. 22,308
(filed: October 31, 2003)

APPEAL FROM THE DISTRICT COURT
OF MCKINLEY COUNTY
Grant L. Foutz, District Judge

ROBERT W. IONTA
Gallup, New Mexico

PETER V. DOMENICI, JR.
LORRAINE A. HOLLINGSWORTH
DOLAN & DOMENICI, P.C.
Albuquerque, New Mexico
for Appellants

THOMAS LYNN ISAACSON
MASON, ISAACSON & MACIK, P.A.
Gallup, New Mexico
for Appellees

OPINION

CASTILLO, JUDGE

{1} In spite of its long history and abundant record, this case has but one determinative question: Does Gallup Westside Development, LLC, (Westside) have vested rights in the development of Unit 3 of the Mentmore East subdivision, thus precluding the City of Gallup (City) from making any changes

to the terms of an expired Assessment Procedure Agreement (APA) pertaining to Unit 3 of the subdivision? This case began in 1997, when the City approved a letter agreement (1997 Letter Agreement) amending and extending the APA. After a number of intervening events, the City's decision was appealed to the district court. Acting in its appellate capacity, the district court issued an order reversing the City's decision and issued a writ of mandamus requiring the City to comply with the terms of the original APA without amendment. The City contends that the district court erred when (1) it substituted its judgment for that of the Planning and Zoning Commission (PZC) and City, (2) it issued the writ, and (3) it made findings of fact and conclusions of law. We hold that Westside has no vested rights. Accordingly, we quash the writ of mandamus issued in the district court and reverse its final order.

I. BACKGROUND

{2} In 1975, final plats for Phase 1 development of a subdivision known as Mentmore East were submitted to and approved by the City, conditioned upon the developers' making certain infrastructure improvements. Phase 1 development was divided into Units 1, 2, and 3, each platted separately, with Unit 4 added later. The original developers, predecessors-in-interest to Westside, executed an APA for Units 1, 2, and 3 with the City and a separate APA for Unit 4.

{3} The APA sets forth procedures by which required improvements are to be installed, restricts the sale of any lot prior to the completion of infrastructure improvements, and provides that plat approval is on the express condition that developers comply with conditions in the APA; it also allows for the City to vacate the plats if conditions are not met. Additionally, the APA provides that developers can make infrastructure improvements "only after approval of the plans and specifications for such improvements by the public works director of the city of Gallup, such plans and specifications to be in accordance with any plans and specifications then in use by the city of Gallup." Paragraph 6 of the APA states that the agreement is to remain in effect for twenty years from the date of its March 10, 1975, execution, or until March 10, 1995. The APA was recorded in 1975. Development proceeded on Units 1, 2, and 4.

{4} The development of Unit 3 is the subject of this appeal. Unit 3 was originally platted with 135 single-family residences and a separate 12.85-acre parcel. In 1980, Unit 3 was split into separate ownership.

In 1981, all of Unit 3, including the 12.85-acre parcel was rezoned to allow development of a mobile home subdivision. Title to the 135 lots passed to Westside when it was formed in 1996; the district court, in 1999, quieted title to the 12.85-acre parcel in the name of Hadden Construction Co., Inc. (HCI). The owner of HCI is the sole owner of Westside.

{5} Although initial grading of roads in Unit 3 was done in the 1970s and some electric utilities were installed in platted easements in the rear of Unit 3 lots abutting Unit 4, it was not until 1996, when Westside requested it, that anyone requested a site development review in order to develop Unit 3. The parties agree that by then, the APA had expired. Rather than vacate the original plat, City staff recommended to the PZC that the APA be extended and amended to bring the development in line with the then current building standards and practices.

{6} At its May 14, 1997, meeting, the PZC agreed with the City staff's recommendation and approved the 1997 Letter Agreement extending and amending the APA. While Westside did not oppose the extension of the APA's effective date, it strongly opposed other provisions of the 1997 Letter Agreement, including the relocation of utilities to the front of lots, the retention of a minimum of 3.5 acres by the City for a park, and certain drainage and sidewalk requirements. Westside did not execute the 1997 Letter Agreement, nor did it appeal the PZC's approval.

{7} One year later, Westside renewed its application for site development review and proposed its own version of a letter agreement. The PZC voted to deny Westside's version of a letter agreement, thereby reaffirming its approval of the 1997 Letter Agreement. Westside appealed to the City Council (hereafter referred to as City). On August 25, 1998, the City, after a public hearing, voted to affirm the decision of the PZC. Westside then appealed to the district court. Because technical problems with the tape recorder prevented the district court from reviewing the complete record of the hearing by the City, the district court remanded the case to the City for a de novo hearing on Westside's application.

{8} The rehearing held on December 14, 1999, lasted three hours. Prior to the rehearing, Westside had submitted to the City more than 760 pages of record with a total of seventy-eight exhibits, including maps, plans, and plats. The City heard testimony from Westside, a former City engineer, the City planner, and thirteen citizens. Once

again, the City affirmed the PZC's approval of the 1997 Letter Agreement.

{9} On January 10, 2000, Westside, now joined by HCI, filed another appeal. We refer to Westside and HCI hereafter as Developers. Developers requested that the district court order the APA extended as originally written without inclusion of the terms of the 1997 Letter Agreement. Pursuant to review standards set forth in NMSA 1978, § 39-3-1.1 (1999) and Rule 1-074 NMRA 2003, the district court issued a final order reversing the City's decision and, in response to Developers' petition for a writ of mandamus, ordered that the City "approve an extension of the 1975 Assessment Procedure Agreement for Mentmore East Unit 3 as originally written." The district court found (1) that there was no substantial evidence to support the City's affirmance of the 1997 Letter Agreement or denial of Westside's proposed revision to the APA and (2) that the City acted contrary to the law. The district court concluded that Developers "have a clear legal right to development of Unit 3 without parks and with utilities located in the rear lot easements and to have the Assessment Procedure Agreement for Mentmore East Unit 3 extension approved without such conditions." This Court granted certiorari.

II. DISCUSSION

A. Final Order Reversing the City's Decision

1. Standard of Review

{10} Pursuant to our Supreme Court's recent ruling, this Court will review a district court's decision in an administrative appeal under an administrative standard of review. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶¶ 16-17, 133 N.M. 97, 61 P.3d 806. We "conduct the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal." *Id.* ¶ 16. The district court may reverse an administrative decision only if it determines that the administrative entity, here the City, acted fraudulently, arbitrarily, or capriciously; if the decision was not supported by substantial evidence in the whole record; or if the City did not act in accordance with the law. *See* § 39-3-1.1; Rule 1-074; *Rio Grande*, 2003-NMSC-005, ¶ 17.

{11} This case involves a question of substantial evidence. Consequently, we review the district court's ruling by independently examining the entire record, keeping in mind that a reviewing court may not sub-

stitute its judgment for that of the City. *See Snyder Ranches, Inc. v. Oil Conservation Comm'n*, 110 N.M. 637, 639, 798 P.2d 587, 589 (1990). We view evidence in the light most favorable to the City while also considering contravening evidence. *See id.* We may, if we were fact-finders in this case, come to a different conclusion than the City; but we may only evaluate whether the record supports the result reached, not whether a different result could have been reached. *See id.* Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Oil Transp. Co. v. N.M. State Corp. Comm'n*, 110 N.M. 568, 571, 798 P.2d 169, 172 (1990); *see Snyder Ranches, Inc.*, 110 N.M. at 639, 798 P.2d at 589; *Groendyke Transp., Inc. v. N.M. State Corp. Comm'n*, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984). The party seeking to overturn the City's decision must establish that there is no substantial evidence in the record to support the decision. *See Hart v. City of Albuquerque*, 1999-NMCA-043, ¶ 19, 126 N.M. 753, 975 P.2d 366. We review questions of the City's and district court's interpretations of the law de novo. *See Rio Grande*, 2003-NMSC-005, ¶ 17. In this case, we reverse because there was substantial evidence in the whole record to support the City's decision and therefore the district court erred in its implicit determination that the City failed to act in accordance with the law.

2. Vested Rights

{12} In reversing the City's decision, the district court concluded that Developers "acquired vested rights in the approved subdivision." Vested rights protect a developer from retroactive application of newly adopted regulations. *Brazos Land, Inc. v. Bd. of County Comm'rs*, 115 N.M. 168, 170, 848 P.2d 1095, 1097 (Ct. App. 1993). Developers argue that their vested rights protect them from having to comply with regulations adopted after the City gave the subdivision final plat approval in 1975. Therefore, they contend, their vested rights justify the district court's determination that the 1975 APA must be extended without amendments.

{13} We view the question of vested rights as determinative in this case. There is a two-pronged test for vested rights in New Mexico: First, there must be approval by a regulatory body; second, there must be a substantial change in position in reliance thereon. *Brazos Land, Inc.*, 115 N.M. at 170, 848 P.2d at 1097; *In re Sundance*

Mountain Ranches, Inc., 107 N.M. 192, 194, 754 P.2d 1211, 1213 (Ct. App. 1988). We conclude that Developers fail to meet either prong of the test.

{14} The City did give final plat approval to the subdivision. Nevertheless, the first prong of the vested rights test is not met as long as revocation of that approval remains a possibility. *See Parker v. Bd. of County Comm'rs*, 93 N.M. 641, 644, 603 P.2d 1098, 1101 (1979) ("We cannot equate the approved subdivision plat in this case with vested property rights, as the approval was conditioned upon performance by the subdivider."); *cf. In re Sundance Mountain Ranches, Inc.*, 107 N.M. at 194-95, 754 P.2d at 1213-14 (stating that rights vested in a subdivider after compliance with statutory prerequisites and a determination by the board of county commissioners that compliance actually occurred). Here, the final approval of the subdivision plat in 1975 was expressly conditioned on compliance with the terms of the APA. Because the City was able to vacate the plat if conditions were not met, Developers did not have vested rights in the property. We acknowledge that Developers on appeal argue approval of the plat was not conditional. Paragraph 3 of the APA specifically states that plat approval is

on the expressed condition, that [Developers] shall fulfill and comply with each and every condition contained within this agreement. It is expressly agreed that upon the failure of [Developers] to fulfill and comply with each and every provision of this agreement, the plat hereby approved will be vacated.

Given this express conditional language of the APA, we reject Developers' argument.

{15} The language in paragraph 6 of the APA further supports this conclusion. Pursuant to paragraph 6, the APA expired by its own terms on March 10, 1995. The district court, however, construed the agreement in such a way as to exclude paragraph 6. In interpreting a written contract, each part must be given meaning and significance according to its importance to the contract as a whole. *Bank of N.M. v. Sholer*, 102 N.M. 78, 79, 691 P.2d 465, 466 (1984); *Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶ 28, 123 N.M. 526, 943 P.2d 560; 13 Eugene McQuillin, *The Law of Municipal Corporations* § 37.130, at 346-48 (3d ed. 1997). Public improvement contracts are "construed with reference to the ordinance

authorizing the improvement.” McQuillin, *supra*, at 347.

{16} According to the pertinent subdivision regulations that are part of the record, a developer must provide assurances for the installation of public improvements by one of three methods: (1) installation prior to final plat approval, (2) posting bond and installing the improvements within one year after final plat approval, or (3) completing an approved assessment procedure. Gallup, N.M., Ordinance, Subdivision Regulations, § IX(3) (1975). Here, the third method was chosen. The first two methods require action before or within one year. It is reasonable to construe the third method to at least require performance under the approved assessment procedure within a reasonable time; and in the present case, twenty years, and no more, is undoubtedly a reasonable time. *W. Commerce Bank v. Gillespie*, 108 N.M. 535, 538, 775 P.2d 737, 740 (1989) (holding that where no time for performance is specified, law implies a reasonable time for performance). The district court’s interpretation renders paragraph 6 irrelevant and meaningless. This Court declines to adopt such a construction of the APA. *See Brooks v. Tanner*, 101 N.M. 203, 206, 680 P.2d 343, 346 (1984) (refusing to adopt a proposed construction that would render meaningless an important contractual phrase).

{17} Even if the first prong had been met, the second prong of the test requires a substantial change in position in reliance on the approval. Developers contend that had they known the 135 lots could not be developed without the imposition of further requirements or that the City would expect a park, the price they paid for the land would have been considerably less. Among the district court’s findings were that Developers “substantially relied on the approved plats and paid higher prices for their parts of Unit 3 than they would have if the plats had not been approved.” We do not agree with the district court that the purchase price, in this case, resulted in substantial reliance.

{18} Our review of the record discloses no evidence that Developers expended money other than the purchase price in reliance on plat approval. The purchase of land, by itself, does not confer vested rights upon the purchaser. *N. Ga. Mountain Crisis Network, Inc. v. City of Blue Ridge*, 546 S.E.2d 850, 853 (Ga. Ct. App. 2001). Nor does the record show that Developers incurred extensive contractual obligations pursuant to the purchase or otherwise sub-

stantially changed their position in reliance on plat approval. *See Brazos Land, Inc.*, 115 N.M. at 170, 848 P.2d at 1097 (concluding vested rights did not exist where developer showed no change in position); 8 Eugene McQuillin, *The Law of Municipal Corporations* § 25.157, at 575-80 (3d ed. 2000) (discussing and compiling case law on how substantial reliance on a permit protects permittee from subsequent zoning laws). In this case, the APA expired in 1995; title to the 135 lots transferred to Westside in 1996; and the 12.85-acre parcel was not quieted in HCI’s name until 1999. From this timetable, it is clear that at the time of purchase, Developers were or should have been aware of the conditional language in the APA and its expiration date. Developers argue that they changed their position by paying an excess purchase price and donating a park. We see no substantial evidence in the record that ties such asserted actions to any government assurances to support reasonable, actual reliance or change in position. *See Brazos Land, Inc.*, 115 N.M. at 170, 848 P.2d at 1097 (holding no finding of substantial reliance or change in position); *see also Debold v. Township of Monroe*, 265 A.2d 399, 403-04 (N.J. Super. Ct. Ch. Div. 1970) (rejecting factually and legally that the developer’s excess purchase price estopped municipality from applying later zoning).

{19} Developers appear to rely on some statements made by City staff in briefing memos to elected officials in arguing their vested rights position. Although this issue is not separately briefed and no authority is cited for it, Developers appear to contend that those statements establish that they in fact have vested rights. We disagree. Developers’ argument is akin to applying estoppel against a government or applying a theory of judicial admissions. Yet, estoppel against a government is exceedingly difficult to prove. *See Lopez v. State*, 1996-NMSC-071, ¶¶ 18, 20, 122 N.M. 611, 930 P.2d 146. There is no suggestion that the elements were proved here. Similarly, the theory of judicial admissions contains its own requirements, including that admission be that of a party and not be an opinion. *See Lebeck v. Lebeck*, 118 N.M. 367, 372, 881 P.2d 727, 732 (Ct. App. 1994). The memo by staff was accompanied by a supporting letter containing a caveat that a court may ultimately disagree. We conclude that the evidence presented to the City supports the conclusion that Developers do not have vested rights in Unit 3 and are therefore not entitled under a vested rights theory to have the APA extended as originally written.

3. Appellate Relief

{20} We are mindful that this is not an appeal from the City’s denial of plat approval. This is an appeal from the City’s decision to approve an extension of the APA on terms other than those in the original APA. The additional terms are contained in the 1997 Letter Agreement, a document that has not been signed by Developers. It is without effect. Currently, as the City articulated during oral argument, there is no agreement between the parties.

{21} This is an appeal from the City’s decision to approve an extension of the APA only with specific changes to the original APA. The parties do not argue that the City has no authority to modify the APA in any respect; indeed, Developers submitted their own proposed modifications to the APA for the PZC’s approval, which the PZC and the City ultimately denied. Rather, the dispute concerns the terms of the 1997 Letter Agreement, which the PZC and the City did approve. Specifically, Developers contend that their vested rights leave the City without the authority to incorporate certain current subdivision regulations into the 1997 Letter Agreement. The only authority the City does have, according to Developers, is to amend the APA by extending its original terms under subdivision regulations in effect in 1975. We have already rejected the application of vested rights in this case. Other than the theory of vested rights, Developers provide us with no ordinance or case law to support their position that the City has no authority to extend the APA on terms other than those contained in the original agreement.

{22} Based on review of the voluminous record, we believe that the 1997 Letter Agreement was not an agreement in the legal sense of the word; rather, it was the City’s offer to amend the APA. As a consequence, there is no contract dispute for this Court to rule on. The City’s offer was rejected first when Westside proposed that the City accept a modification of the APA on different terms and again when Developers appealed the actions of the City based on a vested rights theory. There is no assertion that the terms of the 1997 Letter Agreement were based on coercion, fraud, or bad faith. At this point, it appears the parties are in the same position they were before this litigation began. There is no APA in effect, and there is no contract extending the APA. Developers are not required to accept the City’s terms. They remain free to continue their rejection of the 1997 Letter Agreement.

{23} Alternatively, there is nothing to prevent the re-opening of negotiations. As stated by one party during oral argument, successful negotiations require compromise on both sides. Lastly, there is always the option of plat vacation. *See* NMSA 1978, § 3-20-12 (1973). If the parties choose to vacate the plat, Developers have the protections, as well as the burdens, of developing the property under the City's applicable subdivision regulations. It is the obligation of the parties to decide upon which path to journey. This Court refuses to fashion a contract between the City and Developers or otherwise resolve their disputes over suggested contract terms. The parties have the power to freely negotiate such resolution themselves.

B. Writ of Mandamus

{24} Because, as we have determined, Developers did not have vested rights in development of Unit 3, the district court acted improperly in ordering the City to approve an extension of the APA without amendment. Accordingly, there is no basis for the writ of mandamus; hence, we need not and do not address the City's points on

appeal regarding the trial court's exceeding its writ of mandamus authority.

III. CONCLUSION

{25} We quash the writ of mandamus and reverse the district court's final order. Finally, we affirm the City's authority to offer to extend the APA on terms other than the original terms of the agreement.

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

CELIA FOY CASTILLO,
Judge
WE CONCUR:
LYNN PICKARD, Judge
JONATHAN B. SUTIN, Judge

Certiorari Granted, No. 27,411, January 20, 2004

From the New Mexico Court Of Appeals

Opinion Number: 2004-NMCA-012

STATE OF NEW MEXICO,
 Plaintiff-Appellant,
 versus

DEL E. ROMERO,
 Defendant-Appellee.
 No. 22,836 (filed: November 11, 2003)

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
 Peggy J. Nelson, District Judge

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OPINION

ALARID, JUDGE

{1} This case presents a question of the State's jurisdiction to prosecute a member of Taos Pueblo charged with committing an aggravated battery upon another member of Taos Pueblo on land located within the original boundaries of the land grant from the King of Spain to Taos Pueblo, but which is now part of the town of Taos, New Mexico. We hold that by operation of federal law, the land on which the alleged crime occurred is no longer Indian country, and that the State has jurisdiction to prosecute Defendant.

BACKGROUND

{2} Defendant-Appellee, Del E. Romero, was indicted by a Taos County grand jury on one count of aggravated battery, stemming from an incident at the Pueblo Alegre Mall in the town of Taos, New Mexico. Defendant moved to dismiss the charge against him on the ground that he is an Indian, that the Pueblo Alegre Mall is located in Indian country, and that New Mexico lacked subject matter jurisdiction to prosecute criminal charges against an Indian for an offense committed in Indian country. Defendant requested an eviden-

tiary hearing on his motion to dismiss. The State filed a short response asserting that the Pueblo Allegre Mall is “within the geographical boundaries of the Town of Taos, and outside the exterior boundaries of the Taos Pueblo.”

{3} The trial court held an evidentiary hearing. Defendant and the State stipulated that both Defendant and the alleged victim are members of Taos Pueblo. The evidence presented to the trial court included various maps of the town of Taos and the lands surrounding Taos Pueblo.

{4} Defendant, citing *State v. Ortiz*, 105 N.M. 308, 731 P.2d 1352 (Ct. App. 1986), argued that federal law preempted state criminal jurisdiction in Indian country. According to Defendant, the Pueblo Allegre Mall is located on land that was owned by Taos Pueblo at the time New Mexico was admitted as a state, and therefore is included within the definition of Indian country set out in Article XXI, Section 8 of the New Mexico Constitution: “lands owned or occupied by [the Pueblo Indians] on the twentieth day of June, nineteen hundred and ten, or which are occupied by them at the time of the admission of New Mexico as a state.”

{5} The State, referring to a plat prepared by the Pueblo Lands Board, argued that Pueblo title to the tract on which the Pueblo Allegre Mall is located had been extinguished pursuant to the Pueblo Lands Act, ch. 331, 43 Stat. 636 (1924) (the PLA).

{6} In a letter decision, the trial court found that the Pueblo Allegre Mall is located on privately owned property within the town limits of Taos, in an area “within the original exterior boundaries of the Taos Pueblo Grant.” The trial court further found that Pueblo title to the land underlying the Pueblo Allegre Mall was “extinguished” pursuant to the PLA. Applying *Ortiz*, the trial court held that extinguishment of Pueblo title pursuant to the PLA did not “diminish or change” the boundaries of Taos Pueblo. The trial court concluded that the State lacked subject matter jurisdiction. The trial court entered a separate order of dismissal, incorporating its letter decision.

{7} The State filed a timely notice of appeal.

DISCUSSION

{8} Under federal law, the United States

has exclusive jurisdiction to prosecute certain serious offenses committed by Indians within Indian country. 18 U.S.C. § 1153 (2000); *Ortiz*, 105 N.M. at 310, 731 P.2d at 1354 (discussing exclusive federal jurisdiction under Major Crimes Act). There is no dispute that Defendant is an enrolled member of Taos Pueblo, and that the offense with which he is charged—aggravated battery causing serious bodily harm—is one of the offenses listed in § 1153. Further, as previously noted, the trial court found that the Pueblo Allegre Mall is located on privately owned property within the town limits of Taos, in an area “within the original exterior boundaries of the Taos Pueblo Grant,” and that Pueblo title to the land underlying the Pueblo Allegre Mall was extinguished pursuant to the PLA. These findings are not attacked by either party to this appeal and we therefore accept them as operative facts for purposes of this appeal. This appeal ultimately turns upon a question of law: did extinguishment of the Pueblo title to the lands underlying the town of Taos pursuant to the PLA permanently change the jurisdictional status of this land? We conclude that it did, and that the 926 acres underlying the town of Taos as to which title was quieted against Taos Pueblo pursuant to the PLA are not Indian country. Accordingly, the State may prosecute Defendant for his alleged offense.

Indian Country Defined

{9} In 1948 Congress enacted the current definition of Indian country:

“Indian country” . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151(2000). For the State to prevail, we must be persuaded that Pueblo

Allegre Mall is not located within any of the three categories of lands comprising Indian country set out in § 1151.

{10} There is no serious question as to the inapplicability of Subsection (c). Allotment is a term of art in Indian law “referring to land owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation.” *Felix S. Cohen’s Handbook of Federal Indian Law* 40 (Rennard Strickland, et al., eds. 1982) (hereinafter “*Cohen*”). The lands comprising the Taos Pueblo land grant are owned communally, and therefore are not allotments. See *United States v. Chavez*, 290 U.S. 357, 360 (1933) (observing that the lands of Isleta Pueblo, “like those of other pueblos of New Mexico” are owned communally).

{11} We are also satisfied that Subsection (a) is not applicable in the present case. At one time it was generally accepted, and we so held, that the categories of Indian lands described in Subsections (a) and (b) were largely interchangeable for purposes of jurisdictional analysis. *Cohen* at 38; *Ortiz*, 105 N.M. at 310, 731 P.2d at 1354. However, that position is no longer tenable. In *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the United States Supreme Court held that dependent Indian communities “refers to a limited category of Indian lands that are neither reservations nor allotments.” *Id.* at 527 (emphasis added). There can be no question that the Taos Pueblo land grant is a dependent Indian community: the very term “dependent Indian communities” was adopted in *United States v. Sandoval*, 231 U.S. 28 (1913), to describe New Mexico Pueblos. Indeed, “[t]he entire text of § 1151(b), and not just the term ‘dependent Indian communities,’ is taken virtually verbatim from *Sandoval*.” *Venetie*, 522 U.S. at 530; see also *Cohen* at 34 (characterizing Subsection (b) as “codifying” the phrase “dependent Indian communities”). As a dependent Indian community the Taos Pueblo land grant by definition is not an Indian reservation.¹ Applying *Venetie*, we hold that if the situs of the alleged crime in this case is Indian country, it is by operation of Subsection 1151(b).

The PLA

¹ We are aware that the United States government has set aside public lands in trust for the benefit of the Indians of Taos Pueblo. Pub. L. 91-550, 84 Stat. 1437 (1970). The present appeal does not concern a crime scene located within the limits of these additional

{12} Early decisions of the territorial supreme court and the United States Supreme Court held that Pueblo Indians of New Mexico, unlike other Indians, were not in a state of tutelage and that neither the Pueblo Indians nor their property were under the guardianship of the federal government. *E.g., United States v. Joseph*, 94 U.S. 614 (1876). As a result of these cases, it was understood that Pueblo Indians could convey good title to Pueblo lands notwithstanding federal law generally restricting the alienation of Indian lands. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240-42 (1985). “Relying on the rule established in *Joseph*, 3,000 non-Indians had acquired putative ownership of parcels of real estate located inside the boundaries of the Pueblo land grants.” *Id.* at 243.

{13} In 1910 Congress enacted enabling legislation contemplating the admission of New Mexico as a state. New Mexico Enabling Act, ch. 310, 36 Stat. 557 (1910). As a condition of admission, Congress required the people of New Mexico to enact “an ordinance irrevocable without the consent of the United States and the people [of New Mexico]” recognizing that lands “now owned or occupied by the Pueblo Indians of New Mexico” were Indian country.² New Mexico Enabling Act, ch. 310, § 2, 36 Stat. at 558. In view of the *Joseph* decision, there was a substantial question as to whether Congress had the authority under the Indian Commerce Clause to define Pueblo lands as Indian country. In *Sandoval*, the United States Supreme Court upheld the Enabling Act as a valid exercise of Congress’s power to regulate commerce with Indian tribes. The Court held that Pueblo Indians are “Indians” within the meaning of the Indian Commerce Clause and that the Pueblo Indians, like other Indians, were to be viewed as wards of the federal government. *Sandoval*, 231 U.S. at

46-47. The Supreme Court characterized Section 2 of the Enabling Act as having “prescribed, in substance, that the lands then owned or occupied by the Pueblo Indians should be deemed and treated as Indian country within the meaning of [federal law prohibiting the introduction of intoxicating liquor into Indian country] and of kindred legislation by Congress.” *Id.* at 36-37 (emphasis added; footnote omitted).

{14} *Sandoval*’s holding that Pueblo Indians were wards of the federal government generally subject to federal laws governing Indians called into question the validity of the *Joseph* decision, and clouded the title of thousands of non-Indians who had acquired lands within the boundaries of the Pueblo land grants without the approval of the federal government. *Pueblo of Santa Ana*, 472 U.S. at 243-44.

{15} Congress responded to the problem of claims by non-Indians to lands within Pueblo land grants by enacting the PLA. The PLA established the Pueblo Lands Board to investigate the state of title of lands within the boundaries of the various Pueblos, and provided a mechanism whereby Pueblo title to tracts of land could be extinguished in favor of non-Indian claimants under prescribed conditions. *Pueblo of Santa Ana*, 472 U.S. at 244-45. The Secretary of the Interior was to file “field notes and plat for each [P]ueblo . . . showing the lands to which the Indian title has been extinguished.” PLA, ch. 331, § 13, 43 Stat. at 640. Certified copies of these field notes were to be “accepted in any court as competent and conclusive evidence of the *extinguishment of all the right, title, and interest of the Indians in and to the lands so described . . . and of any claim of the United States in or to the same.*” *Id.* (emphasis added). A decree in favor of a non-Indian claimant pursuant to the PLA had “the effect of a deed of quitclaim as against the United States and said Indians.”

PLA, ch. 331, § 5, 43 Stat. at 637. Among the Pueblo lands as to which Pueblo title was extinguished by the PLA were 926 acres occupied by the town of Taos, which intruded into the southwest corner of the original Taos Pueblo grant. *See generally Pueblo of Taos v. United States*, 33 Ind. Cl. Comm. 82 (1974), *aff’d*, 515 F.2d 1404 (Ct. Cl. 1975).

{16} Congress’s provision in the PLA for the extinguishment of Pueblo title is particularly significant because prior to the enactment of § 1151 in 1948 “Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest.” *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). In 1834 Congress had enacted legislation regulating commerce with Indians. Ch. 161, 4 Stat. 729 (1834). Section 1 of the 1834 act contained the following definition of “Indian country”:

[A]ll that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

4 Stat. 729 (emphasis added). Although Section 1 of the 1834 act was repealed in 1874, *Cohen* at 31, no new definition of Indian country was enacted until 1948,³ and the United States Supreme Court continued to refer to the 1834 definition even after its repeal. *Clairmont v. United States*, 225 U.S. 551, 557 (1912); *see also Cohen* at 35 (observing that “[t]he 1834 statutory definition of Indian country was expressly tied to Indian land title and the Supreme

² In 1910, when Congress enacted the Enabling Act, the *Joseph* decision was still good law. Thus, both Congress in enacting the Enabling Act and the people of New Mexico in acceding to its terms would not necessarily have understood “all lands now owned or occupied by the Pueblo Indians” to have included lands within the original Pueblo land grants that were then owned and occupied by non-Indians.

³ Congress maintained a statutory linkage between Indian title and federal jurisdiction in the enabling acts for states admitted between 1889 and 1959. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 479-80 (1979). Typical of these acts, § 2 of the New Mexico Enabling Act provides “that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States.” Although the dissent correctly notes that the “[t]he Enabling Act recognized federal dominance and governance over lands then held or occupied by Pueblo Indians,” Dissent, ¶ 39, it overlooks the language in § 2 by which Congress expressly linked federal dominance and governance of Indian lands to non-extinguishment of Indian title.

Court had not rejected this requirement before passage of [§ 1151]). Relying on the 1834 definition of Indian country as lands “to which the Indian title has not been extinguished,” the United States Supreme Court repeatedly stated that upon extinguishment of Indian title, status as Indian country ceases. *E.g., Bates v. Clark*, 95 U.S. 204 (1877). Extinguishment of Indian title restored the land in question to the jurisdiction of the state (or territory) in which the land was located *without further action by Congress*. *Clairmont*, 225 U.S. at 558. This rule “govern[ed] in the absence of a different provision by treaty or by act of Congress.” *Clairmont*, 225 U.S. at 559.

{17} Defendant and Amicus Taos Pueblo argue that in enacting the PLA Congress intended to extinguish title to Pueblo lands without altering their jurisdictional status. This argument “contradicts the common understanding of the time” that tribal ownership was a component of status as Indian country, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998), and that upon extinguishment of Indian title the land in question ceased to be Indian country without the necessity of further action by Congress, *Clairmont*, 225 U.S. at 558. We construe the PLA “in light of the common notions of the day and the assumptions of those who drafted [it].” *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). We find nothing in the PLA suggesting that Congress intended to depart from the established rule that status as Indian country ceases upon extinguishment of Indian title. We conclude that in enacting the PLA, Congress clearly understood that it was altering the jurisdictional status of those lands as to which title was quieted in favor of a non-Indian, and that unless Congress subsequently acted to restore the Indian country status of these lands they remain outside Indian country.

Effects of § 1151 on the Jurisdictional Status of Non-Indian Lands Within a Pueblo Land Grant

{18} Defendant argues that Indian title is no longer dispositive of status as Indian country. According to Defendant, § 1151 uncoupled status as Indian country from Indian title. The flaw in this argument is the erroneous assumption that Congress uncoupled Indian title and status as Indian country in all three categories of Indian country set out in § 1151.

{19} A close examination of § 1151 reveals that Congress has expressly uncoupled Indian title and status as Indian country only in Subsection (a). Subsection (a) codifies the holding of such cases as *Kills Plenty v. United States*, 133 F.2d 292 (1943), which had construed the phrase “within any Indian reservation” to confer federal criminal jurisdiction over crimes committed on land within reservation boundaries notwithstanding the fact that the crime scene was located on land that had been patented in fee to non-Indians. *See* § 1151, Historical and Statutory Notes. Some lower courts, however, had reached a contrary result. *Cohen* at 36. When Congress enacted § 1151 in 1948, it eliminated any doubt that Subsection (a) represents a statutory departure from the traditional rule tying status as Indian country to Indian title by adding the additional language, “all lands” and “notwithstanding the issuance of any patent.” *Cohen* at 35, 37. However, any suggestion that Congress generally intended to abrogate the rule tying status as Indian country to Indian title is refuted by Subsection (c), which expressly maintains the linkage between Indian title and status as Indian country. *See Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1421-22 (10th Cir. 1990) (recognizing that Congress has authorized “checkerboard jurisdiction” outside reservations in Subsections 1151 (b) and (c)).

{20} Subsection (b) does not employ the phrases “all lands within the limits of any Indian reservation” and “notwithstanding the issuance of any patent” which accomplish the uncoupling of Indian title and status as Indian country in Subsection (a). As noted in *Venetie*, Subsection (b) is a codification of a different line of authority and is largely drawn from the Supreme Court’s discussion of Pueblo Indians in *Sandoval*.

{21} We find support for the conclusion that Congress intended Subsection 1151(b) to maintain the linkage between Pueblo title and status as Indian country in the legislative history of the Santo Domingo Pueblo Claims Settlement Act of 2000. Pub. L. 106-425, 114 Stat. 1890 (2000) [codified at 25 U.S.C. §§ 1777 through 1777e (2000)](SDPCSA). Congress enacted the SDPCSA as enabling legislation for the settlement of longstanding disputes over lands claimed by Santo Domingo Pueblo,

including a dispute arising out of a decision of the Pueblo Lands Board which purported to extinguish Pueblo title to 27,000 acres within the Santo Domingo Pueblo Grant. SDPCSA, § 2. Section 6 of the SDPCSA, “Affirmation of accurate boundaries of Santo Domingo Pueblo Grant,” provides:

(a) In general

The boundaries of the Santo Domingo Pueblo Grant, as determined by the 1907 Hall-Joy Survey, confirmed in the Report of the Pueblo Lands Board, dated December 28, 1927, are hereby declared to be the current boundaries of the Grant and *any lands currently owned by or on behalf of the Pueblo within such boundaries, or any lands hereinafter acquired by the Pueblo within the Grant in fee absolute, shall be considered to be Indian country within the meaning of section 1151 of title 18.*

(b) Limitation

Any lands or interests in lands within the Santo Domingo Pueblo Grant, that are not owned or acquired by the Pueblo, shall not be treated as Indian country within the meaning of section 1151 of title 18.

SDPCSA, § 6 (emphasis added). Read together, Subsections 6(a) and (b) clearly link status as Indian country to Pueblo title.

{22} A statement by Congress that a subsequent act is intended merely to “clarify” earlier legislation supports the inference that Congress understood the later legislation as continuing earlier law. *Bell v. New Jersey*, 461 U.S. 773, 789 (1983). Subsection 2(b)(3) of the SDPCSA recites that one of the purposes of the act was “to clarify governmental jurisdiction over the lands within the Pueblo’s land claim area.” 25 U.S.C. § 1777(b)(3).

{23} The inference that a subsequent statute merely restates pre-existing law is strengthened when the legislative history of the statute contains a statement disclaiming any intention to significantly alter pre-existing law. *Bell*, 461 U.S. at 789. The legislative history of the SDPCSA includes the statement that the SDPCSA “make[s] *no changes* in existing law.” S. Rep. 106-506 at 13 (2000) (emphasis added).

{24} If § 6 of the SDPCSA merely clarifies pre-existing law without changing that law, then Subsection 1151(b) itself must have been understood by Congress as adopting a rule linking status as Indian country to non-extinguishment of Pueblo title. Congress' subsequent interpretation of Subsection 1151(b) in the context of the SDPCSA, while not definitive, nevertheless has "persuasive value." *Bell*, 461 U.S. at 784. We consider it unlikely that Congress would have created a special rule solely applicable to one Pueblo, further complicating jurisdictional analysis. We consider it far more likely that, as the legislative history of the SDPCSA states, Congress merely was clarifying a rule that it understood already applied to Pueblo lands by operation of Subsection 1151(b).

{25} Defendant's case for exclusive federal jurisdiction is based on the misconception that §1151 has completely abrogated the traditional rule linking status as Indian country to Indian title. While we agree that Subsection (a) has displaced *Bates-Clairmont* with respect to crime scenes "within the limits of any Indian reservation," a New Mexico Pueblo land grant is not a "reservation" within the meaning of Subsection (a). Because it is undisputed that the crime scene in the present case is located on land to which Pueblo title has been extinguished, the crime scene is not Indian country for purposes of § 1153 and the State retains jurisdiction to prosecute Defendant.

{26} Our analysis is consistent with the United States' Supreme Court's decision in *Venetie*. To constitute a dependant Indian community, the land in question must satisfy two requirements: "first, [the land] must have been set aside by the Federal Government for the use of the Indians as Indian land; second, [it] must be under federal superintendence." 522 U.S. at 527. As we have noted above, a PLA decree in favor of a non-Indian and against a Pueblo extinguished *both* the Pueblo's and the United States' title. Where neither the United States (as guardian) nor the Pueblo (as ward) retain an interest in the land in question, there is nothing that can be said to be set aside for the use of Indians. See *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58 (1962) (suggesting that but for enactment of Subsection 1151(a) land within reservation

owned in fee by non-Indian would not be Indian country because it "cannot be said to be reserved for Indians"); *United States v. Conway*, 175 U.S. 60, 68 (1899) (observing that grant by United States of property it does not own is "a simple nullity"). Land to which title has been quieted in favor of a non-Indian under the PLA cannot satisfy the set-aside prong of *Venetie*. 522 U.S. at 527.

{27} We are aware of the canon of construction that "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." *Chickasaw Nation v. United States*, 534 U.S. 84, 88 (2001) (internal quotation marks and citations omitted). We will assume that it is to the Pueblos' benefit to have Subsection (b) construed so that the status as Indian country of Pueblo lands is not tied to Pueblo title. However, canons of construction are "guides that 'need not be conclusive.'" *Id.* at 94 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)). "[O]ther circumstances evidencing congressional intent can overcome their force." *Id.* at 94. We believe that such "other circumstances" are present here.

{28} We recognize that previously we have blurred the distinction between the definitions contained in Subsections (a) and (b). See *Ortiz*, 105 N.M. at 311-12, 731 P.2d at 1355-56. We did so prior to the Supreme Court's pronouncements in *Venetie* and without the benefit of Congress' subsequent legislative construction of Subsection 1151 (b) in the SDPCSA. As the present case makes clear, there are potentially dispositive differences between the scope of Subsections (a) and (b). We therefore disavow *Ortiz* to the extent it suggests otherwise.

Solem is Inapplicable

{29} Defendant, citing *Solem v. Bartlett*, argues that the State was required to prove that the exterior boundaries of the Taos Pueblo land grant have been diminished so that the town of Taos is no longer within the land grant's exterior boundaries; and, that, absent such a showing, all land within the original boundaries of the land grant remains Indian country regardless of whether or not Indian title has been extinguished. We disagree.

{30} Diminishment analysis arises out of a completely different historical context: allotment and surplus lands acts.

Many Indian reservations contain significant amounts of nonmember lands, due to the late-nineteenth-century policy of allotting reservation lands to individual tribal members. Allotments were subject to an initial 25-year restriction on alienation, after which an allottee could receive a patent-in-fee to the land. Although the general restriction on alienation was later extended indefinitely, many allottees nonetheless received patents-in-fee to their allotments, which terminated the trust responsibilities of the United States and allowed alienation of the allotted parcels. Many of the patented allotments were eventually sold to nonmembers. Such allotments generally remain part of the reservation.

Once a reservation was fully allotted, Congress usually enacted legislation opening the remaining or "surplus" reservation lands to nonmember settlement. The method used to open reservation lands to settlement varied widely. . . . Whatever the method, the purpose of the surplus land acts was to return the lands to the public domain and thereby allow nonmember settlement under homesteading and other land disposal laws. While all the acts accomplished this, not all removed the lands from the reservation.

American Indian Law Deskbook 54 (Joseph P. Mazurek, et al., eds. 1998). Diminishment analysis is concerned with determining whether Congress intended a surplus land act to remove reservation lands opened to non-Indian settlement from the reservation:

Whether Congress, in opening surplus lands to nonmember settlement, freed those lands from their reservation status is a question of congressional intent. Intent to remove reservation status is rarely found on the face of the involved statute since Congress, during the era of the

surplus land acts, anticipated that the reservation system would shortly cease to exist. The process of allotting lands to tribal members and selling surplus lands to nonmembers was viewed as the “first step” toward Congress’s ultimate aim of abolishing all Indian reservations, and Congress “failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation. Since subsequent steps to abolish all reservations were never taken, the question becomes whether the surplus land acts, as the initial step in the process, were sufficient to complete the process in a single step instead of the expected series of steps. Courts have been unwilling to extrapolate from the overriding goal of abolishment a general congressional purpose of diminishing reservations with the passage of every surplus land act. Instead, courts examine each individual act to determine whether Congress intended the language of the specific act to diminish the reservation in question. Congressional intent is determined by examining the face of the act, its legislative history, events surrounding the act’s passage, and subsequent treatment of the opened lands.

Id. at 56. As Amicus Taos Pueblo concedes, “Congress never enacted a surplus lands act or otherwise opened Pueblo grant lands for non-Indian settlement.”

{31} There is an additional historical ground for treating reservations and Pueblo land grants differently. In *Solem* the Supreme Court observed that

only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly

indicates otherwise. 465 U.S. at 470. *Solem* relied upon *United States v. Celestine*, 215 U.S. 278 (1909), as support for the above proposition. *Solem*, 465 U.S. at 470. In *Celestine*, the United States Supreme Court observed that

[I]t was decided, in *Bates v. Clark*, 95 U.S. 204, 209, that all the country described . . . as “Indian country” remains such “so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress.” . . . But the word “reservation” has a different meaning, for while the body of land described in the section quoted as “Indian country” was a reservation, yet a reservation is not necessarily “Indian country.” *The word is used in the land law to describe anybody of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and, when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.*

215 U.S. at 285 (emphasis added).

{32} The history of New Mexico Pueblos shows that Pueblo land grants are not “reservations” within the meaning of federal land law. Congress did not reserve the Pueblo lands out of lands ceded by the Pueblo Indians to the United States or out of public lands owned by the United States. *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1388 (Ct. Cl. 1975). Rather, Congress merely confirmed the pre-existing claims of the Pueblos, authorizing the issuance of patents “as in ordinary cases to private individuals.” Ch. 5, 11 Stat. 374 (1858). Pueblo land grants are no more federal reservations than are other private grants confirmed by the United States as required by international law and the treaty of Guadalupe Hildago. *See* 19 Pub. Lands Dec.

326, 327 (1894) [1894 WL 929 (D.O.I.)] (observing that patent to Cochiti Pueblo is “of the form adopted by the government with reference to all Spanish and Mexican land grants”); *Pueblo of San Ildefonso*, 513 F.2d at 1388.

{33} Defendant’s reliance on *Solem* is misplaced. A test designed to determine Congress’s intent in enacting a surplus lands act has no historical connection to Pueblo land grants.

CONCLUSION

{34} We reverse the trial court and vacate the order of dismissal. This matter is remanded for further prosecution of the charge against Defendant.

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

A. JOSEPH ALARID,
Judge

I CONCUR:

LYNN PICKARD, Judge

JONATHAN B. SUTIN,

Judge (dissenting).

SUTIN, Judge (dissenting).

{36} I respectfully dissent. I do not accept the major rationales underlying the majority opinion’s result. I think the case should be remanded for further proceedings.

{37} I do not accept as a justifiable basis for the result cases decided from *Clairmont* back and cases relying on *Clairmont* or *Bates*. *See Clairmont v. United States*, 225 U.S. 551 (1912); *Bates v. Clark*, 95 U.S. 204 (1877). Those cases were decided in contexts and times too far removed to be of assistance in deciding the present case. I am not persuaded by the rationales of reliance by cases on a repealed definition under the 1834 act or of adoption by courts or Congress of a rule stemming for these early cases linking status as Indian country to non-extinguishment of Indian title.

{38} I prefer to begin with the 1910 Enabling Act (the Enabling Act) for New Mexico statehood and *Sandoval*. *See United States v. Sandoval*, 231 U.S. 28 (1913); New Mexico Enabling Act, ch. 310, 36 Stat. 557 (1910). The Pueblo Lands Act of 1924 (the PLA), of course is important. *See Pueblo Lands Act*, ch. 331, 43 Stat. 636 (1924). Then, “[i]n the 1930’s the federal Indian policy had shifted back toward the preservation of Indian communities generally” leading to the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984. *United States v. John*, 437 U.S. 634, 645 (1978).

Of course, *Venetie* must be addressed. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998).

{39} The 1910 Enabling Act, the applicability of which has not been argued on appeal, recognized federal dominance and governance over lands then held or occupied by Pueblo Indians. Those lands were considered Indian country. Then came the PLA in 1924. The purpose of the PLA was to remedy the complex and confused land title issues that existed due to the history of non-Indian settlement and ineffectual federal protection of the grant lands. It was not enacted for the purpose of affecting the jurisdictional status of the parcels, the Pueblo communal title to which was extinguished under the PLA. Nothing in the PLA suggests extinguishment of law enforcement jurisdiction, complete alienation of any geographically defined and contiguous portion of Pueblo land grants, or modification of land grant boundaries. Pursuant to the PLA, Taos Pueblo's communal title to the land in question and to other parcels of land was extinguished. As to those parcels, title was quieted in non-Indians; as to the remainder, title was confirmed and preserved in the Pueblo.

{40} *Venetie* sets out what it takes to establish a dependent Indian community. The definition is based on the Court's readings of *Sandoval*, *United States v. Pelican*, 232 U.S. 442 (1914), and *United States v. McGowan*, 302 U.S. 535 (1938). Although no case appears to analyze the issue, and although I am not entirely sure how a land grant set aside for the Pueblo occupancy that is subject to federal superintendence encompasses a dependent Indian community but one parcel within the grant's exterior boundaries under non-Indian ownership due to the PLA is not a dependent Indian community, it does appear that federal cases have applied the dependent Indian community definition to individual parcels.

{41} Nonetheless, *Venetie* did not involve Pueblo land grants or the PLA. It did not involve individual parcels situated within a land grant or even within a reservation. It involved revocation of an entire reservation. In addition, the express purpose of that revocation was "to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy," and also to settle land claims "without creating

a reservation system or lengthy wardship or trusteeship." 522 U.S. at 523-24 (internal quotation marks, emphasis, and citation omitted). *Venetie* is very different.

{42} It appears to me that interpretation of 18 U.S.C. § 1151(a) and (b), and future refinement of *Venetie*, in regard to jurisdiction to enforce criminal law, are works in progress, at least insofar as federal courts are concerned. On the federal level, *HRI, Inc. v. Environmental Protection Agency*, 198 F.3d 1224 (10th Cir. 2000), indicates, and I suggest *State v. Ortiz*, 105 N.M. 308, 731 P.2d 1352 (Ct. App. 1986), on the state level, shows, that there is room for interpretation of congressional intent favoring a blending of the "reservation" and "dependent Indian community" concepts and the statutory subsections, at least insofar as major crimes are concerned, notwithstanding the rejection by *State v. Frank*, 2002-NMSC-026, 132 N.M. 544, 52 P.3d 404, of the Tenth Circuit's community of interest doctrine. See also *Blatchford v. Gonzales*, 100 N.M. 333, 335, 670 P.2d 944, 946 (1983) ("[I]t is apparent that Indian reservations and dependent Indian communities are not two distinct definitions of place, but definitions which largely overlap."). We have determined that "the *Sandoval* Court identified the pueblo in question as a distinctive Indian community in order to conclude that Congress had jurisdiction to legislate with respect to the lands then held or occupied by Pueblo members." *Ortiz*, 105 N.M. at 311, 731 P.2d at 1355. As far as I can tell, by its identification of dependent Indian community for the particular purposes stated, *Sandoval* did not intend the terminology to run a course through statute and case law that would ultimately separate reservations from dependent Indian communities for federal government dominance and superintendence and enforcement of major crimes by Indians against Indians. I am not prepared to hang my hat on *Venetie* to arrive at an extinguishment of federal jurisdiction to prosecute major crimes.

{43} I do not place much stock in the Santo Domingo Pueblo Claims Settlement Act of 2000, 25 U.S.C. §§ 1777 to 1777e (2000) (SDPCSA), which ratified and provided for the enforcement of an agreement between the United States and Santo Domingo Pueblo. S. Rep. No. 106-506 at 1 (2000). The agreement and the statute embody specific land claims settlements and whisk away the

land title clouds that existed and were being litigated in aged lawsuits. The agreement "was negotiated in consultation with the State of New Mexico, other pueblos, local governments and private landowners, to settle the Pueblo's land claims and provide for settlement of decades-old lawsuits involving title to more than 80,000 acres of public, private, and Indian land." *Id.* One lawsuit, involving tens of thousands of acres of land that was subject to overlapping Spanish land grants, resulted from a decision of the Pueblo Lands Board under the PLA. *Id.* at 2-3, 10-11.

{44} I do not read *Clairmont* and *Bates*, nor do I find any rule of linkage stemming from those cases or developed independently later on, as driving the placement of the jurisdictional provision in, or as codified by, the SDPCSA. No such existing case or case law is set out in Senate Report 106-506 or in the SDPCSA. One can infer from § 1777d(b) that in the give-and-take of settlement, the Santo Domingo Pueblo gave up a claimed right to jurisdiction as to the overlap area, and that the United States, unconcerned, agreed in order to get forty years of litigation concluded once and for all. Senate Report 106-506 reports that the jurisdiction matter was inserted "[i]n order to avoid jurisdictional confusion." S. Rep. No. 106-506 at 12-13. I think it is a mistake to generally apply § 1777d(b) as a statement of Congress's intent that all land within New Mexico Pueblos' exterior boundaries that is held in non-Indian title due to PLA extinguishment is no longer Indian country within the meaning of § 1151.

{45} Finally, apropos to our view of legal history from the time of the PLA, Justice Brennan's dissent in *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985), is noteworthy:

[T]he District Court for the District of New Mexico and the Court of Appeals for the Tenth Circuit . . . over the last 60 years have consistently held that Pueblo lands are *fully* governed by the Nonintercourse Act [see discussion of this Act, *Mountain States*, 472 U.S. at 241-45] and that such lands are inalienable without explicit congressional authorization. . . . The decisions below were merely the most re-

cent applications of this settled law. And this settled law not only did not conflict with decisions of this Court, but followed directly from them.

Id. at 280-81 (footnotes omitted) (Brennan, J., dissenting).

{46} Nothing express exists to date from Congress from which a court can find a congressional intent to extinguish federal major crimes jurisdiction (which, at the same time, would necessarily entail extinguishment of Pueblo criminal jurisdiction), or to encroach on Pueblo sovereignty. Therefore, it seems to me the burden ought to be on the State to prove extinguishment of federal jurisdiction to prosecute major crimes committed on the land in question by substantial and compelling evidence of a congressional intent to remove the land from Indian country, having considered the consequences that flow from that removal.

{47} The *Venetie* test appears to identify land (as opposed to land and community) as dependent Indian community only if it passes the two-part test. 522 U.S. at 526. However, when the State asserts jurisdiction over a non-Indian owned parcel within the exterior boundaries of a Pueblo land grant, I think it appropriate to require the State to prove the negatives of both “set aside for occupancy” and “federal superintendence.” This proof burden employs a presumption favoring Pueblo sovereignty. It rejects a presumption that extinguishment under the PLA of Pueblo communal title automatically amounted to an extinguishment of federal superintendence and of the parcel’s status as Indian country for major crimes jurisdiction. *Cf. Mattz v. Arnett*, 412 U.S. 481, 505 (1973) (“A congressional determination to terminate [a reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.”); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (“[T]he State can point to no language in § 1151’s definition of Indian country which lends the slightest support to the idea that by creating a townsite within an Indian reservation the Federal Government lessens the scope of its responsibility for the Indians living on that reservation.”). It at least might blow some life into the notions of “people,” “culture,” and “community,” and their continuity and

survival, notions not unreasonably to be considered along with the land as a focus of superintendence. The underlying issues, after all, involve people and culture, and not just land ownership. The Pueblo’s concern about loss of sovereignty through slippery-slope court decisions that eliminate the Pueblo’s authority over its members, and the State’s concern that crimes by Pueblo Indians will not be adequately dealt with outside the State criminal justice system.

{48} The issues here involve practical, legal, and sovereignty considerations. As a practical matter, I do not as yet see a compelling reason why major crimes committed by Taos Pueblo Indians against Taos Pueblo Indians on the land in question cannot be prosecuted by the United States. (I can see a practical reason why the United States attorney may prefer not to have to deal with these crimes if the State will step in.) As a sovereignty matter, it is easy to understand the Pueblo’s deep cultural and historical concerns about the loss of federal and Pueblo jurisdiction, particularly when the land in question was a part of the original land grant, remains situated within the exterior boundaries of the land grant, and is land the federal government removed from Pueblo communal title under the PLA. As a legal matter, as I discuss earlier in this opinion, I am not prepared to read into the PLA an intent that was not expressed and probably not present, to apply *Venetie* by rote, to use the SDPCSA as a statement of congressional intent, or to reject the notion that the United States Supreme Court might refine *Venetie* or distinguish it in the context of Pueblo land grants and PLA parcels.

{49} My instincts tell me that this case should be remanded to the district court for further proceedings. Amicus were not involved in the district court proceedings. Section 1151(b) was not argued below. Defendant argued that § 1151(a) applied; the State argued that § 1151(c) applied. *Venetie* was hardly mentioned below and was never argued as instructive or controlling authority. Nor was *Venetie* mentioned in the district court’s decision letter.

{50} In addition, the district court proceedings are noteworthy. Defendant was indicted on June 19, 2001. The New Mexico public defender entered an appearance for Defendant on July 3, 2001. On August 13, 2001, Defendant moved to dismiss for lack of subject matter jurisdiction. Defendant

requested an evidentiary hearing on the motion on August 13 and again on October 23, 2001. The hearing was held on November 5 and November 28, 2001. On November 21, 2001, Defendant asked for a continuance of a November 27, 2001, trial setting to develop facts related to new issues the State was raising, namely the extinguishment of Taos Pueblo rights in 1924 and that the land in question was no longer Indian country. Defendant needed time to “perfect the issue of subject matter jurisdiction,” because the State raised “a new evidentiary issue,” requiring time “to perfect the factual basis for his appeal on the issue of subject matter jurisdiction.” Nevertheless, the hearing occurred on November 28, 2001. Defendant offered to plead guilty, conditioned on his right to appeal on the issue of subject matter jurisdiction. The court then heard the jurisdiction issue. *Venetie* was very briefly mentioned by defense counsel. In the hearing, the court acknowledged that “it’s been a long while since I really dealt with what are termed ‘Indian law issues.’ . . . It’s been too many years.” Nothing was mentioned in the hearing regarding Defendant’s motion for continuance, presumably because Defendant offered to enter a conditional plea. The court suggested that Defendant enter his plea, and, although the court took the jurisdiction issue under advisement, the very next day, on November 29, 2001, the court issued its letter decision, stating that the indictment must be dismissed for lack of jurisdiction.

{51} The foregoing procedural recitation indicates that it was likely that neither Defendant nor the district court thought it necessary to continue the case to allow further factual development by Defendant. Considering the district court’s very quick decision, the court may not have been concerned about any lack of factual development before accepting Defendant’s plea. The court probably felt on November 28 that it was going to hold in Defendant’s favor based on the § 1151(a) and (c) arguments, on cases involving reservation diminishment and surplus lands, and on *Ortiz*. The problem with what occurred is that an appellate court might not affirm the district court’s dismissal, and Defendant could lose without having had the opportunity to make a critical factual record. That is what has now occurred. Whether this was Defendant’s mistake, or the court’s, is of little consequence here. This case is too

significant for such a technical inquiry.

{52} Further, on appeal, *Venetie* was not mentioned in the State's brief in chief and its mention in Defendant's answer brief is of no consequence. The State's brief in chief and Defendant's answer brief are of little assistance. Obviously, the evidence presented in the district court was not honed to the real issue, namely, dependent Indian community under § 1151(b). Amicus stray some from the issues as they were tried below, but they do not hit the real issues on the head. The State does a complete about-face in its reply briefs, not only raising a critical theory and arguments not raised in its brief in chief, but also arguing as its primary and major theory a point that is inconsistent with the major point it raised in its brief in chief. We normally do not consider arguments raised for the first time in a reply brief. *State v. Castillo-Sanchez*, 1999-NMCA-085, ¶ 20, 127 N.M. 540, 984 P.2d 787. Neither Defendant nor any Amicus attempted an additional brief on the State's new point. There are solid indications that the factual record is not as complete as it ought to be. In its reply brief to Defendant's answer brief, the State sees the defects and proposes the alternative remedy of remand.

{53} I am not interested in deciding a case as important as this on appeal when it was tried solely on inapplicable statutes and issues and for the most part on questionable case law, and when it seems obvious that further evidence material to the applicable statutes, the critical issues, and the applicable case law, would assist the district court in arriving at findings of fact, conclusions of law, and a judgment on the right issue, and would also assist the appellate courts that review the proceedings in the district court. See *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971) (discussing significance of evidence as to, among other things, "the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area" when determining whether an area is a dependent Indian community). As a general rule, we do not review matters not presented below. *Campos Enters. v. Edwin K. Williams & Co.*, 1998-NMCA-131, ¶ 12, 125 N.M. 691, 964 P.2d 855; cf. *Berlangieri v. Running Elk Corp.*, 2002-NMCA-060, ¶ 37, 132 N.M. 332, 48 P.3d 70 (Sutin, J.,

dissenting) (expressing disfavor with the majority's decision on an issue neither tried below nor placed before this Court by the parties), *aff'd* 2003-NMSC-024, 134 N.M. 341, 76 P.3d 1098 (affirming, but not on the issue as decided by the majority).

{54} This matter of first impression in our Court is an important one, in need of resolution. As I understand it, the United States District Court for the District of New Mexico has issued an unpublished order that upholds State criminal jurisdiction on land that is in the City of Espanola and not Indian country although it is within the exterior boundaries of the Santa Clara Pueblo. Perhaps ominous in regard to Pueblo interests, the United States has not intervened in, or requested to supply an amicus brief, in the present case. Although it may be that Defendant will ultimately lose and the Pueblo's interests will be adversely affected unless they can develop facts that will persuade the district court to stay with dismissal and persuade the majority in this Court to affirm, this Court, our Supreme Court, and the United States Supreme Court (if the case were to arrive at its doorstep) nevertheless deserve a more fully developed evidentiary record and more fully developed legal positions and arguments, on the practical, legal, and sovereignty issues. The public defender appellate division of the State of New Mexico should not stand alone in the trial on jurisdiction. Interested parties such as the two Pueblos that filed Amicus briefs should take active roles in the trial of the issues on the merits. The United States should be invited to participate and should participate. The issues go far beyond the individual Defendant in this case. I realize that the case can be decided on the present record, but I do not think it judicious or prudent to do so.

{55} One lingering and troublesome question that seems to avoid the fray is why, as to federal major crimes jurisdiction, non-Indian owned parcels in reservations should, as a practical, legal, or sovereignty matter, be treated differently than non-Indian owned parcels in land grants. I understand there are historical distinctions between reservations and land grants in regard to Tribal rights to transfer title to property. To the extent distinctions existed, what is the rational basis for bringing them forward into § 1151 as a basis

to distinguish between reservations and dependent Indian communities? Does § 1151(b) signal anything but an attempt by Congress to acknowledge the United States Supreme Court's judicial recognition of dependent Indian communities together with Congress's own recognition of federal dominance and governance of those communities. I suggest that, if courts must judicially resolve this jurisdictional dispute, it may be time for the courts to refrain from attempting through misfigured pieces to put together a perfect puzzle. The legal backdrop is quaggy and unstable. What exists is a hodgepodge of cases involving a patchwork of statutes, and a mishmash of analyses, stated purposes, arguments, and results, providing, in my view, no common direction for the right result in this case. I am unable to find a congressional purpose that leads me to a definitive, much less right, result. The solution in this case needs a political, not a judicial solution.

{56} It is "Congress, in pursuance of the long-established policy of the government, [that] has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage." *Sandoval*, 231 U.S. at 46 (internal quotation marks and citation omitted). This early proclamation merits repeating today, not so much for the protective and paternalistic aspects needed at the time of New Mexico statehood, but as a guide for courts when considering issues that, in the last analysis, concern Pueblo sovereignty and require sensitive and important policy determinations.

{57} I recognize that the cry for political solution is of little consequence when the issues are dropped in a court's lap, particularly in view of Congress's continued abstinence. Thus, in the vacuum of congressional interest and action, if a policy determination must be made by an appellate court, let us do so on a better record, with fuller analyses and argument. To the extent a judicial solution is required because the matter is here, more than is presently before this Court is required to assure, as best we can, the right result. While the issues are in this Court, they should carry with them the fullest, most effective possible presentation of relevant evidence, of applicable case

law, and of the practical and sovereignty consequences of any court decision.

{58} It is obvious that, in order to decide a case such as this, in their search for congressional intent courts will naturally hunt for relevant statutory language, legislative history, and generally-held contemporaneous understanding of its effect. In my view, this is, and will continue to be, a largely unsuccessful hunt in the present case. In such a circumstance, a court is compelled to turn to historical federal government, Pueblo, and State actions in regard to relevant lands, to practical consequences, and to what is right for the competing sovereigns, precisely what Congress ought to be addressing.

{59} Cases involving reservations, allotments, and surplus lands and involving concepts relating to those circumstances, including the diminishment of reservation boundaries, seem to me to be useful only for phrases taken from them and patched into Pueblo land grant issues in order to reach a particular result. I question whether there exists any analogical benefit from that practice with respect to the issues at hand.

{60} I recognize that distancing cases relating to reservations, allotments, and surplus lands from cases relating to Pueblo land grants and the PLA may not fully square with the notion that, for the purposes of jurisdiction,

reservations, and land grants perhaps ought to be treated similarly. Nevertheless, it appears to me that it might be sensible to read congressional intent to be that of similar treatment for jurisdiction purposes until Congress expressly states what the majority holds, or at least until the State can present substantial and compelling evidence of such congressional intent.

{61} If I were to pick and choose among reservation-related cases, as I indicated earlier I would comfortably reject cases pre-dating *Sandoval*, and it would seem reasonable to choose to apply to the present circumstances a view similar to that stated in *Solem*, namely, that “[w]hen both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.” *Solem v. Bartlett*, 465 U.S. 463, 472 (1984).

{62} Further, I understand that canons of statutory construction generally consist of either a “thrust” and a “parry” or of a “thrust” and a “counterthrust.” *See* Karl N. Llewellyn, *The Common Law Tradition*, App. C (Little, Brown & Co. 1976) (1960). In the present case, I prefer to stick with the “thrust,” namely, that “statutes are to be

construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.” *Chickasaw Nation v. United States*, 534 U.S. 84, 88 (2001) (internal quotation marks and citation omitted). In her dissent in *Chickasaw*, Justice O’Connor refers to this rule as “the Indian canon,” and she states that it “presumes congressional intent to assist its wards to overcome the disadvantages our country has placed upon them.” *Id.* at 99. It carries “the presumption that Congress generally intends to benefit the Nations.” *Id.*; *see also United States v. Thompson*, 941 F.2d 1074, 1077 (10th Cir. 1991) (referring to cases that “stand for the proposition that when congressional intent with respect to an Indian statute is unclear, courts will presume that Congress intended to protect, rather than diminish, Indian rights”).

JONATHAN B. SUTIN, Judge

Certiorari Denied, SC28,432, January 15, 2004

From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-014

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
VERNON MCGEE,
Defendant-Appellant.

No. 23,203 (filed: December 3, 2003)

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY

Frank K. Wilson, District Judge

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OPINION

VIGIL, JUDGE

{1} A jury found Defendant guilty of one count of retaliation against a witness and six counts of violating an order of protection under the Family Violence Protection Act. NMSA 1978, §§ 30-24-3(B) (1997); 40-13-6(E) (1999). Defendant was found to be a habitual offender with three or more prior felony convictions, and received an enhanced sentence on the retaliation conviction of seventeen years and consecutive sentences of 364 days each on the order of protection violations for a total sentence of twenty-three years minus six days. Defendant appeals, contending: (1) the evidence is insufficient to support four of the order of protection violations, (2) the evidence is insufficient to support the retaliation conviction, (3) the trial court committed reversible error in admitting evidence of his conviction for intimidation of a witness, and (4) consecutive sentences

on the order of protection violations violate double jeopardy. We affirm.

BACKGROUND

{2} On June 9, 1999, Defendant returned home from work and told Victim, who was then his wife, that he intended to quit his job. "Victim was unhappy with Defendant's decision and the couple argued until they both fell asleep. Two days later the argument turned violent. Victim was assaulted and beaten in various ways and at various times. She was verbally threatened, and kept forcibly from leaving the house." *State v. McGee*, 2002-NMCA-090, ¶ 2, 132 N.M. 537, 51 P.3d 1191 (hereinafter *McGee I*).

{3} After fleeing the police, Defendant was arrested. While in jail awaiting trial, "Defendant wrote letters to Victim. In those letters, Defendant informed Victim people were watching her every move, that he knew what she was doing and thinking at all times, and that she would never be free of him until one of them was dead." Victim considered the letters "threatening and believed that Defendant would kill her if she testified against him at trial." *Id.* ¶ 3. As a result of these acts, an order of protection prohibiting domestic violence was filed on July 1, 1999, under the Family Violence Protection Act, NMSA 1978, §§ 40-13-1 to 40-13-8 (1987, as amended through 2001). The order prohibited Defendant from writing to, talking to, visiting, or contacting Victim. The order gave notice that a conviction for violation of its provisions could result in a sentence of incarceration of up to one year, and Defendant was served with a copy of the order at the Otero County Detention Center that same day.

{4} The State charged Defendant with various offenses as a result of the violence on June 11, 1999, and Victim testified at the trial in May 2000. On September 26, 2000, Defendant was convicted of aggravated battery against a household member, NMSA 1978, § 30-3-16 (1995), false imprisonment, NMSA 1978, § 30-4-3 (1963), resisting, evading or obstructing an officer, NMSA 1978, § 30-22-1(B) (1981), and intimidation of a witness, NMSA 1978, § 30-24-3(A) (1997).

ORDER OF PROTECTION CONVICTIONS

{5} Defendant asserts the evidence is insufficient evidence to support four convictions for violating the order of protection filed on July 1, 1999, pursuant to the Family Violence Protection Act. He argues that the evidence fails to establish he violated the "no contact" directive of the order by call-

ing Victim's home from the Otero County Detention Center, and at best only proves an attempt to violate the order because he did not communicate with her on those occasions. We disagree.

{6} In reviewing the sufficiency of the evidence, we consider the evidence in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences in favor of the verdict. "This 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." *State v. Estrada*, 2001-NMCA-034, ¶ 40, 130 N.M. 358, 24 P.3d 793 (internal quotation marks and citation omitted).

{7} The order of protection prohibited Defendant from writing to, talking to, visiting, or contacting victim. Defendant was convicted of violating the order of protection four times on February 16, 2000, by calling Victim from the Otero County Detention Center. However, Victim could not recall whether she was in town on that day, whether she received any telephone calls on that day, or whether the Otero County Detention Center number showed up on her caller ID for that date. She could only testify generally that she recalled seeing the Otero County Detention Center number on her caller ID system "several times."

{8} Each inmate at the Otero County Detention Center received a PIN number for using the telephones located in the day room of each housing pod. An inmate must enter an active PIN in order to initiate a call, although one inmate can use another's PIN number. A recording is then made that identifies the Otero County Detention Center as the originating point of the call, followed by a three-second gap in the recording. That gap allows the inmate to identify himself to the recipient so the recipient can decide whether to accept or deny the call. However, during this three-second gap, the inmate is not limited to saying his name; he can say whatever he wants. The pre-recorded message will play: (1) identifying the call as a collect call originating from the Otero County Detention Center; (2) the inmate-caller's pre-recorded self-identification; followed by (3) prompts directing the recipient of the call to affirmatively enter a "1" to accept the call or a "2" to affirmatively deny the call, at which time the attempted connection will be terminated.

{9} Reports were generated showing the outgoing calls from the Otero County Detention Center to Victim's home. The

report showed that five calls to Victim's home on February 16, 2000, were made using Defendant's PIN number: the first call was aborted by the caller before it rang through, the second, fourth, and fifth calls went unanswered, and the third call was affirmatively denied. The calls were made in close temporal proximity to each other, at 2:43 p.m., 2:56 p.m., 3:00 p.m., 3:03 p.m., and 3:05 p.m., respectively.

{10} The evidence supports the jury's verdict that Defendant "contacted" Victim by making the second, third, fourth, and fifth calls. Although three of the calls were unanswered, the jury was free to conclude, based on the evidence, that Victim's caller ID recorded those calls as coming from the Otero County Detention Center. Defendant made "contact" with Victim in each instance because a "contact" is not limited to a direct communication. *See* the definition of "contact" in Webster's Third New International Dictionary (unabridged) 241 (2002); *United States v. Lampley*, 573 F.2d 783, 787 (3d Cir. 1978) (holding defendant cannot evade liability by placing only operator-assisted calls because operator acts as agent of caller for purposes of contacting the party called). One call was affirmatively denied supporting the jury's verdict that the call was made and Victim refused it. To the extent Defendant argues that the evidence is insufficient to prove he made the four calls, that argument also fails. *See Michaud v. United States*, 350 F.2d 131,133 (10th Cir. 1965) (holding eyewitness testimony that defendant was in and near telephone booth at time of call presented a jury question on identity of the caller); *State v. Deaver*, 491 P.2d 1363,1365 (Wash. Ct. App. 1972) (noting that identity of caller may be established by direct or circumstantial evidence).

RETALIATION CONVICTION

{11} Defendant argues the evidence is insufficient to support his conviction for retaliation against a witness. We apply the same standard of review to this claim as we did to the order of protection convictions pursuant to *Estrada* and affirm.

{12} Victim testified that on October 2, 2000, just five or six days after Defendant was sentenced, she received two calls from Defendant while he was incarcerated in the Otero County Detention Center. Victim answered the first call. A recorded message said it was a collect call and then she heard Defendant state his name, "Vernon McGee," identifying himself as the caller. Victim had no doubt the voice was Defendant's, and she immediately

hung up. A second call immediately followed. Victim's niece who was living with Victim, testified she answered the second call. Again, a recorded message said it was a collect call, and instead of saying his name, Defendant said, "[S]omeone's coming to get you." Victim's niece recognized Defendant's voice, and immediately hung up. Victim and her niece testified that the calls "scared" and "frightened" the Victim. Victim immediately called the police and when they arrived at her house, she showed them her caller ID that displayed the two calls that had just come from the Otero County Detention Center.

{13} Defendant argues that the foregoing evidence is insufficient to allow the jury to find beyond a reasonable doubt that he threatened Victim with the specific intent to retaliate against her, an essential element of retaliation against a witness under Section 30-24-3(B). Specifically, he argues that the threat he made is only "generic" to the long and stormy relationship between himself and the Victim, and not because of Victim's complaint and testimony against Defendant. We disagree.

{14} We have previously described what constitutes a specific intent to retaliate under Section 30-24-3(B). In *State v. Warsop*, 1998-NMCA-033, ¶ 14, 124 N.M. 683, 954 P.2d 748, we said:

"[T]o retaliate" does not connote some retributive physical violence. Rather, it connotes the simple concept of "pay back." The [victim], by his action, had upset [the defendant]. By threatening the [victim, the defendant] could perhaps upset him as well, thereby fully accomplishing the "pay back" that is the essence of retaliation.

(quoting *State v. Fixel*, 945 P.2d 149, 152 (Utah Ct. App. 1997)). Moreover, *Warsop* states that retaliation under Section 30-24-3(B) does not depend on whether the Defendant intends to carry out his threat. It only requires the intent to retaliate or to exact "pay back" which does not necessarily involve retributive physical violence. *Id.*

{15} Proof of intent is rarely provable by direct evidence. That is why circumstantial evidence must often be relied upon for its proof. See *Estrada*, 2001-NMCA-034, ¶ 42 (recognizing proof of intent rarely proved directly and often proved by circumstantial evidence). Circumstantial evidence, like direct evidence, will support a jury's finding of a specific intent. See *State v. Durant*, 2000-NMCA-066, ¶ 15, 129 N.M.

345, 7 P.3d 495 (concluding circumstantial evidence proved specific intent beyond a reasonable doubt).

{16} Defendant argues that *Casey v. State*, 676 N.E.2d 1069 (Ind. Ct. App. 1997) supports his argument that the evidence is insufficient to prove his intent in this case. However, *Casey* involved a prosecution for intimidation under Indiana law in which the statutory elements of intent differ from the elements of intent to retaliate under Section 30-24-3(B).

{17} We hold that the direct and circumstantial evidence supports the jury's verdict that Defendant called Victim on October 2, 2000, with the requisite intent to accomplish what Section 30-24-3(B) prohibits. See *State v. Coffin*, 1999-NMSC-038, ¶ 77, 128 N.M. 192, 991 P.2d 477 (stating a jury is free to draw its own inferences based on the evidence); *State v. Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988) (stating a jury is free to reject a defendant's version of the facts).

ADMISSIBILITY OF CONVICTION FOR INTIMIDATION OF WITNESS

{18} The trial court allowed Defendant's conviction for intimidation of a witness in *McGee I* to be admitted into evidence over Defendant's objection. Defendant argues that because the elements of retaliation against a witness, for which he was on trial, and the elements of intimidation of a witness, for which he was previously convicted, are so similar, admission of the conviction for intimidation of a witness resulted in undue prejudice under Rule 11-403 NMRA 2003 (authorizing the exclusion of probative but unfairly prejudicial evidence). Defendant does not object to admission of the conviction for false imprisonment. We review the trial court's decision to admit the evidence for an abuse of discretion. *Estrada*, 2001-NMCA-034, ¶ 36. Defendant's argument fails because it overlooks the facts and holdings in *Estrada*.

{19} In *Estrada*, the defendant was convicted of embezzlement, conspiracy to commit embezzlement, and harboring a felon when he assisted another person in shoplifting from a store in which he was a loss prevention officer. The conviction was based upon an investigation and testimony of another loss prevention officer. The defendant later saw the witness and made threats. On this basis the defendant was convicted of retaliating against a witness. Section 30-24-3(B). The defendant argued on appeal that evidence of the prior convictions was reversible error. We rejected his argument, stating:

Defendant argues that the trial court erred in admitting evidence of his prior convictions for embezzlement, conspiracy to commit embezzlement, and harboring a felon. . . . We conclude the trial court acted within its discretion in allowing the State to introduce evidence of Defendant's prior felony convictions.

Relying on *State v. Tave*, 1996-NMCA-056, ¶¶ 12-22, 122 N.M. 29, 919 P.2d 1094, Defendant argues that whether he was convicted of a felony is irrelevant to the crime of retaliation against a witness, and therefore, any evidence of his prior felony convictions was inadmissible under Rule 11-402, NMRA 2001. A similar argument was made and rejected by this Court in *State v. Warsop*, 1998-NMCA-033, ¶ 19, 124 N.M. 683, 954 P.2d 748. The question in *Tave* was whether the name of a prior felony was admissible for purposes of proving a felon-in-possession charge. In *Warsop*, we held that *Tave* is distinguishable from cases involving the charge of retaliation against a witness because a felon-in-possession charge arises from an incident wholly unrelated to the predicate felony. By contrast, in cases involving retaliation against a witness, the prior felony offense is closely intertwined with the retaliation charge because the victim of the retaliation was also the witness who reported the felony in the underlying case.

In this case, Doty, the victim of the retaliation, was also the chief witness who testified against Defendant in the case resulting in his convictions for embezzlement, conspiracy to commit embezzlement, and harboring a felon. According to *Warsop*, a victim's testimony regarding what he witnessed and reported with respect to the prior felony offense is relevant to prove the defendant's intent and motive with respect to the retaliation charge.

Although Defendant is correct in pointing out that his convic-

tions in the underlying case were not necessary to prove the crime of retaliation against a witness, *see State v. Perea*, 1999-NMCA-138, ¶¶ 7-8, 128 N.M. 263, 992 P.2d 276, we conclude that evidence of the prior convictions was nonetheless relevant and probative of Defendant's intent and motive. As the trial court properly noted, it is conceivable that Defendant would have had more reason to be angry and to retaliate if the underlying charges against him had resulted in convictions rather than acquittals. Thus, under *Warsop*, we hold that evidence of Defendant's prior convictions, including the name and nature of the prior felonies, was relevant to establish his intent and motive with respect to the retaliation charge, and the probative value of the convictions was not substantially outweighed by its prejudicial effect.

Estrada, 2001-NMCA-034, ¶¶ 36-39 (internal citations omitted).

{20} We hold that *Estrada* answers Defendant's contentions under this point. Victim's report and testimony resulted in Defendant's conviction for intimidation of a witness in the first case, and Defendant's subsequent threats against Victim for reporting and testifying in the first case resulted in a prosecution for retaliation against a witness in this case. Under *Estrada*, no abuse of discretion was committed in admitting the intimidation of a witness conviction into evidence, and the relevance was not substantially outweighed by its purported prejudicial effect.

DOUBLE JEOPARDY IN SENTENCING

{21} Defendant was given six consecutive sentences for the four order of protection violations occurring on February 16, 2000, and the two order of protection violations occurring on October 2, 2000. He argues that the consecutive sentences violate his right to be free from double jeopardy in sentencing. *See Herron v. State*, 111 N.M. 357, 358, 805 P.2d 624, 625 (1991) (recognizing that subjecting defendant to multiple punishments for the same offense violates double jeopardy prohibition). Specifically, Defendant argues that he was engaged in a single course of conduct on February 16, 2000, of making or attempting to make sev-

eral calls to Victim in a short period of time, and a separate single course of conduct on October 2, 2000, of making or attempting to make two calls to Victim. Therefore, his argument continues, he can only be sentenced once for each course of conduct. We review this contention de novo, *see State v. Barr*, 1999-NMCA-081, ¶ 13, 127 N.M. 504, 984 P.2d 185 (stating challenge to multiple sentences on double jeopardy grounds, though essentially constitutional, becomes one of statutory construction), and reject Defendant's argument.

{22} "Where an accused is charged with multiple violations of a single statute and raises a double jeopardy challenge, we must determine whether the legislature intended to permit multiple charges and punishments under the circumstances of the particular case." *State v. Castañeda*, 2001-NMCA-052, ¶ 13, 130 N.M. 679, 30 P.3d 368. Where the statutory language clearly defines the unit of prosecution, the statute controls. *Barr*, 1999-NMCA-081, ¶ 14, *see State v. Borja-Guzman*, 1996-NMCA-025, ¶ 13, 121 N.M. 401, 912 P.2d 277 (holding that legislature evinced intent to permit prosecution for each distinct act of delivery of a controlled substance).

{23} The Family Violence Protection Act clearly reflects its intent that each violation shall be subject to a separate prosecution and punishment. This intent is reflected in several of its provisions. First, "domestic abuse" is defined as "any incident by a household member against another household member" which results in many different types of harm. Section 40-13-2(C). Second, anytime there is an act of "domestic abuse" a victim may petition the court for an order of protection. Section 40-13-3(A). Third, upon finding that "domestic abuse" has occurred, the court must enter an order of protection ordering the respondent to refrain from abusing the petitioner, and "[t]he court shall specifically describe the acts the court has ordered the respondent to do or refrain from doing." Section 40-13-5(A). Fourth, the order of protection "shall contain a notice that violation of any provision of the order constitutes contempt of court and may result in a fine or imprisonment or both." Section 40-13-5(B). Fifth, violation of an order of protection constitutes a crime, with mandatory sentences upon second or subsequent convictions. Section 40-13-6(E). Sixth, in addition to charging the person with violating an order of protection, a peace officer must file all other possible criminal charges arising from an incident of domestic abuse when probable cause exists. Section 40-

13-6(G). Seventh, the remedies provided in the Family Violence Protection Act are in addition to any other civil or criminal remedy available to the petitioner. Section 40-13-6(H). Finally, the Family Violence Protection Act defines an "order of protection" as "a court order granted for the protection of victims of domestic abuse." Section 40-13-2(E).

{24} In this case, the order of protection clearly and unambiguously ordered Defendant not to "contact" Victim. Each and every time Defendant called Victim on February 16, 2000, and on October 2, 2000, he made a "contact" with Victim in violation of the order of protection. The legislature has made its intent clear that each violation will be punished separately. Defendant's right to be free from double jeopardy in sentencing was not violated. *See People v. Wood*, 698 N.Y.S.2d. 122, 128 (N.Y. App. Div. 1999) (holding it was proper for the district attorney to charge defendant with five counts of violating no contact provision of protective order for five separate calls, regardless of their closeness in time).

CONCLUSION

{25} The judgment and sentence is affirmed.

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

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge
CELIA FOY CASTILLO, Judge

Certiorari Granted, No. 28,414, January
13, 2004

From the New Mexico
Court of Appeals

Opinion Number: 2004-NMCA-013

TOPIC INDEX:

Criminal Law: Homicide

STATE OF NEW MEXICO,
Plaintiff-Appellant/Cross-Appellee,
versus
JIMMY RAY O'KELLY,
Defendant-Appellee/Cross-Appellant.
Nos. 23,272 / 23,364
(filed: November 25, 2003)

APPEAL FROM THE DISTRICT COURT
OF DOÑA ANA COUNTY
Robert E. Robles, District Judge

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OPINION

PICKARD, JUDGE

{1} This case presents a novel set of facts that requires us to examine the limits of the depraved mind murder and felony murder statutes. Defendant was charged with false imprisonment, kidnapping, aggravated battery, felony murder, and depraved mind murder. He moved to dismiss both murder charges because neither he nor his accomplice committed the lethal act. The trial court dismissed the depraved mind murder charge, which the State appeals, and did not dismiss the felony murder charge, which Defendant appeals pursuant to our grant of his application for interlocutory appeal. First, we discuss the decision to dismiss the depraved mind murder charge and affirm the dismissal. Sec-

ond, we discuss the decision not to dismiss the felony murder charge and reverse the denial of the motion to dismiss it.

FACTS AND PROCEEDINGS

{2} The parties stipulated to the following facts for the purposes of this appeal. There was a party in a Las Cruces apartment complex. Hellaman Tellez lived in a first floor apartment directly beneath the apartment where the party occurred. Tellez's friend, Jose Campos, visited Tellez and then attended the party. By 1:30 a.m., the party had spread to the parking lot, and many of the party-goers were rowdy and violent.

{3} Two unidentified men from the party repeatedly rang the doorbell for Tellez's apartment. When Tellez opened the door, they forced their way inside. They scuffled with Tellez, hit him over the head with a bottle, and left the apartment. Tellez got his two loaded handguns and went out of his apartment to the first floor balcony.

{4} At the same time, a group of people in the parking lot had surrounded Jose Campos and were attacking him while Defendant held a gun to his head to prevent him from fleeing. The group severely beat, pistol-whipped, kicked, and punched Campos, breaking bottles over his head and giving him serious lacerations and other injuries.

{5} When Tellez came out of his apartment with his loaded guns, he witnessed Campos's attack. He pleaded with Defendant and his companions to stop the beating. As the beating continued, Defendant turned to point his gun at Tellez. Tellez fired at Defendant and Defendant fired back. In the ensuing gun battle, Defendant fired four shots. Tellez, who returned to his apartment at one point for more ammunition, fired 20 shots. One of Tellez's shots hit and fatally wounded Gerald Pettes, an innocent bystander. Tellez also injured Defendant and two or three others. None of Defendant's shots hit anybody.

{6} A grand jury indicted Defendant on counts of first degree (felony) murder, first degree kidnapping with a firearm enhancement, aggravated assault (deadly weapon) with a firearm enhancement, shooting at a dwelling or occupied building (no great bodily harm), and possession of a firearm or destructive device by a felon. Another grand jury issued a separate indictment of Defendant for first degree (depraved mind) murder, arising from the same incident. The trial court joined the indictments.

{7} Defendant moved to dismiss both murder charges. The trial court heard Defendant's motion to dismiss and ruled that the facts were not legally sufficient to support the depraved mind murder charge, but did suffice to support the felony murder charge. The court further certified the order denying the motion to dismiss the felony murder charge for interlocutory appeal.

{8} Defendant filed an application for interlocutory appeal of the trial court's decision not to dismiss the felony murder charge. *See* NMSA 1978, § 39-3-3 (1972). The State filed an interlocutory appeal as of right of the dismissal of the depraved mind murder charge. *See* § 39-3-3(B)(1). We assigned the consolidated appeal to the general calendar.

DISCUSSION

1. Depraved Mind Murder

{9} The State appeals the trial court's dismissal of the depraved mind murder charge. The issue of whether Defendant may be held liable for depraved mind murder when he or his accomplice did not commit the lethal act that killed the innocent bystander is one of first impression. The State argues that the depraved mind murder charge should stand because Defendant "initiate[d] a gun battle in a public place" and therefore meets the intent and causation requirements. We disagree.

{10} As a matter of statutory interpretation and construction, we review the issue *de novo*. *State v. Pearson*, 2000-NMCA-102, ¶ 5, 129 N.M. 762, 13 P.3d 980. "Fundamentally, our role is to effectuate the Legislature's intent as evidenced by the statute's plain terms and avoid strained or absurd constructions." *Id.*

{11} NMSA 1978, § 30-2-1(A)(3) (1994) defines first degree murder as "the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life." The jury instructions require the State to prove beyond a reasonable doubt that:

2. The defendant's act caused the death of [the victim];

3. The act of the defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life;

4. The defendant knew that his

act was greatly dangerous to the lives of others[.]

UJI 14-203 NMRA 2003 (footnote omitted).

{12} The intent element of depraved mind murder “encompass[es] an intensified malice or evil intent.” *State v. Brown*, 1996-NMSC-073, ¶ 15, 122 N.M. 724, 931 P.2d 69. It requires that the defendant “acted with a depraved mind or wicked or malignant heart and with utter disregard for human life.” *Id.* ¶ 16 (internal quotation marks omitted). We have distinguished depraved mind murder from other first degree murder, characterizing it as “extremely dangerous and fatal conduct performed without specific homicidal intent but with a depraved kind of wantonness.” *State v. Johnson*, 103 N.M. 364, 368, 707 P.2d 1174, 1178 (Ct. App. 1985). Courts require the defendant to have “subjective knowledge . . . that his [or her] acts were greatly dangerous to the lives of the others.” *Brown*, 1996-NMSC-073, ¶ 20 (internal quotation marks omitted).

{13} In depraved mind murder cases, defendants usually manifest their intent in one of two ways. First, depraved mind murder can apply to cases where there is intent to kill a specific person and bystanders are killed as a result of depraved acts flowing from this intent. *State v. Sena*, 99 N.M. 272, 274, 657 P.2d 128, 130 (1983) (affirming a depraved mind murder conviction when the defendant shot at a doorman and killed bystanders). More classically, “the act done is dangerous to more than one person such as firing into a crowd or placing a bomb in an airport locker.” *State v. DeSantos*, 89 N.M. 458, 461, 553 P.2d 1265, 1268 (1976).

{14} There is also a causation element to depraved mind murder. Courts generally employ the jury instruction for causation in homicide cases which reads:

1. The death was a foreseeable result of the defendant’s act;
2. The act of the defendant was a significant cause of the death of [the victim]. The defendant’s act was a significant cause of death if it was an act which, in a natural and continuous chain of events, uninterrupted by an outside event, resulted in the death and without which the death would not have occurred.

[There may be more than one significant cause of death. If the acts of two or more persons significantly contribute to the cause of death, each act is a significant cause of death.]

UJI 14-251 NMRA 2003 (Homicide; “proximate cause”; defined.); *see State v. Trujillo*, 2002-NMSC-005, ¶ 25, 131 N.M. 709, 42 P.3d 814.

{15} Applying these requirements, New Mexico courts have upheld depraved mind murder convictions for shooting from a balcony into a group of people; committing multiple shootings, some fatal, in a crowded house; and shooting with intent to kill a doorman, but resulting in the deaths of bystanders. *Id.* ¶¶ 31-32; *State v. Abeyta*, 120 N.M. 233, 246, 901 P.2d 164, 177 (1995), *abrogated on other grounds by State v. Campos*, 1996-NMSC-043, ¶ 32 n.4, 122 N.M. 148, 921 P.2d 1266; *Sena*, 99 N.M. at 274, 657 P.2d at 130. In contrast, our Supreme Court has reversed depraved mind murder convictions when trial courts have incorrectly construed the intent element by refusing to instruct on intoxication as it relates to the subjective knowledge requirement or by instructing the jury to use an objective knowledge standard. *Brown*, 1996-NMSC-073, ¶¶ 34-35; *State v. Ibn Omar-Muhammad*, 102 N.M. 274, 277, 694 P.2d 922, 925 (1985), *modified on other grounds by State v. Cleve*, 1999-NMSC-017, ¶ 27, 127 N.M. 240, 980 P.2d 23. Our Supreme Court has also overturned a depraved mind murder conviction when the defendant’s “depraved mind act” was too attenuated from the actual cause of death. *State v. Hernandez*, 117 N.M. 497, 499, 873 P.2d 243, 245 (1994) (holding that the defendant did not have intent for depraved mind murder when the fatal shot happened during a struggle for control of the rifle, some time after the defendant’s initial shooting spree).

{16} In the present case, the issue is whether Defendant can be found to possess the depraved mind intent and to have been the proximate cause of an innocent bystander’s death, given the fact that he did not fire the lethal bullet. The State argues that we should extend the depraved mind murder statute to include cases where the defendant sets in motion a chain of events that leads to the accidental death of a bystander. We disagree.

{17} New Mexico is one of only three states, along with Maine and Washington, to codify depraved mind murder as first degree murder. 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 7.7(d), at 244-45 & n.65 (1986) (“Less defensible is placing depraved [mind] murder into this category [of first degree murder], as a few states have done.”). Only New Mexico and Washington make it punishable by death. *See* John T. Rago, “*Truth or Consequences*” and *Post-Conviction DNA Testing: Have You Reached Your Verdict?*, 107 Dick. L. Rev. 845, 850, n.21 (2003) (listing the states that have the death penalty). As a result, our courts have noted the necessity of construing depraved mind murder to “sufficiently distinguish the offense of first-degree depraved mind murder from second-degree murder.” *Brown*, 1996-NMSC-073, ¶ 13. “First-degree murder is reserved for the most blameworthy or the most heinous and reprehensible class of homicides; thus, the difference in culpable mental states is crucial in justifying the more serious penal consequences of first-degree murder.” *Id.* ¶ 15 (internal quotation marks and citation omitted). In keeping with this view of depraved mind murder, we refuse to expand the doctrine to cover unintentional killings in which the lethal act was not committed by the defendant or his or her accomplices.

{18} The State urges us to follow the lead of California and other states who use a “provocative act murder” doctrine to find liability in these attenuated situations. We do not agree that New Mexico should adopt the standards of other states that include depraved mind murder as second degree murder, and whose depraved mind murder convictions do not carry the potentially capital consequences that New Mexico’s statute imposes.

{19} In applying this limitation to the present case, it is clear that the trial court was correct to dismiss the depraved mind murder conviction. Defendant did not commit the lethal act, and Tellez, who did fire the lethal shot, was not Defendant’s accomplice. We therefore affirm the dismissal of the depraved mind murder charge.

2. Felony Murder

{20} Defendant challenges the trial court’s failure to dismiss the felony murder charge on the grounds that he lacked the requisite intent, he was not the actual or proximate

cause of the victim's death, and the potential for a capital sentence indicates that the felony murder charge is disproportionate to his actions. These claims raise legal issues and require us to interpret the felony murder statute, and we review them de novo. *Pearson*, 2000-NMCA-102, ¶ 5. Because we find that New Mexico espouses an agency theory that does not hold defendants responsible for lethal acts of third parties who are not accomplices, we reverse.

{21} Felony murder is the common law crime that makes a defendant liable for murder when a killing occurs in the commission or attempted commission of a crime. See *LaFave*, *supra*, § 7.5, at 206. The crime is generally said to have originated with Lord Coke's 1644 statement, "a death caused by any unlawful act is murder." 2 Charles E. Torcia, *Wharton's Criminal Law* § 147, at 296 (15th ed. 1994) (internal quotation marks and citation omitted). Blackstone echoed this sentiment, stating that "if one intends to do another felony, and undesignedly kills a man, this is also murder." 4 William Blackstone, *Commentaries on the Laws of England* 201 (1769) (University of Chicago Press ed., 1979). In England, courts limited felony murder by requiring that the predicate felony be violent, or that the death be "the natural and probable consequence of the defendant's conduct in committing the felony." *LaFave*, *supra*, § 7.5, at 207.

{22} The general trend towards limiting the felony murder rule has continued in America, as courts and legislatures have limited the permissible predicate felonies, eliminated liability for deaths of accomplices, and created causation and intent requirements. *LaFave*, *supra*, § 7.5, at 208. These limitations have often come in response to criticisms that felony murder is "unfair, unprincipled and inconsistent with other criminal and civil standards." Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 *Ariz. St. L.J.* 763, 763 (1999). But, although England abolished felony murder in 1957, only three American states (Hawai'i, Kentucky, and Michigan) have completely abolished the rule. *LaFave*, *supra*, § 7.5, at 233 & nn.136-37.

{23} New Mexico's felony murder rule states, "Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the

means with which death may be caused . . . in the commission of or attempt to commit any felony[.]" Section 30-2-1(A)(2). The root of our felony murder doctrine was a legislative determination "that a killing in the commission or attempted commission of a felony is deserving of more serious punishment than other killings in which the killer's mental state might be similar but the circumstances of the killing are not as grave." *State v. Ortega*, 112 N.M. 554, 565, 817 P.2d 1196, 1207 (1991). While the wording of our statute is broad, New Mexico has followed suit with the rest of the nation by creating a series of limitations to the felony murder doctrine.

{24} There are five main limitations to New Mexico's felony murder rule. First, the predicate felony must be the actual and proximate cause of the death. *State v. Harrison*, 90 N.M. 439, 441-42, 564 P.2d 1321, 1323-24 (1977), *superseded by rule on other grounds as stated in Tafoya v. Baca*, 103 N.M. 56, 60, 702 P.2d 1001, 1005 (1985). Second, the predicate felony must be inherently dangerous. *Id.* at 442, 564 P.2d at 1324. Third, the felony murder rule does not extend to cases where the victim of the predicate felony kills the defendant's accomplice. *Jackson v. State*, 92 N.M. 461, 462, 589 P.2d 1052, 1053 (1979). Fourth, there is a mens rea requirement that the defendant must possess at least the intent required for second degree murder. *Ortega*, 112 N.M. at 563, 817 P.2d at 1205. Finally, the "collateral-felony" limitation dictates that the predicate felony may not be a lesser included offense of second degree murder. *Campos*, 1996-NMSC-043, ¶ 19. Each of these doctrines is discussed in more detail below.

{25} New Mexico's first felony murder limitation was the causation requirement, which our Supreme Court announced in the 1977 case of *Harrison*. As a basis for this holding, the Court noted that the exact meaning of causation in the felony murder context had been the subject of much debate and confusion among academics and in other jurisdictions. *Harrison*, 90 N.M. at 441, 564 P.2d at 1323. The causation requirement clarified this by mandating that the predicate felony be both the actual and proximate cause of the death. "[C]ausation must be physical; causation consists of those acts of defendant or his accomplice initiating and leading to the homicide with-

out an independent force intervening . . ." *Id.* at 441-42, 564 P.2d at 1323-24.

{26} The *Harrison* Court also created the requirement that the felony upon which the felony murder charge is based must be inherently dangerous. *Id.* at 442, 564 P.2d at 1324. The Court declared, "To presume conclusively that one who commits any felony has the requisite mens rea to commit first-degree murder is a legal fiction we no longer can support." *Id.* (emphasis omitted). By requiring the felony to be inherently dangerous, the Court effectively raised the felony murder intent requirement to assure that it would be "sufficient to justify convicting a defendant of felony murder and sentencing him to death or life imprisonment." *Id.* Thus, when the predicate felony is a first degree felony, there is a presumption that it is sufficiently dangerous to form the basis of a felony murder charge. *Id.* When the predicate felony is a more minor offense, the jury must make a factual determination based on the specific situation in the case as to whether the "circumstances surrounding its commission . . . [were] inherently dangerous to human life." *Id.*

{27} Two years after *Harrison* established the causation requirement and the inherently dangerous felony test, our Supreme Court created a per se rule that felony murder charges are not permitted when the felony victim kills the defendant's accomplice. *Jackson*, 92 N.M. at 462, 589 P.2d at 1053. In *Jackson*, the Supreme Court stated, "[A]ny expansion of the felony-murder doctrine would fly directly against the progressive direction taken by this [C]ourt in *Harrison*." *Id.* at 462, 589 P.2d at 1053. The Court did not articulate a specific policy basis for this rule, but rather cited a string of cases from across the country that had the same holding. Since all of Defendant's arguments essentially call for an extension of the *Jackson* rule to his peculiar circumstances, we will discuss the different rationales in more detail below.

{28} Twelve years later, in *Ortega*, 112 N.M. at 561, 817 P.2d at 1203, New Mexico added an intent element to felony murder. The defendant in *Ortega* argued that even with the *Harrison* limitations, felony murder was basically a strict liability crime with a punishment too severe to be constitutional under the United States Supreme Court's test regarding conclusive presumptions in

Morissette v. United States, 342 U.S. 246, 275 (1952). The Court explained that the *Harrison* approach inferred the mens rea for murder from the mens rea for an inherently dangerous felony. It cautioned:

[A]ny presumption which establishes a fact essential for conviction of the crime by proof of another fact, or which shifts to the defendant the burden of persuasion that the essential fact is not true, runs afoul of the Due Process Clause by conflicting with “the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.”

Ortega, 112 N.M. at 562, 817 P.2d at 1204 (internal quotation marks, citations, and emphasis omitted). The Court overcame this problem by rejecting the imputed intent approach in favor of a unique interpretation of the felony murder statute requiring “proof that the defendant intended to kill.” *Id.* at 562-63, 817 P.2d at 1204-05. “An unintentional or accidental killing will not suffice.” *Id.* at 563, 817 P.2d at 1205. Under this construction, the intent requirement for felony murder is identical to the intent requirement for second degree murder. *Id.* “The felony-murder intent requirement is satisfied if there is proof that the defendant intended to kill, [or] knew that his actions created a strong probability of death or great bodily harm to the victim or another person . . .” *State v. Griffin*, 116 N.M. 689, 695, 866 P.2d 1156, 1162 (1993).

{29} Most recently, our Supreme Court incorporated a collateral felony requirement, which states that “the predicate felony cannot be a lesser-included offense of second-degree murder.” *Campos*, 1996-NMSC-043, ¶ 19. Since “it is impossible to commit second degree murder without committing some form of both aggravated assault and aggravated battery,” this requirement precludes the State from transforming all second degree murders to first degree murder. *Id.* ¶ 23. In this analysis, courts apply a “strict elements test” that finds an offense to be a lesser-included offense “only if the statutory elements of the lesser offense are a sub-set of the statutory elements of the greater offense such that it would be impossible ever to commit the greater offense without also committing the

lesser offense.” *State v. Meadors*, 121 N.M. 38, 42, 908 P.2d 731, 735 (1995).

{30} These limitations have been codified in the Uniform Jury Instructions for felony murder:

For you to find the defendant . . . guilty of felony murder, which is first degree murder, . . . the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (name of defendant) [committed] [attempted to commit] [the underlying felony] [under circumstances or in a manner dangerous to human life];

2. [The defendant] caused the death of [the victim] during [the commission of] [the attempt to commit] _____ (name of felony);

3. [The defendant] intended to kill or knew that [his] [her] acts created a strong probability of death or great bodily harm[.]

UJI 14-202 NMRA 2003.

{31} In summary, all of New Mexico’s felony murder limitations work together to ensure that defendants convicted of felony murder have a culpable mental state consistent with the legislature’s retributive and punitive goals. Other states, like Kansas and California, use their felony murder statutes more broadly, “to deter negligent or accidental killings that may occur in the course of committing a felony.” *Campos*, 1996-NMSC-043, ¶18. In contrast, New Mexico aims to punish those who commit an inherently dangerous felony with “malice” that results in death. *See Ortega*, 112 N.M. at 565, 817 P.2d at 1207.

{32} Defendant’s claims all arise from the unusual set of facts presented in this case. It is uncontested that Defendant did not fire the shot that killed Pettes, the deceased victim. Tellez, the individual who did fire the lethal shot, was not Defendant’s accomplice. Furthermore, unlike in *Jackson*, Pettes was not Defendant’s accomplice either. The stipulated facts characterize him as an “innocent bystander,” although Defendant asserts that Pettes was Defendant’s “close friend.” Under these unusual circumstances, Defendant claims that he cannot be liable for Pettes’s death

because he lacked the intent, and because Tellez was an independent intervening force. None of the reported facts in any prior New Mexico case indicate whether a defendant can be charged with felony murder based on the lethal acts of another person who is not an accomplice. Thus, this is a case of first impression and requires us to determine which approach is in keeping with New Mexico precedent and policy. Defendant basically invites us to extend *Jackson* to cases where a third party, who is not engaged in a common plan with the defendant, commits the lethal act and the victim is not the defendant’s accomplice. We agree that this is the proper application of New Mexico law.

{33} The approaches that exist in this area of the law can be divided into two camps. The states that do not hold defendants liable for the acts of non-accomplices follow an “agency theory,” where a defendant is only liable for murder “if the defendant or her co-felon actually performed the lethal act.” James W. Hilliard, *Felony Murder in Illinois—The “Agency Theory” vs. the “Proximate Cause Theory”*: *The Debate Continues*, 25 S. Ill. U. L.J. 331, 332 (2001). The states that do hold defendants liable for third party acts do so under the “proximate cause theory” that a defendant is responsible “for any death proximately resulting from the forcible felony or attempted forcible felony.” *Id.*

{34} Although many jurisdictions expressly adopt one of these theories in their cases dealing with liability for the death of an accomplice, as discussed below, our Supreme Court did not espouse either theory in *Jackson*. However, it is useful to examine the rationale for the four cases that the Court cited in *Jackson* to support the proposition that a defendant cannot be liable for the death of an accomplice. All four cases use the agency theory as the basis for their holdings.

{35} The earliest two cases on which *Jackson* relied are from Pennsylvania: the seminal *Commonwealth v. Redline*, 137 A.2d 472 (Pa. 1958), and its progeny, *Commonwealth ex rel. Smith v. Myers*, 261 A.2d 550 (Pa. 1970). *Redline* and *Myers* both explicitly reject the proximate cause theory of liability. In *Redline*, the defendant had been convicted of felony murder of his co-felon, who was lethally shot by police. *Redline*, 137 A.2d at 473. The

Redline court denounced a proximate cause approach because it found that “the thing which is imputed to a felon for a killing incidental to his felony is *malice* and *not the act of killing*. The mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony-murder doctrine.” *Id.* at 476 (emphasis in original). The court reasoned that in order to imply the malice from the acts of another, the other person must be engaged in a common criminal enterprise. *Id.* A concurring opinion noted that holding defendants liable for acts of people who share no common criminal objective has minimal deterrent value. *Id.* at 501 (Cohen, J., concurring). In *Myers*, the court reiterated its decision in *Redline* and further criticized the proximate cause theory as an inappropriate use of tort principles in a criminal context. *Myers*, 261 A.2d at 557.

{36} The third case on which *Jackson* relied, *State v. Canola*, 374 A.2d 20, 30 (N.J. 1977), also expressly adopted the “agency theory” of felony murder. The facts involved a defendant who was convicted of felony murder for the acts of his robbery victim, who killed his accomplice. *Id.* at 20. After a thorough review of case law from different jurisdictions, the New Jersey Supreme Court stated that “modern progressive thought in criminal jurisprudence favors restriction rather than expansion of the felony murder rule.” *Id.* at 29. The court stated, “Tort concepts of foreseeability and proximate cause have shallow relevance to culpability for murder in the first degree.” *Id.* at 30. It also noted that the old common law formulations of the felony murder rule often excluded acts of third parties. *Id.* Finding that affirmance of the defendant’s conviction in these circumstances would be a drastic expansion of New Jersey’s felony murder doctrine, it reversed the felony murder conviction. *Id.*

{37} In the most recent case, *People v. Antick*, 539 P.2d 43, 45 (Cal. 1975) (en banc), superseded on other grounds as stated in *People v. Castro*, 696 P.2d 111, 115 (Cal. 1985), the defendant and his accomplice, Bose, committed a robbery together. Subsequently, Bose initiated a gunfight with the police that resulted in his own death from police fire. *Id.* at 45. The defendant was convicted of felony murder for Bose’s death. *Id.* at 44. In striking the conviction, the California court summarized its support

of the agency theory:

When a killing is not committed by a robber or by his accomplice but by his victim, malice aforethought is not attributable to the robber, for the killing is not committed by him in the perpetration or attempt to perpetrate robbery. It is not enough that the killing was a risk reasonably to be foreseen and that the robbery might therefore be regarded as a proximate cause of the killing. Section 189 requires that the felon or his accomplice commit the killing, for if he does not, the killing is not committed to perpetrate the felony. Indeed, in the present case the killing was committed to thwart a felony. To include such killings within section 189 would expand the meaning of the words murder . . . which is committed in the perpetration . . . [of] robbery . . . beyond common understanding.

Id. at 48 (internal quotation marks and citation omitted).

{38} These cases exemplify the national trend towards adopting the agency theory. A review of New Mexico case law and policy reveals that our courts have followed this trend, and that the agency approach fits with New Mexico’s unique felony murder doctrine.

{39} As stated earlier, no prior New Mexico case has ever raised this particular issue on appeal. However, in *Harrison*, our Supreme Court explained the difference between an independent intervening force and a dependent intervening force using these examples:

A policeman who shoots at an escaping robber but misses and kills an innocent bystander would be considered a dependent, intervening force, and the robber would be criminally liable for felony murder under this test. Lightning striking and killing the bystander would be an independent, intervening force.

Harrison, 90 N.M. at 442 n.1, 564 P.2d at 1324 n.1. This example appears to follow a proximate cause rationale.

{40} However, *Harrison* was decided

before New Mexico imposed its felony murder intent requirement, and its dicta are not enough to overcome the overwhelming trend towards limiting New Mexico’s felony murder rule. Our unique configuration of felony murder limitations emphasizes that a defendant must possess the intent to kill in order to be charged with felony murder. As the Pennsylvania court explained in *Redline*, the agency approach ensures that the intent of another actor is only imputed to the defendant when they are engaged in a common criminal enterprise. We also believe that an agency approach follows our Supreme Court’s edict against any expansion of the felony murder doctrine. See *Jackson*, 92 N.M. at 462, 589 P.2d at 1053.

{41} The State urges us to rely on the Wisconsin case of *State v. Oimen*, 516 N.W.2d 399, 405 (Wis. 1994), which held that a defendant can be charged with felony murder when his intended victim kills an accomplice. We note that New Mexico has already rejected this doctrine expressly in *Jackson*. Furthermore, the *Oimen* court addressed the causation and intent issues involved in their holding by adopting a “substantial factor” test for felony murder causation. *Id.* at 404. Our Supreme Court expressly rejected the substantial factor test for felony murder in *State v. Montoya*, 2003-NMSC-004, ¶ 21, 133 N.M. 84, 61 P.3d 793, explaining that the test “only applies to situations where two causes, each alone sufficient to bring about the harmful result, operate together.” (Internal quotation marks and citation omitted.) Therefore, we find that adopting *Oimen* would not be in keeping with existing New Mexico law.

{42} The State also refers us to the New York case *People v. Hernandez*, 624 N.E.2d 661 (N.Y. 1993). In *Hernandez*, the New York Court of Appeals overruled its own precedent to reject an agency theory in favor of a proximate cause approach. *Id.* at 665. It held that its former cases were based on an older version of the New York Penal Code, which had subsequently been revised to broaden the wording of the felony murder statute. *Id.* at 666. In addition to following legislative intent, the court explained that its holding was in keeping with an imputed intent theory:

The basic tenet of felony murder liability is that the mens

rea of the underlying felony is imputed to the participant responsible for the killing. By operation of that legal fiction, the transferred intent allows the law to characterize a homicide, though unintended and not in the common design of the felons, as an intentional killing.

Id. at 665 (internal citation and emphasis omitted). This imputed intent approach, which implies the intent for felony murder from the underlying felony, was expressly rejected by our Supreme Court in *Ortega*. *Ortega*, 112 N.M. at 562-63, 817 P.2d 1204-05. Thus, *Hernandez* is not an appropriate model for New Mexico law.

{43} In summary, the agency approach is the logical extension of existing New Mexico felony murder law. Our Supreme Court's decision in *Jackson* relied on cases espousing the agency approach. Our precedents directly conflict with the underpinnings of a proximate cause approach. Our existing limitations to the felony murder doctrine counsel against its expansion.

{44} In the instant case, the State argues:

[I]t was entirely foreseeable that when [Defendant], who

was apparently leading a group of his friends in brutally beating, and pistol whipping . . . Tellez's friend, responded to . . . Tellez's pleas to stop the beating by pointing his gun at an obviously armed . . . Tellez, . . . Tellez would, fearing for his life, respond by firing at [Defendant].

The State further argues, "[D]efendant knew that when he threatened an armed . . . Tellez with his weapon that that act created a strong probability of death or of great bodily harm to . . . Tellez or another." This view of the facts arguably creates sufficient jury questions of intent and causation to support a felony murder charge under a strict reading of *Harrison* and *Ortega*. A narrow reading of the jury instructions might also suggest that these facts could support a felony murder charge.

{45} However, under the agency rule we announce today for the reasons discussed above, this is not enough to overcome the facts that Tellez was not Defendant's accomplice and that they were not engaged in any common enterprise. Without an accomplice relationship between Defendant

and the person who committed the lethal act, there is not enough to support a charge of felony murder under an agency view.

{46} We hold that the Defendant's felony murder charge cannot stand, and we reverse the trial court's failure to dismiss the charge.

CONCLUSION

{47} We affirm the dismissal of the depraved mind murder charge and reverse the failure to dismiss the felony murder charge.

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

LYNN PICKARD, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CELIA FOY CASTILLO, Judge

WRITS OF CERTIORARI

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

EFFECTIVE FEBRUARY 10, 2004

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PETITIONS FOR WRIT OF CERTIORARI DENIED:

NO. 28,448 Gaby v. Gersonde (COA 22,015) 1/28/04
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NO. 27,872 Martinez v. St. Paul Ins (COA 22,343/22,344) 1/30/04
 NO. 27,995 State v. Flenniken (COA 22,715) 2/9/04
 NO. 27,996 State v. Augustin M. (COA 22,900) 2/9/04

UNPUBLISHED DECISIONS ISSUED:

NO. 27,816 Warford v. Herrera filed 1/26/04
 NO. 27,692 State v. Sanchez-Lara filed 2/5/04